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Judging Big Tech

Insights on applying U.S. antitrust laws to digital markets

December 2022 **By Erika M. Douglas, Harry First, Marina Lao, and A. Douglas Melamed. Edited by Laura Alexander.**

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The Washington Center for Equitable Growth is a nonprofit research and grant-making organization dedicated to advancing evidence-backed ideas and policies that promote strong, stable, and broad-based economic growth. Our fundamental purpose is to determine the channels through which rising economic inequality affects economic growth and stability in the United States.

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Foreword

By James P. Steyer, Founder and CEO, Common Sense Media

Our antitrust laws are intended to fight the concentration of wealth and power in monopolies, which often abuse their market power at the expense of consumers, workers, and, ultimately, our economy and our society. As the founder and CEO of Common Sense Media, one of the world's leading voices focused on protecting children from unsuitable—and at times harmful—media and technology, I've learned a lot about the importance of antitrust and competition, including the impact of powerful tech companies on the youngest and most vulnerable people in our nation.

Over the past two decades, online platforms—one of the chief threats to kids' and teens' well-being—have benefited from a lax attitude toward their meteoric rise in power from the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission, both of which are tasked with enforcing U.S. antitrust laws. There are many consequences to these platforms' unchecked power, but perhaps none is more important than their impact on young people and the next generation. With the U.S. surgeon general's warning about our youth's mental health crisis, we must adopt a different mindset toward antitrust enforcement.

I understood the beneficial role played by antitrust law well before starting Common Sense and even before attending law school. My father was an antitrust attorney at a prominent New York City law firm. His career spanned more than 40 years—long enough for him to witness regulators and courts apply two very different approaches to antitrust analysis.

The first, known as the "Harvard School," focused on industry structure. Here, the number of firms and their relative sizes were the relevant variables. Harvard School academics convinced regulators and courts to presume that large firms with high market shares would engage in anticompetitive practices and that the purpose of antitrust law was to protect small competitors and rivalrous markets. This approach provided judges with a bright-line rule: Any merger or joint venture that resulted in excessive market share was per se illegal. Mergers in concentrated industries merited government intervention.

By the later years of my father's career, however, the Harvard School's interventionist approach gave way to the Chicago School's laissez-faire philosophy of limited government. Proponents of this theory—most notably then-professor Robert Bork—claimed that markets were inherently efficient, and that competitive forces would correct any imbalance in economic power by would-be monopolists. Chicago School economists and lawyers assumed (erroneously, in my opinion) that because firms and consumers alike were rational actors seeking to maximize their own self-interest, the market equilibrium would result in wealth maximization.

Under this approach, the government considered most mergers an efficient means of lowering costs and reducing prices. Adherents of the Chicago School in government also believed that courts were ill-equipped to judge when mergers were inefficient and that their intervention in any but the clearest cases of harm might unintentionally decrease consumer welfare. Bork and his successors were successful at persuading courts to shift their focus in antitrust cases from market share to "consumer welfare."

The Chicago School of economic thinking remains powerful to this day. Regardless of whether the White House has been under the control of Democrats or Republicans, government antitrust intervention in recent decades has been reserved only for conduct that demonstrably results in higher consumer prices. This antitrust framework, however, has difficulty answering the challenge posed by online platforms and other tech firms, which typically offer their products or services at no charge to users.

In Chicago School terms, these tech firms do not harm competition, even if they come to dominate their markets as virtually the sole provider of certain services, because consumers spend no money to buy their products. While even the Chicago School recognizes that reduced quality and consumer choice—not just higher prices—are valid antitrust harms, courts and scholars struggle to develop reliable measures of these nonprice qualities, and courts are reluctant to rely on qualitative measures in the absence of evidence of price effects.

As a result, tech firms are allowed to engage in any number of anticompetitive practices, so long as the conduct does not result in an increase in prices. For the Chicago School, only reduced consumer welfare triggers an antitrust action, and the primary measure of that welfare is prices.

If my father were alive today, I'm certain he would argue that today's digital economy calls for a new, more nuanced framework for antitrust enforcement. For markets based on emerging technologies, both the Harvard School and the Chicago School are overly simplistic. With Big Data, firms with little market share have the potential to do as much damage as firms with large market share. While consumers aren't charged money for using online platforms, they pay a price nonetheless. In exchange for "free" products or services, consumers give up their privacy. The price is not charged in dollars and cents, but in addresses and shopping habits.

Unlike purchases of regular products or services, using a website or an online platform is not a one-time-only transaction. Instead, by merely using the internet, consumers are producing continuous data about themselves. In short, consumers have no control over the personal data that they cannot stop creating.

Such products or services have further costs, still. Online platforms, for example, enable the broad and rapid propagation of misinformation and disinformation—both of which were once of limited scope or reach.

These dynamics surely call for government action. The antitrust laws notoriously use broad language that leaves much discretion in the hands of antitrust enforcement agencies and the courts. Thus, one of the most valuable contributions that academics, scholars, and policymakers can make is to develop clear-eyed legal approaches to the challenge of tech firms.

There is nothing radical in this. The law must adapt to new situations by developing new principles that still advance its original goals. The law adapted when the industrial revolution changed the primary technology of transportation from horses to the combustion engine. Our rules for automobile travel developed from the laws that used to govern previous forms of transportation, while remaining mindful of the change in technology that made the new circumstances unique.

Similarly, antitrust law today must adapt to the challenges of tech firms by adapting long standing principles to address the unique nature of the internet, while keeping an eye on the ultimate goal of protecting, promoting, and preserving competition.

The four essays in *Judging Big Tech: Insights on applying U.S. antitrust laws to digital markets* offer critical new approaches to antitrust regulation. They not only contribute to discussions around antitrust law and competition policy, but, importantly, they also offer regulators and the courts an updated framework for enforcing the antitrust laws in the modern world. The topics of these essays also are part of a continuing debate that our society must have to determine how best to regulate large tech firms, by combining new rules for emerging technologies while still advancing the core principles of antitrust law.

Jim Steyer

Jim Steyer

Introduction

By Laura Alexander, Director of Markets and Competition Policy, The Washington Center for Equitable Growth

The importance of digital information technology and communications giants to the U.S. economy and society today is undeniable. The business strategies of these companies are increasingly capturing the attention of the U.S. Congress, the White House, federal agencies, and governors and state legislatures across the nation. This increased focus is not surprising, given that these companies—including Amazon, Apple, Alphabet's Google unit, and Meta Platform's Facebook and Instagram units—are the main arteries for the U.S. public's social and commercial engagement online. As such, they hold tremendous commercial and political power, and their chief executives are often in the news in ways that highlight the outsized importance of themselves, their firms, and their firms' business strategies to the U.S. economy and society.

Antitrust enforcement agencies are particularly interested in these companies because of the ways in which the dominant technology firms are expanding their businesses and how those decisions affect U.S. consumers, businesses, and workers. The problem from an antitrust enforcement perspective, however, is that the business practices and strategies playing out across the U.S. information technologies and communications sectors and beyond are not always easily connected to the historic applications of U.S. antitrust law, which consists of laws and precedents dating back to 1890 and draws on even earlier common law principles.

Indeed, antitrust cases in modern technology markets present several challenges for antitrust enforcers and courts alike. Thoughtful analysis and tools are needed for making sense of technology markets and the competitive dynamics within those markets in order to enable courts and antitrust enforcers to apply these longstanding, fundamental laws to allegedly monopolistic practices in the context of new technologies. Antitrust laws are broad and designed to evolve with markets and technologies, but applying them to these new technology markets still raises hard questions.

How can effective legal remedies be crafted by lawyers and judges in rapidly evolving markets involving technologically complex products? How should courts block dominant tech companies from buying up all of their nascent competitors to eliminate their rivals without stifling innovation? How should courts account for harms and benefits from alleged anticompetitive conduct where those harms and benefits occur outside of markets where the antitrust harm is alleged? What can traditional forms of evidence, such documents evidencing intent, tell us about how to analyze competitive dynamics in technology markets?

Both plaintiffs and defendants in digital technology antitrust cases will have highly qualified experts framing the facts and precedents in their favor before courts. What's more, the dominant technology companies in these cases will continue to fund out-of-court material, such as white papers, law journal articles, and judicial education programs—all of which can obfuscate the very different ways in which monopolistic conduct appears and operates in digital markets, compared to more traditional sectors of the U.S. economy.

This leaves the generalist federal judges presiding over these cases—and the law clerks who assist them—to interpret and apply the law in challenging circumstances. They are faced with the difficulty of processing evidence within the context of an analytical framework, economic theory, and the applicability of legal precedent in tech antitrust cases at a time when those factors are very much up for debate.

The four essays in this book provide objective insights, unfiltered through the lens of litigation or business strategy, on how courts and litigants can successfully navigate these relatively unchartered waters to apply our nation's century-old antitrust statutes to today's U.S. digital information technology and communications industries in a way that is consistent with the central goal of antitrust: to protect and promote competition. Rather than arguing which side should win, the authors of these essays seek to unpack the correct analytical framework and identify the dispositive facts that judges need to understand to rule fairly and effectively in antitrust cases involving modern technology markets. Each essay discusses a basic legal issue and how that issue may arise in an antitrust case involving digital platforms, then offers guidance on how that issue can be addressed in a way that is consistent with existing laws and precedent but cognizant of the realities of modern technology markets.

It's also important to be clear about what these essays are not. They are neither expert reports nor detailed analyses of specific cases in which technology firms are currently embroiled or might soon become defendants. Rather, they are four essays on common issues that have arisen, or are likely to arise, in antitrust litigation involving digital platforms or large technology companies.

The book opens with a topic that is often relegated to the end of discussions about monopolization: remedies. In Chapter 1, Harry First, the Charles L. Denison

Professor of Law at New York University School of Law and co-director of the law school's Competition, Innovation, and Information Law Program, explains why it would be a mistake for litigations and courts to assume remedies can be deferred to the end of these cases and why it would behoove all involved to think carefully and creatively about remedies from the outset of each case.

First examines the serious questions that arise surrounding remedies in monopolization cases once violations of antitrust laws are determined to exist. Is breaking up a digital technology company feasible or sufficient? How can an injunction be crafted not just to eliminate the conduct at issue, but also to effectively restore competition? How can innovative mechanisms, such as technology committees, be used to implement remedies in technically complex markets? What liability findings are needed to support effective remedies, and how should the liability case be framed to lay the groundwork for the ultimate remedy? First uses the 1998 federal court decision in *United States v. Microsoft Corporation* as the backdrop for examining remedy questions in monopolization cases and draws several important lessons from that experience.

In Chapter 2, Doug Melamed, a professor of the practice of law at Stanford Law School, sets out a framework for how courts should think about mergers and acquisitons of nascent competitors by dominant technology companies. One way that digital technology companies allegedly gain and maintain market power is by acquiring or otherwise neutralizing nascent or potential competitors before they can pose a direct competitive threat. This tactic poses a challenge for merger law: How should enforcers and courts determine whether these acquisitions are likely to reduce future competition when that competition has yet to occur?

This causation question is central to any case alleging that a digital platform obtained its monopoly, at least in part, by acquiring young companies before they have a chance to become full-fledged competitive threats. In this chapter, Melamed examines what a plaintiff must prove to establish causation in a monopolization case and how those elements should be framed and evaluated in digital technology markets to stop mergers that pose a significant threat to competition, while allowing innovation-rich start-up markets to flourish.

Erika M. Douglas, an associate professor of law at Temple University's Beasley School of Law, takes up the topic of cross-market effects in Chapter 3. Digital technology companies often operate in multiple antitrust markets. Indeed, the essense of technology platforms is to bring together multiple markets in a single digital location and facilitate their interactions. This raises the question of whether and how courts addressing alleged antitrust harms from conduct in one market should take account of alleged benefits from the same conduct in other related markets.

With a fresh and careful analysis of past court decisions, Douglas demonstrates that, outside of the merger context, the way in which antitrust courts should treat such cross-market effects is an open legal question. Moreover, it is a question desperately in need of an answer from courts, as past attempts to avoid or ignore the issue have led to economically and doctrinally incoherent decisions that undermine antitrust law. Finally, Douglas looks to precedent to develop guidance that points the way to a principled approach to cross-market effects in conduct cases, including those involving digital technology platforms.

The final chapter is authored by Marina Lao, the Edward S. Hendrickson Professor of Law at Seton Hall University's School of Law. She argues that courts should embrace evidence of a defendant's anticompetitive intent as a powerful analytical tool to help resolve some of the most vexing puzzles inherent in applying the antitrust laws to digital technology markets. The probative value of evidence of anticompetitive intent has been overlooked, Lao explains, because of overstated concerns about its reliability and a blinkered focus on quantitative evidence.

The evidence, however, often fails to paint a clear picture of competitive effects when innovation and other nonprice harms to competition defy quantification or easy measurement. This creates major problems of proof for antitrust enforcement in digital technology markets. Lao argues that reviving recognition of intent evidence in monopolization cases in markets marked by rapidly changing technologies, such as those involving digital platforms, can help strengthen antitrust enforcement by enabling judges to use traditional documentary evidence and the defendants' own expertise about their products and markets to contextualize quantitative economic evidence and evaluate competitive dynamics in complex and rapidly changing markets.

These four essays together are designed to help judges, antitrust enforcers, and policymakers interpret U.S. antitrust law to fit new and complex digital markets and to address the novel types of market power and the exercises of market power that plague those markets—the consequences of which cascade into other key economic sectors in the United States. With this book of essays, our hope here at Equitable Growth is that, in league with Common Sense, we are providing new and valuable legal tools and insights from antitrust experts that judges and others will find useful in adjudicating the first wave of digital platform antitrust cases.

Antitrust remedies and the Big Tech platform cases

By Harry First, Charles L. Denison Professor of Law, New York University School of Law

Overview

More than a quarter century has passed since the Antitrust Division of the U.S. Department of Justice used Section 2 of the Sherman Act to deal with the abuses of what we today call a Big Tech platform company. That enforcement effort was directed at Microsoft, the technology giant of the day.

The Justice Department's initial effort, focused on the licensing terms that Microsoft imposed on manufacturers of desktop personal computers, led to a settlement and a consent decree entered in 1995. The settlement decree, though, was vague on a key term that sought to restrict Microsoft's ability to bundle new programs with Windows, leading to Microsoft's evasive conduct and a failed effort to hold the company in contempt.[1]

The shortcomings of this initial approach generated a broader case against Microsoft, *United States v. Microsoft Corp.*, which the Justice Department, along with 20 states and the District of Columbia, filed in 1998. A trial ensued, with findings favorable to the government antitrust enforcers. Approximately 3 years after the case was filed, the U.S. Court of Appeals for the District of Columbia Circuit affirmed the core of the Section 2 claim and the U.S. Supreme Court subsequently denied review.[2]

With a change of administration in Washington, the case was settled, and a remedial decree was agreed to by the company and the newly installed George W. Bush administration. One year later, the district court judge approved the settlement, which remained in effect for an additional 9 years until the judge determined that the decree's terms had been satisfied, and it could be allowed to expire.

Government antitrust enforcers have now started a new round of Section 2 litigation against major tech companies. Instead of concentrating on just one company, though, government enforcers have filed broad cases against two firms that operate digital platforms—Google and Facebook—with possibly more cases to come.[3]

Unlike in *Microsoft*, there are two different federal enforcers bringing separate suits, plus different sets of state enforcers that have filed multiple (and somewhat different) antitrust lawsuits against both platforms in different federal courts.[4] The litigation tasks now underway will not be easy; rather, they will be complicated and lengthy. Indeed, if the cases go through to full trial and appeal, the litigation process will certainly be lengthier than it was in *Microsoft*.

Government enforcers filed almost no major Section 2 cases between *Microsoft* and the current Big Tech platform cases.[5] In this chapter, I will explore the experience in the *Microsoft* litigation to see whether it has anything to teach the courts and the litigants in the unfolding litigation against Google and Facebook, but my focus will not be on substantive law principles. Rather, my focus will be on remedies.

Remedies often get overlooked in discussions of antitrust litigation, treated almost as an afterthought. The court of appeals' opinion in *Microsoft*, for example, didn't discuss the trial judge's remedial order until almost the very end of its opinion. This is not surprising, though, as legal logic puts the decision about remedies at the end. How can one decide what remedies to impose before one knows whether they need to be imposed? And how can a court decide what to remedy until it decides what went wrong?

Liability issues thus tend to take center stage—and appropriately so. But that shouldn't make the remedy discussions less critical, although often it has.

There is another reason why I want to examine the question of what types of remedies the courts might be able to impose on Google and Facebook. When remedies have been part of the antitrust debate, the focus has often been on an after-the-fact assessment of their effectiveness, or on the general question of whether there should be a preference for conduct remedies or structural remedies, such as divestiture, or sometimes on what remedies would be a good idea in a specific important case currently under litigation.[6]

My interest, however, is in examining the legal constraints on remedies in government civil antitrust cases to see what guidance appellate courts have provided to trial courts and antitrust enforcers for framing appropriate remedies. I think that it is particularly important to undertake this examination now, in the context of the

Google and Facebook cases, before the litigation unfolds in court because there is still an opportunity to apply the remedial suggestions of this chapter in these two very consequential antitrust cases.

The first three sections of this chapter focus on the current legal framework for determining remedies in civil antitrust cases. In the first section, I provide a general description of the policy and legal framework that guides remedies in these government cases. I then examine the remedies that were imposed in the *Microsoft* litigation in the United States to illustrate how the D.C. Circuit Court of Appeals applied the general legal rules for remedies in light of the particular issues that it faced in *Microsoft*. My account also shows that the trial court did work within that framework to create some forward-looking remedies and to craft an ongoing institutional structure (called the "Technical Committee") to carry out the remedies that it imposed.

I next discuss the current cases against Google and Facebook, and how the *Microsoft* litigation can inform and affect the remedies that the government plaintiffs might obtain. I argue that the court of appeals' approach in *Microsoft* underscores the need for government antitrust enforcers to lay the foundation for the remedy they want during the merits trials themselves. Waiting for a later remedies trial may not provide an adequate basis for relief beyond what was pointed to at trial. This means that government enforcers need to think about remedies sooner rather than later.

In the concluding section of this chapter, I offer some suggestions for a revised framework for crafting remedies in government civil antitrust cases. Instead of the usual directives of an injunction, where the defendant is told what not to do and sometimes what to do, I argue that government enforcers should frame remedies in terms of goals and benchmarks.

Under our current approach, the government often drafts a complex set of injunctive remedies in cases where conduct relief is sought and even more complex provisions if a restructuring of the defendant is sought. Under a goals-and-benchmarks approach, the specific actions that a defendant would take would be more bottom up than top down. It would likely lead to less concern for evasive behavior by the company and more concern for evasive arguments over results.

Indeed, goals and benchmarks would require a different sort of specification than command-and-control injunctions, and they will certainly be challenging to craft and oversee. But I think they might offer a more direct way to effectuate the overall goals that the courts have established for antitrust civil remedies.

The policy and legal framework for remedies

Policy goals

Antitrust remedies can be said to have three policy goals: deterrence (both specific and general), compensation, and remediation. Specific deterrence aims to ensure that the antitrust violator will not commit the violation again in the future; general deterrence aims to convince others not to engage in the same (or similar) unlawful behavior in the future lest they be sanctioned as well. Compensation involves requiring the antitrust violator to pay injured parties an amount sufficient to compensate them for their losses. Remediation is a future-oriented goal, an effort to restore the competition that was lost to the defendant's violation.

Of the three goals, remediation would seem to be most important in government monopolization cases. Deterrence is thought to be the goal of the criminal law (and, to some extent, private damages litigation). Compensation is the province of private litigation. For monopolization cases, the federal government has abandoned the use of the criminal law, even though Section 2 allows it, and has left compensation to private parties, even though the government has the statutory authority to sue monopolists for the monetary injuries they cause to the U.S. government.[7] Instead, the federal government has chosen to seek only equitable relief in Section 2 cases, proceeding through civil process in federal district court.[8]

U.S. Supreme Court remedies jurisprudence

Modern U.S. Supreme Court jurisprudence on antitrust remedies has not closely distinguished among these separate goals or even among separate antitrust statutes. The Supreme Court often mixes together language relating to deterrence and remediation, along with a dose of compensation, and pays little apparent attention to the statutory context of the violation. The result is language that gives trial courts the power to enter wide-ranging decrees but does not necessarily provide clear guidance on when particular remedies are appropriate. Five cases illustrate the Supreme Court's approach.

First is *United States v. Crescent Amusement Co.*, a case brought under Sections 1 and 2 of the Sherman Act against a group of motion picture exhibitors for using their buying power to gain a monopoly in their respective geographic areas. After a successful trial upholding the Sherman Act claims, the district court entered a decree barring the defendants from future theater acquisitions unless the owner "voluntarily" offered to sell the theater.[9] In its 1944 decision reviewing the decree, the Supreme Court placed the emphasis on deterrence, but also showed a concern for market remediation: "Where the proclivity for unlawful activity has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis."[10]

Applying that language, the court required that the decree be revised to put the burden on the defendant to show that the acquisition would not unreasonably restrain competition. "The pattern of past [predatory] conduct is not easily forsaken," the court concluded.[11]

Four years later, the Supreme Court decided *Schine Chain Theatres, Inc. v. United States,* another Section 1 and Section 2 case involving motion picture exhibitors.[12] The district court had entered a decree that required the defendant to divest more than 50 theaters in more than 40 towns. The Supreme Court objected to the divestitures because it was unclear whether the particular theaters "were products of the conspiracy," obtained by "practices which violate the antitrust acts."[13] Requiring divestiture of theaters "unlawfully acquired," the court wrote, was an "equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project."[14]

Although the Supreme Court likened this remedy to restitution because "it merely deprives a defendant of the gains from his wrongful conduct,[15] this type of disgorgement does not serve the compensatory function of restitution because the theaters were not given back to the owners who were allegedly forced to sell to the defendants. Rather, divesting gains from unlawful conduct serves a deterrent function; whether that deterrence is adequate is a separate matter.

As in *Crescent Amusement*, however, the Supreme Court in *Schine* also paid attention to remediation. The Court wrote that additional divestitures might be required if the Schine chain still had monopoly power even after being "deprived of the fruits of their conspiracy."[16] The use of divestiture or dissolution, said the Court, "take[s] account of the present and future conditions" in an industry, as well as "past violations."[17] Its benefit is that: "(1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act."[18]

The Supreme Court returned to these themes two decades later in *United States v. United Shoe Machinery Corp.* This monopolization case was originally brought in 1947 and decided, after trial, in 1953. The trial judge had found United Shoe in violation of Section 2 but refused the Justice Department's request that the company be dissolved into three separate manufacturing companies, calling the request "unrealistic." The trial judge stated that "United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts."[19]

Instead, the judge imposed a variety of restrictions short of a break up, designed to "recreate a competitive market."[20] But 10 years after entry of the court's decree, and pursuant to the decree, the federal government returned to the district court to report that "workable competition had not been established."[21] The antitrust enforcers then asked the district court to reorganize the company into two fully competing companies, but the court held that it lacked the power to modify the earlier decree.

The Supreme Court disagreed with the district court's view of its limited power to modify its earlier decree. The court now generalized its earlier statement in *Schine*, no longer limiting future-oriented remedies to divestitures of previous acquisitions, and emphasized the need to bring competition to the market: "[I]t is the duty of the court to prescribe relief which will terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future." The trial court had an "inescapable responsibility to achieve this objective."[22]

The Supreme Court accordingly returned the case to the district court to consider the relief the government had requested. If the decree had not achieved its objects of "extirpat[ing]" practices that would cause monopolization and "restor[ing] workable competition in the market," then the time had come for other, "more definitive" means to achieve these results: "A decade is enough."[23]

Two other cases confirm the emphasis on the future orientation of antitrust remedies. Neither was a monopolization case, but both rejected the idea that remedies should be limited to ending the practices that were found to be illegal, a point that the Supreme Court had earlier made in *Schine*.[24]

One is *Ford Motor Co. v. United States*, a vertical merger case in which the Supreme Court, in 1972, reviewed a decree requiring Ford not only to divest the spark plug plant it acquired illegally, but also to buy half its annual spark plug needs from the plant's new owners for 5 years, not to manufacture spark plugs for 10 years, and not to use the Ford brand name on the plugs that it bought in the interim. The court upheld the divestiture of the illegally obtained plant, which is a straightforward merger remedy, but it also upheld the other, more unusual provisions of the decree—provisions that placed major restrictions on how Ford could operate in the future. Antitrust relief, the court emphasized, must "restore competition" and "unfetter a market from anti-competitive conduct."[25]

The other case emphasizing the market-rehabilitation goal is *International Salt Co. v. United States*, a suit brought under Section 1 of the Sherman Act and Section 3 of the Clayton Act, which the Supreme Court decided in 1947. The suit challenged the defendant's leases that tied the licensing of its patented salt-processing machines to the purchase of salt. The district court's decree required that International Salt lease its machines "to any applicant on non-discriminatory terms and conditions," even though the firm had agreed to end the tying provisions in its current leases and no threat had been shown that it would enter into discriminatory leases in the future.

The defendant argued that the injunction "should go no farther than the violation or threat of violation," but the Supreme Court disagreed strongly. Justice Robert H. Jackson wrote for the court: "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed .... In an equity suit, the end to be served is not punishment of past transgression, nor is it merely to end specific illegal practices. A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes less than that, the Government has won a lawsuit and lost a cause."[26]

Three points emerge from this review of the U.S. Supreme Court's jurisprudence on remedies in government civil antitrust cases. First, and most obviously, the Court's language is broad and open-ended. The language shows the Court's willingness to use equitable remedies to fix the past and help the future, to punish the offender, and to bring competition to the marketplace even if it didn't exist before. The Court is well-aware that it is not enough just to enjoin the anticompetitive behavior that was the subject of the suit.[27] "Go forth and sin no more" decrees do not exhaust a court's remedial powers. On the contrary, the Court has embraced a broad approach to remedy once a violation is proved.

Second, the Supreme Court has taken an activist approach to reviewing the decrees that district courts enter in government antitrust litigation. True, the Court often points out that terms of antitrust decrees should be framed in the district courts, which are "invested with large discretion to model their judgments to fit the exigencies of the particular case."[28] That said, the court has often reversed district court judges for not going far enough and rarely for going too far. Despite the asserted deference to the trial court, the Supreme Court has not treated the trial courts deferentially. Rather than acceding to the view that the trial court's power should be viewed "as one of discretion, subject only to reversal for gross abuse," the court has reviewed trial court decrees closely, recognizing its "obligation to intervene in this most significant phase of the case when necessary to assure that the relief will be effective."[29]

Third, Supreme Court decisions articulating the proper scope of antitrust decrees in government cases are not recent. Although Supreme Court case law in this area dates back to *Standard Oil Co. of New Jersey v. United States* in 1911, the critical modern opinions on civil antitrust remedies were handed down from the mid-1940s to the early 1970s.

There is a simple explanation for the dearth of more recent U.S. Supreme Court cases. Government equity decrees don't happen without government lawsuits seeking equitable relief, and U.S. Supreme Court decisions don't happen without appeals to the Court. Nearly all the civil suits the Justice Department has brought in recent years have involved mergers, but the most recent substantive merger case that the Justice Department appealed to the Supreme Court was in 1975.[30] The department has brought almost no civil nonmerger cases since the 1970s[31] (its criminal docket has been much fuller), and none has ended up in the Supreme Court. [32]

If and when the current wave of government civil monopolization cases reaches the Supreme Court, it will likely be asked to follow precedent and adhere to its earlier broad language on the scope of civil antitrust decrees, as well as to its activist approach toward reviewing what the lower courts have done. It is possible, however, that the Court will choose to change its views, or at least modify them. This is because antitrust doctrine since 1975, shaped in the context of private litigation, has taken a decidedly more conservative approach than the Court had taken in the period when the earlier remedy decisions were written.

Nevertheless, the Supreme Court has not been uniformly pro-defendant in recent years.[33] Perhaps when faced with a government plaintiff, acting in the public's interest and not on behalf of private parties, the Court will still draw on the language that it had used earlier. For now, however, the cases examined above stand as good precedent, to which the lower courts are at least formally required to adhere.

Remedies in *Microsoft*

The remedy decrees in *Microsoft*

The complaints that the Justice Department and the states filed against Microsoft in 1998 focused on Microsoft's self-described "'jihad' to win the 'browser war.'"[34] The basic theory of the case was that Microsoft had a monopoly in the market for desktop operating systems for Intel-based personal computers. This monopoly was protected by the need for compatible software applications that made the operating system useful and attractive to consumers, which the government called the "applications barrier to entry."

At the time, most applications were written to be compatible only with Windows, but Microsoft feared that Netscape's internet browser and the Java programming language that Netscape distributed would be able to operate across platforms. This would make it possible for applications programmers to write programs to Netscape that would run on competing operating systems, not just on Windows, thereby ending Microsoft's monopoly grip on the operating systems market.

To remove Netscape's threat, Microsoft bundled its Internet Explorer browser into the Windows operating system, first by contract and later by incorporating the code for Internet Explorer into the code for its Windows 95 and 98 operating systems. Although this was the heart of the complaint, that wasn't all that Microsoft did. At trial, the plaintiffs showed a systematic pattern of behavior aimed at preserving the applications barrier to entry and Microsoft's operating system monopoly.

For the most part, the trial judge agreed with the governments' case, finding that Microsoft violated Section 1 and Section 2 of the Sherman Act. Although some of Microsoft's conduct did benefit consumers, the judge found that there was no reason for Microsoft's refusal to offer an unbundled operating system, with the Internet Explorer browser removed, other than its desire to exclude Netscape from the market. [35]

After finding that Microsoft had violated the antitrust laws, the trial judge solicited remedy proposals from both sides. The plaintiffs proposed a decree that would have broken up Microsoft into two separate companies. One company would have continued the "Operating Systems Business" ("OpsCo"), including not only Windows but also the operating systems for servers and handheld devices. The other company would have carried on the "Applications Business" ("AppsCo"), which was everything else that Microsoft did, including Office and Internet Explorer. The details of Microsoft's restructuring were to be filled in later, in a plan initially to be drafted by Microsoft and due within 4 months of entry of the decree.

The plaintiffs also proposed a detailed set of interim conduct prohibitions to be in effect until either 3 years after the divestiture plan was fully implemented or until the expiration of the term of the final judgment (10 years from the date of its entry), whichever came first. These conduct restrictions were drafted on the assumption that Microsoft would be broken up; conduct relief was only necessary to prevent certain harms while the details of the break-up were being worked out.

The core idea behind the government plaintiffs' approach to remedy, however, was that the best way to bring competition to the operating systems market was to change Microsoft's incentives by changing its corporate structure. Only regulating certain conduct would not "pry open" the market to competition, to use Justice Jackson's words in *International Salt*.

The interim conduct provisions were focused on the exclusionary behavior proved during the trial. Included were various nonretaliation and uniformity requirements, designed to ensure that Microsoft would treat equally its various groups of customers (such as computer manufacturers) and complementary product providers (such as independent software vendors). Microsoft would be required to license Windows to all original equipment manufacturers, or OEMs, on uniform terms, thereby depriving Microsoft of a major tool for rewarding OEM loyalty and for punishing disloyalty, and it could not enter into exclusive agreements with third parties (such as internet content providers) to distribute Microsoft middleware to the exclusion of competing products.

The decree also would have enjoined Microsoft from "binding" a "middleware product" (such as a browser) to a Windows operating system unless Microsoft offered an "otherwise identical" operating system in which end-user access to that product could readily be removed. The royalty rate for such a system without access to Microsoft's browser was required to be lower than the rate for one bundled with Internet Explorer, thereby giving original equipment manufacturers a financial incentive to offer their customers a version of Windows that would allow a customer to choose a different browser.

Finally, the decree required broad information disclosure in a "timely manner" to enable software and hardware interoperability with the Windows operating system running on a personal computer. To ensure "effective" interoperability, Microsoft would have been required to establish a "secure facility" at which Windows' source code would be available to qualified representatives of interoperable hardware and software vendors.

Microsoft objected to the plaintiffs' proposals and filed its own remedy proposal; it requested discovery and a trial on remedies to begin 7 months later. The 7 months would have meant that the remedies hearing would have occurred after the 2000 presidential election—an election that would mark the end of the Clinton administration that had brought the case and which might bring a more Microsoft-friendly George W. Bush administration.

The proposed remedies trial itself also looked to be an extended affair. Microsoft envisioned testimony from 23 witnesses. The government plaintiffs, although not requesting a hearing, had filed a brief in support of their proposed remedy accompanied by six supporting affidavits from expert economists, computer scientists, and an investment banker. All witnesses would need to be deposed in advance of trial, of course, and it was not clear how long the actual hearing might take.

In any event, the trial judge was skeptical about the entire enterprise. The judge viewed this proposed testimony as "merely the predictions of purportedly knowledgeable people as to effects which may or may not ensue." He noted that he had found such testimonial predictions "less reliable even than testimony as to historical fact" and that he had found cross-examination of such witnesses to be of "little use" in assessing the accuracy of their predictions.[36]

Instead of the lengthy proceeding to determine the appropriate remedy that Microsoft had proposed, the judge held a one-day hearing, at which no evidence was presented, and then entered the decree that the plaintiffs proposed, including the provisions to restructure Microsoft. In his subsequently issued opinion, the judge indicated that although a structural remedy was one that he had come to only "reluctantly," he now considered it "imperative."

For one, the judge said that Microsoft had proven untrustworthy in the past when it came to complying with court-ordered injunctive relief. For another, the plaintiffs' proposed remedy was the work-product of senior government antitrust officials, who are expected to act "in the public interest." The judge's conclusion was that the plaintiffs' proposed decree appeared to address "all the principal objectives of relief" in an antitrust case: "to terminate the unlawful conduct, to prevent its repetition in the future, and to revive competition in the relevant markets."[37] The trial judge thus loosely tracked Supreme Court language governing remedy, but he did not explain why he thought the proposed decree accomplished those objectives. He then entered the decree the plaintiffs proposed, staying its effect while the case was on appeal.[38]

On appeal, although the D.C. Circuit Court of Appeals did not reach the question of how to handle the remedy decree until the penultimate section of its opinion,[39] it began its opinion with an interesting "reflection" that related to remedy: "a practical matter of note … the temporal dimension of this case."[40] Even though the *Microsoft* case was tried relatively quickly, the court pointed out that more than 6 years had passed since Microsoft had engaged in its anticompetitive conduct, "and six years seems like an eternity in the computer industry."[41] This passage of time, and the dynamism of the industry, "threatens enormous practical difficulties" for courts considering appropriate equitable relief, whether that relief takes the form of conduct remedies or "broader structural remedies."[42]

The upshot? The D.C. Circuit Court of Appeals indicated that equitable remedies to restore competition may very well turn out to be of "limited" use in technologically dynamic markets, and government enforcers may have to be satisfied with creating precedent that "defin[es] the contours of the antitrust laws so that law-abiding firms will have a clear sense of what is permissible and what is not."[43] In other words, the emphasis would be on the deterrence objective of remedies, more so than remediation.

Given the court's skepticism about the value of competition-restoring remedies, it was not surprising that the court of appeals ended up vacating the district court's decree. The court gave a number of reasons—the trial court's failure to hold an evidentiary hearing,[44] the trial court's failure to explain how the decree would achieve the recognized goals of an antitrust remedy,[45] and the modifications that the court of appeals had made in the grounds for liability (although it had upheld much of the judge's core Section 2 decision).[46]

Despite its introductory caution, however, the court of appeals did not rule out the possibility that some equitable remedies might be appropriate. So, it remanded the case to consider "which of the decree's conduct restrictions remain viable in light of our modification of the original liability decision"[47] and offered the district court some "further guidance" for how it might exercise its discretion in fashioning a new remedial decree.[48]

The court of appeals noted that although district courts are afforded "broad discretion" in entering relief, it cautioned the district court to be careful before imposing a structural remedy on Microsoft, an arguably "unitary" company not put together through acquisitions. One reason for this caution was simply "logistical difficulty."[49] A company that grew through acquisitions might have "preexisting internal lines" that could make it easier to split up, as opposed to a company that has only one plant and one set of production tools.

The court of appeals referred to the trial judge's observation in *United Shoe Machinery Co*., which the judge had refused to split up in 1953: "It takes no Solomon to see that this organism cannot be cut into three equal and viable parts."[50] The court of appeals, however, did not refer to the fact that the remedy imposed in 1953 failed to restore competition, and that the company was subsequently restructured on motion of the government.[51]

Another reason for a cautious approach to a structural remedy was more substantive. The district court should consider whether there was a "sufficient causal connection" between Microsoft's anticompetitive conduct and its monopoly position in the operating systems market.[52] Although the court of appeals had found sufficient causal connection between Microsoft's exclusionary behavior and the maintenance of its monopoly to find liability, it characterized that causation test as rather toothless.[53] The court of appeals said that more would be required to impose a structural remedy, perhaps even a "significant causal connection" between Microsoft's conduct and Microsoft's monopoly position.[54]

Noting that the district court had specifically refused to find that, absent the exclusionary behavior, Netscape would have ignited competition in the operating systems market, the court of appeals suggested that the district court may well decide that divestiture "is not the appropriate remedy."[55] The court concluded: "While we do not undertake to dictate to the District Court the precise form that relief should take on remand, we note again that it should be tailored to fit the wrong creating the occasion for the remedy."[56]

The court of appeals' legal directions helped shape the eventual remedy on remand, but larger events also played a significant role. A presidential election and a new administration at the Justice Department had preceded the court of appeals' decision; within 3 months of the decision, the new administration announced that it would not seek structural relief. The trial judge then pushed the parties into a mediation process that led to a settlement to which Microsoft and the Justice Department agreed, but to which only nine of the remaining 19 plaintiff states agreed.

This set up an unusual conflict between two sets of government enforcers, with one group (which included the U.S. Department of Justice) advancing a settlement as being in the "public interest" and the other group seeking a court-ordered decree that would provide for broader relief. The split in the federal-state enforcer coalition led to a procedural bifurcation in how the district court decided on remedy. Justice Department settlement decrees are subject to the light-touch review of the Tunney Act to see whether they meet that act's "public interest determination."[57] The hearing on the Justice Department's proposed settlement decree took the district court only 1 day, and the district court later found that it met that statutory requirement.[58]

The state plaintiffs that sought greater relief, though, had to prove that they were entitled to the relief they requested. This meant that they had the burden to show that their proposed decree met the legal standards that the court of appeals had articulated in its opinion. To carry that burden of proof required 32 trial days, with the parties calling more witnesses for this proceeding than had testified at the liability trial itself.[59]

The district court judge rejected almost all of the litigating states' proposals, seeing its review as constrained by the findings of the judge in the original liability trial and by the court of appeals decision with regard to the conduct for which Microsoft was found liable. "The mandate of the appellate court," the judge wrote, "requires this Court to fashion a remedy appropriately tailored to the revised liability findings .... Indeed, it would make little sense to proceed to craft a remedy in the absence of substantial reliance upon the factual foundation which underlies the liability entered in this case."[60]

In hewing closely to the trial court's findings of fact and the appellate court's substantive legal conclusions, the district court judge admonished the litigating states that the remedy decree was not the vehicle "through which [they] can resolve all existing allegations of anticompetitive conduct which have not been proven or for which liability has not been ascribed."[61]

Despite the constraint of the prior decisions, the district court did make an effort to deal with the issue that the court of appeals had raised: the significant passage of time. In its lengthy evidentiary remedies hearing, the court allowed the parties to update the factual information originally presented in the case, enabling the court, in its remedial decree, to go beyond "a mere proscription of the precise conduct found to be anticompetitive" at the original trial and impose some forward-looking remedies involving technologies that had not yet emerged when the case was litigated.[62] Even with these updates, however, the court stuck to what it viewed as the original theory of liability of the case that the government plaintiffs had originally litigated.

Only one of the litigating states—Massachusetts—appealed the district court's remedy decision to the D.C. Circuit Court of Appeals, arguing that the district court incorrectly rejected the remedies that the litigating states had proposed.[63] The appeal was decided by six of the seven judges who had decided Microsoft's appeal 3 years before—and who had been skeptical about whether any remedy might effectively be imposed in the case. This time, though, they unanimously upheld the decree that the trial judge entered, supported, as it was, by lengthy hearings and extensive findings of fact.

The court's affirmance included the "most forward-looking" provisions of the trial court's decree, those which required the disclosure of communications protocols connecting servers and personal computers. These were forward-looking because servers were not the subject of the litigation, and there had been no allegations that Microsoft's disclosure practices had violated Section 2 of the Sherman Act.[64] Massachusetts had argued that the district court did not go far enough in its protocol disclosure order, but the court of appeals upheld the district court, finding no abuse of discretion in the order the court entered.

The court of appeals did quote *International Salt*: "When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." But the court of appeals added this caveat: "True enough, but when the district court undertakes to block the untraveled roads by adopting a forward-looking provision, its discretion is necessarily less broad because, without liability findings to mark the way, it is in danger of imposing restrictions that prevent the defendant from forging new routes to serve consumers."[65]

Carrying out the remedies in *Microsoft*

The remedy decree that the trial judge entered in 2002 was to be in effect for 5 years. The trial judge chose the short term as a reflection of the likelihood of change in a dynamic technical industry. "Imposing a remedy in this case isn't unlike trying to shoe a galloping horse," the judge wrote. By the time the 5-year term would be up, "the market will have long since sent the horse to pasture in favor of more advanced technology."[66]

The trial judge was wrong. The decree ended up lasting nearly 9 years, and the two software products involved in the case—the Windows operating system and browser software (even if not Netscape itself)—are still very much with us.

One reason why the decree lasted longer than expected was the technical nature of the most forward-looking aspect of the remedy: the requirement to disclose the communications protocols for connecting servers and personal computers running the Windows operating system. Microsoft's compliance with this aspect of the decrees was extraordinarily slow, eventually leading the plaintiffs and the trial judge to lose patience. Microsoft was forced to adopt a new approach to the task, and the judge extended the decrees (twice) until the trial judge could pronounce Microsoft in compliance with its obligations.

Critical to obtaining Microsoft's compliance was the use of a 'Technical Committee.' Recognizing that compliance would inevitably raise technical issues that lawyers might not understand, the Technical Committee was designed to bring technical expertise to bear on complaints that might arise over compliance. Funded by Microsoft, the Technical Committee initially consisted of three software engineers. As time went on, however, its role grew into that of partner with Microsoft in solving technical problems, particularly in documenting the protocols; its staff eventually grew to about 50 engineers, along with outside consultants. By the end of the decree, a lawyer for the Justice Department was describing the Committee's work as "Herculean," and the trial judge was praising its adoption as "ingenious" and a "model for monitoring" that she would "heartily recommend."[67]

A second important aspect of decree administration was the requirement of periodic public reporting. The Department of Justice, Microsoft, and the states prepared Joint Status Reports on a regular basis, each party writing its own submission for the report, which was then followed by a court conference that allowed the trial judge to track compliance. The reports were also posted publicly on the Justice Department's website. Although these reports had various requirements for confidentiality, particularly with regard to specifics of the Technical Committee's work, they did force Microsoft and enforcers to account for progress in meeting the requirements of the remedy.

One aspect that was not much addressed during the administration of the decrees was whether they were bringing competition to the operating systems market, a stated goal of antitrust remedies. The trial court judge broached the question only two times in the course of administering the decree. The first time—3 years after entry of the decree—the Justice Department lawyer said that they "don't have a particularly good answer" to whether the decree had been effective. The second time, the department discussed some "encouraging" indications of competition in the markets for interoperable software and operating systems.

But no systematic effort was made to address the question, and the court did not press the issue. Instead, the court and the parties focused on compliance with the decree's provisions rather than the effect of that compliance.

Insights from the *Microsoft* case for today's Big Tech antitrust cases

There are four broad insights that we can draw from the remedy history in *Microsoft* that will be helpful when thinking about remedies in the Big Tech platform cases that are now being litigated. First, the record made in the trial on liability will largely, but not completely, determine remedy. Some leeway might be possible, and a separate remedy hearing might update the facts originally presented, but remedy will mostly be cabined by the original theory of the case and what the government enforcer proved at trial. This means that government antitrust enforcers must pay attention to remedy early on, laying the groundwork at trial for what they want by way of relief.

Second, when deciding on remedy, courts are very much focused on the practical—that is, on what works. However broad or narrow a remedy the government proposes, a court needs to be convinced that it can be implemented. Unless the parties agree to a remedy, it will be up to the government antitrust enforcers to prove to the court that they have proposed an appropriate remedy that is consistent with the requirements the U.S. Supreme Court has established. The states that objected to the Justice Department's settlement failed in that regard.

Third, courts are not limited to stopping current practices. Forward-looking remedies are a recognized and acceptable part of a remedial order, but these remedies must still be anchored in the violations shown at trial. They can't address unproven violations of the antitrust laws.

Fourth, the court and the parties must plan for how a remedial decree will be implemented. This planning needs to recognize that a defendant's incentives are not necessarily in line with swift compliance and that in technical cases, an ongoing institutional body with technical expertise will likely be needed to resolve expected (but unpredictable) problems in carrying out a decree's requirements.[68] The Technical Committee from the *Microsoft* litigation is a good model for this effort.

Remedies in today's Big Tech platform cases

Google

The complaints in the government cases against Google focus on internet search (done through various access points) and online advertising.[69] The Justice Department's complaint alleges that Google has a monopoly in the consumer-facing general search services market and in the business-facing markets for search advertising and general search text advertising, the latter being a subset of the former.[70] The parallel 38-state complaint (the "Colorado complaint") uses similar terminology for the markets that it claims Google has monopolized.[71]

Both complaints allege a variety of exclusionary agreements and practices that block the distribution of rivals' search engines and that keep rivals from obtaining sufficient data to achieve scale economies in search and advertising results. The Justice Department directs most of its fire at Google's control of the mobile distribution channel, accomplished through the license agreements for the Android operating system that Google imposes on handset manufacturers, but the complaint also makes passing mention of the extension of Google's control over voice assistants and internet-connected devices.[72]

The Colorado complaint is broader. "The additional claims in this case are brought to combat a broader range of Google's illegal conduct [than the Justice Department's]," the complaint points out.[73] That complaint gives more attention to connected devices (cars, for example), restrictive agreements on the advertising side of Google's business, and the impact of Google's conduct on the business of "specialized vertical providers" that offer functionality in addition to search (for example, an application for finding and hiring local services).[74]

The requests for relief in both complaints are expectably vague. Arguably, there is no benefit to a plaintiff being too specific about relief when filing a complaint, as specificity might constrain the plaintiff in unexpected ways once the litigation is over. Thus, although the federal and state antitrust complaints include a request for "structural relief" or "structural divestitures," both complaints specify that this relief should be imposed "as needed," and neither sets out what exactly that structural relief might look like, even on a tentative basis.[75]

The Justice Department complaint calls for enjoining the practices described in the complaints and "any other practices with the same purpose and effect."[76] The Colorado complaint phrases it more broadly, seeking the imposition of "effective, monitorable, and measurable conduct remedies that eliminate the ability of Google to continue to reap benefits from its pattern of competitive harm" along with "any other" relief that is "necessary and appropriate to restore competitive conditions."[77] But, overall, the relief requests lack specificity.

Although the vagueness of the relief requests is understandable, it is not inevitable. By contrast, the complaints that the government plaintiffs filed in *Microsoft* were much more specific, at least with regard to conduct remedies. The core of those cases was the bundling of Windows and the Internet Explorer browser, to the exclusion of Netscape's browser that Microsoft believed to be a nascent challenge to its operating systems monopoly. The Justice Department's complaint had a number of very specific relief provisions to deal with that bundling, including injunctive provisions specifically forbidding the particular licensing requirements that the government was attacking, and it also included a "must-distribute" provision that would have required Microsoft to include Netscape with Windows for a period of 3 years.[78]

Did the government plaintiffs' specificity in the Microsoft case matter? In the long run, probably not. Although some of what the government plaintiffs sought in their complaints did end up in the settlement decrees (but not the "must distribute" provision), many of their relief proposals, including their later-proposed reorganization of Microsoft, came years after the original complaints were filed and were not foreshadowed in the original complaints. Nor did the initial requests seem to constrain the government plaintiffs when it came time to seek relief; their actual relief proposals were both more sweeping and more detailed. If the specificity did matter, then perhaps it was a short-run effect, focusing the federal government on the need to have at least some definite goal in mind before bringing such an important case.

Facebook

The Federal Trade Commission and New York state-led cases against Facebook allege that the firm monopolized the market for "personal social networking services" and that it maintained its monopoly through a "buy or bury" strategy—either buying competitive threats or burying competitors by engaging in certain exclusionary conduct.[79] The two most significant of Facebook's acquisitions are alleged to have been Instagram and WhatsApp, companies that Facebook allegedly felt posed nascent competitive threats to its monopoly position.[80]

The monopolizing tactic on which the complaints focus involves Facebook's conditions on the licensing of application programming interfaces, or APIs, which allow developers to interoperate with the Facebook platform. These restrictive conditions have included, at times, a requirement that the developers' applications not compete with Facebook.[81]

For remedy, the complaints in both cases are fairly specific with regard to the "buy" tactic. Both complaints call for "divestiture or reconstruction" of "illegally acquired businesses," specifically naming Instagram and WhatsApp but not limiting their requests to those companies.[82] The complaints also seek a requirement that Facebook provide advance notice of future acquisitions (the New York state case) or obtain advance approval (the Federal Trade Commission case).

When it comes to Facebook's policies regarding API licensing, however, the complaints' remedy requests are more general. For these practices, the complaints simply request a prohibition on conduct that is "similar or related" to that described in the complaints. In this regard, the remedy requests are more similar to the Google litigation than to the far more specific requests in the complaints in *Microsoft*.

The Facebook litigation has gotten off to a much rockier start than the Google litigation. The district court initially dismissed the complaints from both the Federal Trade Commission and New York state, giving the federal agency leave to replead but dismissing New York's complaint with prejudice.[83] The Federal Trade Commission subsequently filed an amended complaint, which survived a motion to dismiss.[84]

The district court, in its opinions so far, however, has taken a decidedly skeptical view of the claim that Facebook's API licensing restrictions violate Section 2 of the Sherman Act, whether framed as a refusal to deal or as an agreement to license only on condition that the developer not deal with other social networks.[85] The court also questioned whether the Federal Trade Commission would be entitled to injunctive relief even if its legal claims were valid. Although the Federal Trade Commission Act of 1914 gives that federal agency the power to seek an injunction to stop a threatened violation,[86] the district court pointed out that, according to the complaint, the most recent example of a refusal to license occurred in 2013, and that Facebook withdrew the policy of imposing these conditions in 2018.[87]

Google and Facebook: The range of remedies

Based on the violations pleaded in the Google and Facebook complaints, what sorts of remedies might the government plaintiffs be able to get? As we have seen, at the conclusion of the liability trial in *Microsoft*, the government plaintiffs proposed a reorganization of Microsoft that would have fundamentally altered its structure and changed its economic incentives (or at least so the plaintiffs hoped), along with interim conduct remedies. The parties subsequently settled for a remedy decree that mostly addressed the conduct proven at trial but had a forward-looking component as well.

One can imagine a variety of conduct prohibitions that might be sought in both the Google and Facebook cases. The Google case involves contracts with mobile handset manufacturers; the Facebook case alleges exclusionary terms for interoperating with applications developers. Both are similar to contractual or other exclusivity provisions in *Microsoft* and could be prohibited or modified for some future period.

But the courts have clearly said that government antitrust enforcers need not rest with such a prohibition. Fidelity to the U.S. Supreme Court's goal that remedies should "effectively pry open the market to competition" will allow the government plaintiffs to seek more robust remedies. These might include requiring interoperability for APIs (again, similar to *Microsoft*), sharing of data flows, or even review of algorithms.

Requested conduct remedies could also have a forward-looking component similar to what the court faced in the protocol disclosure requirement in *Microsoft*. Both Google and Facebook are involved in technologically evolving industries. Although lawyers and judges are poor futurists (as *Microsoft* itself showed), nevertheless the outlines of some of that evolution are observable even now. Facebook has changed its name to Meta Platforms and believes that the future of computing lies in the virtual-reality world of the metaverse. Indeed, the Federal Trade Commission, in a separate case, has already sued to stop Meta Platforms from acquiring a virtual-reality software developer, so relief may have to consider how virtual reality may affect Facebook's social network business.[88] For Google, search is moving to other platforms, such as voice assistants in homes and automobiles, some of which are already covered in some detail in the Colorado complaint.[89] Concentrating remedy on mobile distribution might not be sufficient to open internet search markets to competition.

Structural relief is also mentioned in the pleadings in the Google and Facebook cases. The target of restructuring is clearer in the Facebook case—Instagram and WhatsApp, which were the main nascent threats to Facebook when they were acquired. In the Google case, the federal, and particularly the state, complaints suggest a broad effort to control or affect a wide range of businesses through the control of search and search advertising. This may call for some sort of broad remedy that changes Google's basic incentives (much as in *Microsoft*) or perhaps a more targeted set of spinoffs (such as the Android mobile operating system[90] or perhaps a vertical separation of Google's general search functionality from its specialized search functionality[91]).

As our earlier discussion of *Microsoft* indicated, if federal and state antitrust government enforcers propose some or all of these remedies, the courts will need to be convinced that the remedies are anchored in the violations presented at trial and that they are practical. Commentators have made many suggestions for opening up Google's or Facebook's markets,[92] but the more dissimilar these remedies are from the facts at trial, the more difficult it will be for a court to find that their adoption is "tailored to fit the wrong."[93] Practicality will be more dependent on what these government enforcers present at a trial on remedies and on the institutional structure they propose to deal with ongoing technical issues. On this point, *Microsoft* is more of a help to enforcers, given the very positive experience that the court had with the Technical Committee.

The courts will also face some important legal constraints from the earlier *Microsoft* decision. The court of appeals approved forward-looking remedies that addressed newly evolving technology—but only cautiously. The shift from the web to the metaverse may be analogous to the shift from local storage on personal computers to the use of servers that was happening in *Microsoft*, but the court might be concerned about overregulating innovation in such a new and unknown area.

The court of appeals also left open the possibility of structural relief in *Microsoft* but made plain that there would be a high bar to such an approach. Restructuring not only would have to be a fit way to remedy the harm proved, but also might be subject to a strong causation requirement. Recall that the government plaintiffs in *Microsoft* were unable to prove that the Netscape browser would have developed into a full challenger to Windows. The court of appeals held that their proof of excluding Netscape's browser was enough for liability, but perhaps not sufficient to warrant Microsoft's restructuring.[94]

Does this indicate that if the Federal Trade Commission, in the Facebook case, seeks the divestiture of Instagram and WhatsApp, then the agency might be required to prove that "but for" the acquisitions, the two companies would have grown into challengers of Facebook's monopoly? If so, this is likely be a difficult burden to meet, but one for which the government enforcers would need to be prepared as they present their case at the trial on liability.

The Google and Facebook cases are being litigated in the District Court for the District of Columbia, and so the trial judges in these cases are bound by the court of appeals' decision in *Microsoft*. That decision takes a more conservative view of remedies than the Supreme Court has in the past.

For example, although the court of appeals in *Microsoft* wrote that remedies in civil antitrust cases should "unfetter the market,"[95] it actually paid little attention to this principle when giving guidance to the district court on remedy. Instead, the court of appeals emphasized its principle of "tailoring the remedy to fit the harm," a principle more related to the criminal law's concern for proportionality than to a concern for bringing competition to a monopolized market. The court of appeals also asserted a "less broad" role in stopping monopolists from attaining their old goals through different means.[96]

This dissonance between the court of appeals' approach to remedies in *Microsoft* and the Supreme Court's earlier decisions leaves government enforcers with a difficult challenge. They might take a narrower view of remedies in an effort to comply with the D.C. Circuit Court of Appeals' more conservative views.[97] Or they might propose more sweeping relief and try to convince the D.C. Circuit to accept these remedies—or hope that the Supreme Court will.

In any event, the key to success at convincing a court to adopt the chosen remedies will be to build a full record for their adoption as a matter of legal liability at trial and then to show that the remedies are practical at a subsequent remedies hearing.

Conclusion: A new framework

We seem to be perpetually dissatisfied with antitrust remedies. This dissatisfaction started early on—Louis Brandeis, prior to his appointment to the U.S. Supreme Court wrote critically about the remedies in the American Tobacco monopolization litigation of 1902.[98] Midcentury criticism was directed at the courts' unwillingness to order structural relief in a host of industries, from aluminum, to ball bearings, to titanium compounds, to railroad sleeping cars, to grocery store chains.[99] Most recently, the remedies in *Microsoft* were heavily criticized.[100]

This dissatisfaction has not been limited to the United States. Critics have dismissed as "largely ineffective" the set of remedies that the European Commission imposed on Google in three cases decided between 2017 and 2019, involving the licensing of Android, search preferencing, and advertising practices—despite the European Commission's imposition of massive fines and its effort to design a "choice screen" to allow users to choose a search engine other than Google.[101]

Unless there is legislative change in the United States, however, litigation continues to be the only way that the U.S. government has to deal with the alleged competitive abuses of Big Tech platforms. Improving on how the courts and enforcers think about and fashion remedies is thus an unavoidable challenge.

The earlier discussion of possible remedies in the Google and Facebook cases was framed in terms of the current approach to remedy decrees, which is a top-down "command and control" approach. That approach is one in which the government enforcer draws up an injunction intended to stop the particular practice that was the subject of the litigation or perhaps to stop similar practices that would achieve the same ends. It is an approach premised on the idea that the decree should tell the defendant what it can't do—or sometimes what it must do.

Such specificity is an important feature of a court decree, but it also focuses any subsequent court supervision on the question whether the defendant is complying with the decree rather than on whether the remedy is actually effective—an effect well on display in the *Microsoft* litigation itself.[102] Further, in a case involving complex behavior, as occurs in civil antitrust monopolization cases, a directive approach can suffer from information asymmetries between the defendant that knows its business better than anyone and a government plaintiff that knows it less well. In such situations, it may be difficult to tell a defendant exactly what to do that will remedy the situation. The defendant certainly has no incentive to point the way.

An alternative approach would be to frame the remedy in terms of the goals of the litigation and to provide benchmarks by which the defendant could show a court that it was achieving the goals. This approach would call on the government to think clearly about what it wants to achieve in the litigation. Is the ambition of the antitrust enforcers in the Google and Facebook cases to undo the monopolization they believe these firms have maintained through a variety of anticompetitive practices? If so, then the goal might be to bring about competition in the monopolized markets. On the other hand, the goal might be more modest—say, removing certain obstacles to competition and letting the competitive process proceed without them.

In either event, once the goal is articulated, it would be up to the defendant to figure out the best way to achieve it, a bottom-up approach. Defendants' incentives are often to delay, of course, particularly if there are monopoly profits to be maintained, so benchmarks would need to be set to measure progress toward achieving the goal. In these Big Tech platform cases, technical issues would be involved throughout the process, from setting the benchmarks to evaluating progress, for which an ongoing monitoring organization would need to be established, such as the Technical Committee in *Microsoft*.

A time deadline also would need to be set for overall compliance, after which some greater intervention might be necessary—perhaps a "crown jewel" divestiture or a financial penalty—much as the federal government did in the *United Shoe* litigation when, after 10 years, the court-ordered remedy had not produced competition in the market.[103]

One benefit of the goals approach, compared to the directives approach, is that it ends the dissonance between what the court orders and what is hoped to be gained from the antitrust litigation. The abiding dissatisfaction over antitrust remedies often comes from the failure of the directed remedies to achieve what many thought were the goals of the litigation in the first place.

Was the goal of the *Microsoft* litigation to end Microsoft's monopoly in the desktop operating systems market? If so, then the remedies failed. But if the goal was "only" to stop certain practices or perhaps to lower entry barriers by licensing protocols, without regard to whether the market was no longer monopolized after Microsoft complied, then those remedies might be counted as a success.

Shifting to a goals-based approach to remedy is challenging. It asks government antitrust litigators, as they are framing their litigation, to decide what is achievable through antitrust litigation. Private antitrust lawyers generally don't take antitrust cases if they don't think they can collect enough in damages to make the litigation worthwhile financially (for them and for their clients). Criminal antitrust prosecutors generally don't bring cases where fines or imprisonment aren't available. But civil antitrust enforcers have a more difficult challenge because they need to think about how to remediate a market that has failed to operate properly because of what the defendant or defendants did. If they can't think of a way in which antitrust intervention can make a difference, though, perhaps they might need to examine more closely their decision to try.

Effective relief must be the goal of the two Big Tech platform cases now being litigated. Setting goals for the remedy, accompanied by benchmarks, rather than resting with ill-conceived directives that the defendant may too easily evade, can help. Contrary to the D.C. Circuit Court of Appeals' view, expressed in the first *Microsoft* appeal, it is not enough if the end result of these cases is just to enunciate general rules of law.

Justice Jackson got it right: If the antitrust decree accomplishes less than bringing competition to the market, then the government has "won a lawsuit and lost a cause." With some foresight at trial and attention to the desired impact of the litigation, the government antitrust enforcers may yet win the Google and Facebook lawsuits and also win the causes.

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Endnotes

1 See United States v. Microsoft Corp., 147 F.3d 935 (D.C. Cir. 1998). The suit was originally filed in 1994. See United States v. Microsoft Corp. 56 F.3d 1448, 1441 (D.C. Cir. 1995).

2 See United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

3 See United States v. Google LLC, No. 1:20-cv-03010-APM (D.D.C. 1/15/21) (amended complaint) (hereinafter DOJ complaint); FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. 9/8/21) (substitute amended complaint) (hereinafter FTC complaint). State enforcers have also filed more targeted cases against Amazon; see California v. Amazon.com, Inc., Doc. No. CGC22601826 (Cal. Super. Ct. Sep 15, 2022) (alleging that various contract terms with merchants on Amazon's marketplace violate California antitrust and unfair competition law); District of Columbia v. Amazon.com, Inc., Civ. No. 2021-CA-001775 (D.C. Super. Ct. Jun 01, 2021) (alleging that various contract terms with merchants on Amazon's marketplace violate D.C. antitrust law).

4 See Colorado v. Google LLC, No. 1:20-cv-03715-APM (D.D.C., 1/4/21) (35 states, Puerto Rico, Guam, and D.C.) (hereinafter Colorado complaint); Texas v. Google LLC, No. 4:20-cv-00957-SDJ (E.D. Texas, 12/16/20) (10 states); Utah v. Google LLC, No. 3:21-cv-05227 (N.D. Cal., filed July 7, 2021) (36 states and D.C.) (Google App Store); New York v. Facebook, Inc., No. 1:20-cv-03589-JEB (D.D.C., filed December 22, 2020) (46 states, Guam, and D.C.) (hereinafter New York complaint).

5 Two exceptions are FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (held that Qualcomm's licensing practices did not violate Section 2) and McWane v. FTC, 783 F.3d 814 (8th Cir. 2015) (held that exclusivity requirements violated Section 2).

6 For a sample of the rich debate over the effectiveness of structural versus behavioral remedies, see, for example, John Kwoka, Mergers, Merger Control, and Remedies (Cambridge, MA: MIT Press, 2015); Robert W. Crandall, "The Failure of Structural Remedies in Sherman Act Monopolization Cases." Working Paper 01-05 (AEI-Brookings Joint Center for Regulatory Studies, 2001), available at http://papers.ssrn.com/abstract=286357. For more recent writing, see John Kwoka and Tommaso Valletti, "Unscrambling the eggs: breaking up consummated mergers and dominant firms," Industrial & Corporate Change 30 (5) (2021): 1286–1306, available at https://doi.org/10.1093/icc/dtab050.

7 The most recent major criminal Section 2 case was brought against American Tobacco in 1940; see American Tob. Co. v. United States, 328 U.S. 781 (1946). The most recent criminal charge under Section 2 was brought in 1977; see United States v. Braniff Airways, 453 F. Supp. 724 (W.D. Tex. 1978) (conspiracy to eliminate a competitor in a tricity intrastate airline market). For a listing of criminal Section 2 cases, see Joseph Matelis and Daniel Richardson, "Criminal Enforcement of Section 2 of the Sherman Act," Antitrust 36 (3) (Summer 2022): p. 61. In 2022 the Department filed its first criminal monopolization case in more than 40 years, see United States v. Zito, CR22-113-SPW (D. Mont. Sept. 19, 2022) (guilty plea for attempted monopolization) (unsuccessful solicitation of an agreement to divide markets for highway crack sealing services in Montana and Wyoming). The last criminal Section 2 case before that was brought in 1977. For government civil damages from antitrust violations, see Harry First and Spencer Weber Waller, "Pairing Public and Private Antitrust Remedies." In Nicolas Charbit and Sonia Ahmad, eds., Albert A. Foer: A Consumer Voice in the Antitrust Arena (New York: Institute of Competition Law, 2020), p. 109.

8 The Federal Trade Commission has the option to invoke its administrative process and enter its own cease and desist order after an administrative proceeding. In the Facebook litigation, however, it has chosen to litigate in federal court.

9 See United States v. Crescent Amusement Co. 323 U.S. 173, 185 (1944).

10 Ibid., p. 186.

11 Ibid.

12 Schine Chain Theatres v. United States, 334 U.S. 110 (1948).

13 Ibid., p. 129.

14 Ibid., p. 128.

15 Ibid.

16 Ibid., p. 129.

17 Ibid.

18 Ibid., p. 128–29.

19 United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), aff'd per curiam 347 US 521 (1954).

20 See 110 F. Supp., p. 347.

21 See United States v. United Shoe Mach. Corp., 391 U.S. 244, 247 (1968).

22 Ibid., p. 250. Compare the court's three-part statement in Schine, supra text accompanying note 18.

23 A consent decree, ordering extensive divestiture of assets, was later entered. See United States v. United Shoe Machinery Corp., 1969 Trade Cases ¶ 72,688 (D. Mass. 1969).

24 See Schine, 334 U.S., p. 128 (“an injunction against future violations is not adequate to protect the public interest”).

25 Ford Motor Co. v. United States, 405 U.S. 562, 573, 577 (1972).

26 International Salt Co. v. United States, 332 U.S. 392, 400-01 (1947).

27 See also Crescent Amusement, supra note 9, p. 189 (“The Court has quite consistently recognized in this type of Sherman Act case that the government should not be confined to an injunction against further violations.”); International Salt, supra note 26, p. 400, n.10 (after noting that the FTC Act permits courts in government civil suits to ask for the FTC’s assistance in framing an appropriate decree, the court states: “This would seem unnecessary if Congress intended a simple prohibition of the particular practice proved before the court. It indicates the Congress has intended decrees to deal with the future economic condition of the enterprise as well as past violations.”).

28 International Salt, supra note 26, pp. 400–01.

29 United States v. Glaxo Group Ltd., 410 U.S. 52, 64 (1973) (requiring defendant drug companies to grant reasonable-royalty patent licenses and to sell bulk-form of the drug to all bona fide purchasers on reasonable and nondiscriminatory terms) (remedies requested by government but denied by district court).

30 See United States v. Citizens & Southern Nat’l Bank, 422 U.S. 86 (1975).

31 The Antitrust Division filed 251 civil nonmerger cases from 1970 to 1979; it filed 25 from 2010 to 2019. See U.S. Department of Justice, “Antitrust Division Operations: Workload Statistics” (2021), available at https://www.justice.gov/atr/division-operations.

32 Since 1974, civil antitrust cases brought by the U.S. Department of Justice can be directly appealed only to the courts of appeals; between 1903 and 1974, such cases were subject to direct appeal to the Supreme Court. See 15 U.S.C. § 29 (amending the Expediting Act of 1903). The Supreme Court now hears government civil antitrust cases only on grant of a writ of certiorari; the same is true for FTC cases. Cf. Ohio v. American Express Co., 138 S. Ct. 2274 (2018) (case brought by United States and state plaintiffs; state plaintiffs filed for writ of certiorari, but United States did not). The Supreme Court, in recent years, has not reviewed a Section 2 FTC case; see supra note 5. Other FTC antitrust cases have not involved questions of the proper scope of remedy; see, for example, North Carolina State Bd. of Dental Examiners v. FTC, 574 U.S. 494 (2015) (state action immunity defense for state regulatory board); FTC v. Phoebe Putney Health Sys., 586 U.S. 216 (2013) (state action immunity defense to hospital merger); cf AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021) (FTC lacks power to order restitution and disgorgement under § 13(b) of FTC Act) (unfair or deceptive acts or practices).

33 Compare NCAA v. Alston, 141 S. Ct. 2141 (2021) (restraints on compensation of student athletes; held: violation); Apple Inc. v Pepper, 139 S. Ct. 1514 (2019) (held: standing to pursue antitrust claim); FTC v. Actavis, Inc., 570 U.S. 136 (2013) (pay for delay; held: violation); with Ohio v. American Express, supra note 32 (requiring plaintiffs to prove net harm from both sides of a “two-sided” market).

34 United States v. Microsoft Corp., Civ. No. 98-1232, ¶ 10 (D.D.C., May 18, 1998). This account of the Microsoft trial and remedies phase draws from Andrew I. Gavil and Harry First, The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century, Chapter 4 (Cambridge, MA: MIT Press, 2014).

35 The district court’s findings of fact and conclusions of law are separately reported. See 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact), 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law).

36 See United States v. Microsoft Corp., 97 F. Supp. 2d 59, 62 (D.D.C. 2000).

37 Ibid.

38 See United States v. Microsoft Corp., 253 F. 3d 34, 48 (D.C. Cir. 2001).

39 The final section of the opinion considered the trial judge’s judicial misconduct. In this part of its opinion, the court of appeals disqualified the trial judge who had entered the original decree from continuing to hear the case. See Ibid., pp. 116–18.

40 Ibid., p. 48 (quotation rearranged).

41 Ibid., p. 49.

42 Ibid.

43 Ibid.

44 Ibid., p. 101.

45 Ibid., p. 103 (“a remedies decree in an antitrust case must seek to ‘unfetter a market from anticompetitive conduct,’ to ‘terminate the illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future’”) (citations omitted).

46 Ibid., pp. 103–104.

47 Ibid., p. 105.

48 Note that a new district court judge needed to be assigned to the case, the court of appeals having disqualified the original trial judge; see supra note 39.

49 See Microsoft, 253 F. 3d, p. 106.

50 Ibid.

51 See supra notes 20–23 and accompanying text.

52 Microsoft, 253 F. 3d, p. 106.

53 Ibid., p. 79 (recognizing the difficulty of proving what would have happened to the nascent threat that Netscape posed but deciding that the plaintiffs' proof of causation of harm from its exclusionary behavior was nevertheless sufficient; characterizes its test for causation as "rather edentulous").

54 Ibid., p. 107 (quoting the Areeda and Hovenkamp treatise).

55 Ibid.

56 Ibid.

57 See Antitrust Procedures and Penalties Act of 1974, 15 U.S.C. § 16 (e).

58 See United States v. Microsoft Corp., 231 F. Supp. 2d 144 (D.D.C. 2002).

59 See New York v. Microsoft Corp., 224 F. Supp. 2d 76, 87 (D.D.C. 2002), aff'd, 373 F. 3d 1199 (D.C. Cir. 2004).

60 224 F. Supp. 2d., p. 88, 98.

61 Ibid., p. 192.

62 Ibid., p. 193.

63 See Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004).

64 Ibid., p. 1223.

65 Ibid., pp. 1223–24.

66 New York v. Microsoft Corp., 224 F. Supp. 2d 76, 184 (D.D.C. 2002).

67 For a fuller description of the Technical Committee's work, see Jay L. Himes, Jason Nieh, and Ron Schnell, "Antitrust Enforcement and Big Tech: After the Remedy Is Ordered," Stanford Computational Antitrust 1 (2021): 64, 68–73.

68 For a thoughtful discussion of the defendant's incentives in the remedy phase, see Ibid., pp. 77–78.

69 For simplification, I discuss only the two cases originally filed against Google in the D.C. District Court in 2020 and 2021. The Utah multistate case, focused on the Google Play store, and the Texas multistate case, focused on an alleged agreement between Google and Facebook dividing advertising markets, are filed in different federal courts. See supra note 4. I also refer to the Colorado complaint as the "States' complaint" even though 14 states also joined the Justice Department's complaint.

70 See, for example, DOJ Complaint, supra note 3, ¶¶ 88–89, 97–98 (all ads generated in response to online searches), 101–02 (ads with notation of "ads" or "sponsored"). The search advertising market includes "specialized search ads," which provide additional information relating to the advertised product or service, as well as "general search text ads." See ¶ 102.

71 See, for example, Colorado complaint, supra note 4, ¶ 59 (referring to a "general search advertising market" and also a "search advertising market described in the Department of Justice Complaint").

72 See DOJ complaint ¶¶ 160, 163.

73 See Colorado complaint ¶ 17.

74 Ibid., at ¶¶ 127–199. For a description of what these specialized vertical providers offer, see Ibid. at ¶ 169.

75 See DOJ complaint ¶ 194b; Colorado complaint ¶ 233c.

76 DOJ complaint ¶ 194c.

77 Colorado complaint ¶ 233 c, g.

78 See DOJ Microsoft complaint, supra note 34, ¶ VIII.2.d, e. The states sought similar relief, specified in their motion for a preliminary injunction.

79 See FTC complaint, supra note 3, ¶¶ 77–79; New York complaint, supra note 4, ¶ 104. Although the caption of the FTC's case was changed from Facebook to Meta Platforms, Inc., to reflect Facebook's name change, this chapter will continue to refer to Facebook as the defendant.

80 Instagram is described as a photo-based social network; WhatsApp is described as a mobile message service.

81 See, for example, FTC complaint ¶ 133. New York's complaint is substantially similar.

82 See FTC complaint ¶ XI.B; New York complaint ¶ 277. New York's complaint additionally claims violations of Section 7 of the Clayton Act, along with Section 2 of the Sherman Act; the FTC's complaint does not include a Section 7 count.

83 See New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (challenge to Instagram and WhatsApp acquisitions barred by laches, the acquisitions having occurred in 2012 and 2014; exclusionary behavior had ended more than 5 years before filing complaint, so cannot form basis for an injunction) (appeal pending).

84 See FTC v. Facebook, Inc., 2022 U.S. Dist. LEXIS 5415 (D.D.C. 2022).

85 Ibid., at *51–52 (citing earlier opinion dismissing first complaint).

86 See 15 USC § 53(b) (giving FTC power to seek injunction when any person "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission").

87 See FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 26 (D.D.C. 2021) (noting that the Justice Department has broader power to sue for injunctive relief, so could possibly bring this litigation).

88 See FTC v. Meta Platforms, Inc., Case No. 22-cv-04325 (N.D. Cal., filed July 27, 2022).

89 See Colorado complaint ¶¶ 127–143.

90 Paul Heidhues and others, "More Competitive Search Through Regulation," Policy Discussion Paper No. 2 (Yale Tobin Center for Economic Policy, Digital Regulation Project, 2021), pp. 18-23, available at https://dx.doi.org/10.2139/ssrn.3923593.

91 See Richard Feasey and Jan Krämer, "Implementing Effective Remedies for Anti-Competitive Intermediation Bias on Vertically Integrated Platforms" (Brussels: Centre on Regulation in Europe, 2019), pp. 31–33 (discussing structural separation), available at https://bit.ly/3j7ToNq.

92 Heidhues and others, "More Competitive Search Through Regulation," pp. 23–26 (requiring access to Google search data or its web index).

93 See supra note 56 and accompanying text.

94 See supra notes 53–56 and accompanying text.

95 See Microsoft, 253 F. 3d, p. 103.

96 See supra note 65 and accompanying text.

97 The FTC may have already hinted at a narrow focus; see FTC v. Meta Platforms, Inc., Joint Civil Rule 16.3 Report to the Court at 3 (filed February 22, 2022) ("The Federal Trade Commission seeks a prompt end to the ongoing conduct through which Meta [fka Facebook] unlawfully maintains its monopoly power.").

98 See Eliot Jones, The Trust Problem in the United States (New York: The MacMillan Co., 1921), pp. 461–69.

99 See Joel B. Dirlam and Alfred E. Kahn, Fair Competition: The Law and Economics of Antitrust Policy (Westport, CT: Praeger Publishers, 1954), pp. 152–63, 166–69 (discussing Alcoa and A&P); Walter Adams, "Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust," Indiana Law Journal 27 (1) (1951) (discussing Alcoa, Timken, National Lead, Pullman).

100 Compare, for example, Carl Shapiro, "Microsoft: A Remedial Failure," Antitrust Law Journal 75 (3) (2009): 739, with William H. Page, "Mandatory Contracting Remedies in the American and European Microsoft Cases," Antitrust Law Journal 75 (3) (2009): 787. For an overall negative, but somewhat mixed, assessment, see Gavil and First, The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century, pp. 277–79.

101 See Heidhues and others, "More Competitive Search Through Regulation," p. 3. See also Thomas Hoppner, "Google's (Non-) Compliance with the EU Shopping Decision" (2020), p. 15 (2020), an empirical study arguing that Google's Compliance Mechanism for implementing the European Commission's decision "failed to improve the market conditions for competing comparison shopping services." Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3700748.

102 See supra text following note 67.

103 For other earlier examples of this "Damocles sword" approach, see Sigmund Timberg, "Equitable Relief Under the Sherman Act," University of Illinois Law Forum 1950 (4) (1950): 629, 658 and n. 138 (citing cases).

Mergers involving nascent competition

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Overview

Mergers involving nascent competition are a hot topic in antitrust circles, especially in light of the pending Federal Trade Commission case against Facebook Inc., but the thinking about the topic is nascent, too. This chapter is intended to contribute to that thinking and to discuss a variety of questions that have not previously been discussed together.

The chapter focuses on acquisitions by dominant firms of small or early-stage firms that, if not acquired, could threaten the acquiring firm's dominance. It explains that, while the vast majority of such mergers are likely to be benign or procompetitive, some might be very harmful to competition and economic welfare. If the potential harms from a merger are great enough, the expected value of the merger—taking into account both the likelihood and the magnitude of possible harms and benefits—might be harmful even if the merger is more likely to be benign than harmful.

The chapter argues that mergers that are in this sense expected to be harmful can in principle be prohibited under both Section 7 of the Clayton Antitrust Act of 1914 and, perhaps more readily, under existing Section 2 of the Sherman Antitrust Act of 1890. It suggests criteria for identifying anticompetitive mergers involving nascent competition and addresses policy concerns about merger error costs, efficiencies, the impact of heightened scrutiny of such mergers on venture capital investment, multiple acquisitions by a single dominant firm, and post-acquisition challenges to such mergers.

Defining the problem

The acquired firm in a merger involving nascent competition is a firm, or substantial assets of a firm, that is acquired early in the firm's life, when its commercial prospects are uncertain. For present purposes, that firm can be called a "nascent competitor."

Because of the uncertainty about the future prospects of the nascent competitor, the competitive significance of the acquisition must be assessed on the basis of predictions about possible future changes in the firm and markets in which it does business. Past performance and tools used to measure that performance, such as revenues, market shares, the Herfindahl-Hirschman Index, profits, price-cost margins, and bidding histories, are of little or no help. Assessment of the competitive significance of the acquisition is therefore likely to be especially uncertain.

In their important paper, "Nascent Competitors," Scott Hemphill and Tim Wu include "prospective innovation" as a central attribute of nascent competitors.[1] It is, to be sure, a defining characteristic on a problematic merger involving nascent competition that the merger eliminates the possibility that the acquired firm will become something that both is very different from what it is at the time of the acquisition and significantly enhances competition by diminishing the market power of the acquiring firm and perhaps displacing it. Future innovation will often be important, perhaps essential, to the acquired firm's developing in that way, and some scholars have suggested that the effects of innovation might be the most important benefits and harms from mergers involving nascent competition.[2]

Nevertheless, adding some notion of innovation to the definition of a nascent competitor seems unnecessary. In the first place, one can imagine competitive effects stories that do not depend on future innovation. Moreover, innovation can be part of the factual assessment in any event, without making it a definitional element; and making it part of the definition would needlessly complicate the analysis by adding an additional, difficult, and ambiguous element.[3]

The acquisitions of nascent competitors on which this chapter is focused are acquisitions by a firm that is well-established and has substantial market power that might be threatened by the acquired nascent competitor.[4] These acquisitions can injure competition if their effect is to maintain market power of the acquiring firms that would otherwise be dissipated by competition.

By contrast, acquisitions by firms lacking such an existing presence would be problematic only if they were likely to create or increase the firms' market power. Such acquisitions would thus raise competition concerns that are beyond the scope of this paper and that can be assessed within existing frameworks for analyzing the competitive effects of mergers.

The economic welfare implications of acquisitions of nascent competitors can be very substantial. Established, enduring monopolies can be displaced by significant new competitive alternatives that are often the result of valuable innovation. That displacement process both diminishes welfare-reducing market power and reflects the flourishing of important new and often welfare-enhancing business alternatives. It is, in Joseph Schumpeter's paradigmatic term, "creative destruction."[5] Acquisitions that extinguish those possibilities can be very damaging to economic welfare.

They can be damaging to economic welfare for an additional reason as well. In winner-take-all (or winner-take-most) markets, an acquisition that eliminates a nascent competitive threat to a firm with substantial market power can nudge the market toward "tipping" to become a market in which network effects and economies of scale make entry by new rivals in the future more costly and less likely.[6]

Nascent competitors might threaten the market power of the acquiring firm by expanding their existing businesses or by evolving into some other or additional businesses. They might do so on their own or after being acquired by another firm, including perhaps a smaller competitor of the acquiring firm. Where the competitive threat requires evolution into a different business, the nascent competitor might be regarded as a "potential competitor," rather than as an actual, early-stage competitor. In that case, a firm that is a nascent competitor with respect to the markets relevant to the market power of the acquiring firm might be a reasonably mature competitor in other markets.

Nascent competitors might threaten the acquiring firm either horizontally—if the nascent competitor might itself become an important competitor of the acquiring firm—or vertically if the nascent competitor might become an important input or complement to a competitor of the acquiring firm.[7] By eliminating that threat, the acquisition might be thought to harm competition on either a horizontal theory or a vertical theory. The horizontal theory could be an ordinary collusion story, in which the merging firm agrees to share the preserved monopoly rents, or an exclusion story, in which the acquiring firm uses anticompetitive conduct or threats thereof to coerce the nascent competitor to sell to it. The vertical theories relevant to this chapter involve protecting the acquiring firm's existing market power; they do not include harm to competition in a different, vertically related market.

Acquisitions of nascent competitors might be especially problematic if they undermine the innovation process.[8] To be sure, such acquisitions might make innovation more likely if they increase the ability of the merging parties to innovate by enabling the combination of scarce research-and-development assets or if they increase the incentive of the merging parties to innovate by increasing the likelihood that the innovator will be able to appropriate the benefits of its innovations. But there is a real risk that acquisition of a nascent competitor will reduce the likelihood of innovation in the markets in which the acquiring firm has market power.

The nascent competitor's incentive to innovate in those markets depends on the prospect of displacing the acquiring firm in whole or in part. The incentive of the dominant acquiring firm to innovate in those markets is, on one hand, diminished by the prospect of cannibalizing its current profits in those markets and, on the other hand, motivated by a desire to prevent cannibalization of those revenues by others.[9] The merger of the two firms both diminishes the incentives of both of them to innovate and internalizes to the acquired firm the acquiring firm's disincentive to innovate.

So-called "killer acquisitions," in which the acquiring firm in effect shuts down the threatening nascent competitor after acquiring it, are included among the acquisitions with which this chapter is concerned.[10] But the chapter is also concerned with acquisitions in which the acquiring firm continues to operate the acquired firm as a complement to or differentiated alternative to its established business but does so for its benefit rather than in the potentially more welfare-enhancing way in which the nascent competitor might be operated if not controlled by an incumbent monopoly that is reluctant to cannibalize its existing profits. Facebook's acquisition of Instagram, which at the time was a small, differentiated, and growing social network alternative to Facebook, might have been such an acquisition.

In brief, then, a merger involving nascent competition can be defined as follows: (i) the acquisition, (ii) by a firm with substantial market power, (iii) of a firm (or its assets) that has the potential for substantial growth and development (iv) which, if realized, could materially undermine the market power of or perhaps even supplant the acquiring firm.

Legal basis for antitrust intervention

The lawfulness of mergers involving nascent competition can be assessed under Section 7 of the Clayton Act, 15 U.S.C. § 18, which prohibits mergers in certain circumstances, and under Section 2 of the Sherman Act, 15 U.S.C. § 15, which prohibits some kinds of conduct that creates or preserves monopoly power.

Section 7 of the Clayton Act

The competitive significance of mergers is ordinarily assessed under Section 7 of the Clayton Act, which prohibits mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." By its terms, the statute is plainly applicable to mergers involving nascent competition, and there is a well-developed procedural and substantive jurisprudence for analyzing all sorts of mergers.

Section 7 is, however, an imperfect tool for assessing acquisitions of nascent competitors. Notwithstanding its potentially far-reaching language, Section 7 has been construed by courts and the two federal antitrust enforcement agencies—the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice—largely in the context of mergers of mature firms and in ways that seem ill-suited for assessment of acquisitions of nascent competitors. Although the law is not entirely clear, several cases and commentators have suggested that a merger can violate Section 7 only if harm to competition is more likely than not.[11] Some commentators have thus argued that mergers involving nascent competition should be illegal only if they are found to be more likely than not to injure competition.[12]

Whatever might be the appropriateness of a more-likely-than-not standard for mergers involving mature firms and markets, for which reasonably reliable predictions can be made, it seems very inappropriate for mergers involving nascent competition. In the first place, any such standard would make antitrust challenges to acquisitions of nascent competitors almost impossible because neither the courts nor even the merging parties can be confident about the future of the nascent competitor and most such mergers are likely to be benign.

Moreover, a more-likely-than-not standard makes no sense as a conceptual matter.[13] The problem with mergers involving nascent competition is not that, but-for the acquisition, the nascent competitor is likely to become a significant competitor. Rather, it is that if the nascent competitor does become a significant competitor, it could greatly enhance economic welfare by dissipating the market power of the entrenched acquiring firm. If it implements important innovation, it might, if not acquired by the entrenched incumbent, become the "next big thing" or otherwise change the market paradigm. The latter is especially likely in digital technology markets characterized by winner-take-all (or most) competition and competition among differentiated firms.[14]

The focus with respect to mergers involving nascent competition should thus be on acquisitions that are on balance likely to harm competition and thus economic welfare, taking account of both the likelihood of harm and the magnitude of harm. In effect, as Hemphill and Wu put it, the focus ought to be on the expected value of the acquisition comparing the likelihood and magnitude of efficiency benefits from the acquisition with the likelihood and magnitude of benefits to competition and welfare in its absence.[15]

The expected value of merger enforcement cannot be measured or even approximated with precision, especially in the case of mergers involving nascent competition.[16] The objective, therefore, should be to develop suitable proxies that will help identify those mergers that are most likely to have a negative expected impact on competition and economic welfare compared to the but-for world without the merger. The following would seem to be a suitable initial set of proxies:

- As noted above, the acquiring firm must have substantial existing market power; and its market position must —absent the threat posed by the acquired firm—seem reasonably secure in light of its resources, the nature of competition in the market, network effects and other entry barriers, and similar considerations. Absent those conditions, there is little reason to think that the acquisition might have the purpose or effect of perpetuating a significant market power problem.

- There must be a reasonable possibility—more than *de minimis* but not necessarily more likely than not—that the acquired firm will, but-for the acquisition, develop into a substantial competitor of the acquiring firm or provide a uniquely valuable complement to such a competitor.

- By contrast to naked exclusionary conduct that provides no efficiency or welfare-enhancing benefits, acquisitions of a nascent competitor almost always have the potential to create merger-specific efficiencies by combining complementary assets. Therefore, such acquisitions should be prohibited only if the acquired firm is the only firm, or one of only a small number of firms, that has a reasonable possibility of becoming or enabling a substantial competitor of the acquiring firm. Demonstrating such relative uniqueness will usually require proof that the acquired firm has some important assets or a unique, differentiated path to promoting significant new competition that is not available to other firms.[17] If there are many firms that are equally likely to promote competition within a roughly similar time period, there is little reason to think that acquisition of one of them will preserve the acquired firm's market power and thus little reason to run the risk of sacrificing merger-specific efficiencies.[18]

- Antitrust enforcement agencies and courts might be especially vigilant in reviewing acquisitions by a firm that has engaged in a series of acquisitions of nascent competitors that seem to pose an unusual competitive risk. The multiplicity of such acquisitions might shed light on the motives of the acquiring firm. Experience with prior acquisitions might shed light on the likelihood that the acquiring firm actually expects or is able to realize important efficiencies from subsequent acquisitions. And prior acquisitions might leave fewer competitive threats and thus increase the potential competitive harm from later acquisitions. Special vigilance is also warranted where there is evidence that the merging parties understood that the merger would extinguish a meaningful competitive threat to the acquiring firm.

Section 2 of the Sherman Act

Mergers involving nascent competition might be better assessed under Section 2 of the Sherman Act, which makes it unlawful to "monopolize" a relevant antitrust market. Section 2 prohibits both the creation of new monopoly power and the maintenance of existing monopoly power by conduct that reduces or extinguishes the threat of future competition that might erode that power.[19] It is thus well-suited to assess allegedly anticompetitive conduct by firms that already have substantial market power. It has been clear for more than 100 years that anticompetitive acquisitions can violate Section 2.[20]

Conduct that is alleged to violate Section 2 is usually assessed by the so-called Rule of Reason. Although various articulations of the Rule of Reason differ in detail, all entail in substance the following steps:

- First, the plaintiff must prove that the conduct has harmed or threatens to harm competition. In this context, the harm would be the elimination of the competitive threat posed by the nascent competitor to the acquiring firm.
- Second, if the plaintiff succeeds, the defendant may rebut that showing by proving that the conduct will generate substantial efficiencies.
- Third, if the defendant proves such efficiencies, the plaintiff may prove that the efficiencies could be achieved by means less harmful to competition.[21]
- Fourth, if at this point the court believes that the conduct will both harm competition and generate important merger-specific efficiencies, the court must balance the two to determine which is more important.

Section 2 is well-suited for assessing mergers involving nascent competition because its well-developed jurisprudence provides for the consideration of both harms and benefits by a sensible burden-shifting approach that puts the burden of proving the various elements on the party most likely to have access to relevant evidence and avoids requiring either party to prove a negative. Just as antitrust analysis commonly uses proxies, such as market definition and market shares to estimate market power, and the Herfindahl-Hirschman Index to predict harm from mergers, so it could develop and use proxies, such as those summarized above, to estimate likely expected values of mergers involving nascent competition.

Section 2 has two other advantages as well. First, it is better suited than Section 7 of the Clayton Act for assessing the efficiencies that might be created by the acquisition of a nascent competitor. Section 7 law is based in part on an implicit assumption that most mergers have procompetitive benefits and thus requires plaintiffs to prove a likelihood of substantial harm. Once that proof is made, efficiency defenses are rarely successful. Section 2 jurisprudence embodies no such presumption and thus permits the decisionmaker to assess harms and efficiencies with no a priori presumption as to which is more important or more likely.

Second, "monopoly maintenance" cases under Section 2 concern conduct by incumbent monopolies that is alleged to reduce the likelihood or significance of future competition. Monopoly maintenance cases are sensitive to the particular risks to competition from aggressive conduct by firms with substantial market power. Those firms often have more ability than others to injure competition. Because firms with substantial market power have more at stake and can reap a larger portion of the anticompetitive benefits of nipping a nascent competitive threat in the bud, they are more likely to be motivated to do so, and incremental barriers to competition can be especially harmful in markets already characterized by monopoly power.

Section 2 jurisprudence is not burdened by the jurisprudence developed for more general application in merger cases under Section 7 and, in particular, is not constrained by any expectation that courts may find acquisitions to be unlawful only when they are more likely than not to harm competition.

Two commentators have suggested that Section 2 may not properly be construed to prohibit acquisitions that would pass muster under Section 7 because, they argue, Congress intended Section 7 to be more restrictive than Section 2.[22] But the legislative history and U.S. Supreme Court opinion on which they rely concerned the scope of Section 7, not Section 2.[23] While they might therefore support an argument that Section 7 should be construed more broadly in order not to be narrower than Section 2, they do not support an argument for failing to apply existing Section 2 standards to acquisitions of nascent competitors.

Moreover, the legislative history on which these commentators rely focused on the need for Section 7 to address "monopolistic tendencies in their incipiency, and well before they have attained such effects as would justify a Sherman Act proceeding [as the Sherman Act was then construed]."[24] That concern provides no basis for declining to construe the Sherman Act to prohibit acquisitions of nascent competitors that threaten incipient harm to competition.

It is widely understood that the antitrust laws evolve in a common law-like process.[25] Thus, even if the Clayton Act was intended in 1914 to be more aggressive than the Sherman Act as it had been previously construed by the courts, the meaning of the Sherman Act might well have evolved since then to be more far-reaching in some respects than the Clayton Act. And, even if the Clayton Act treats mergers more skeptically than the Sherman Act in general, the Sherman Act might be more aggressive with respect to acquisitions used as part of a scheme to maintain monopoly power.

The *Microsoft* case

The basic theory for challenging a merger involving nascent competition is that the acquisition extinguished a small but realistic possibility that, but-for the acquisition, the acquired firm would have developed into an important competitor of, or an important complement to competitors of, the acquiring firm and thus eroded its monopoly power. The principal legal authority under Section 2 is the D.C. Circuit Court's unanimous *en banc* decision in *United States v. Microsoft Corp*.[26] The court held in that case that Microsoft violated Section 2 by a course of conduct that harmed Netscape's browser application and thus extinguished a small but realistic possibility that the browser would evolve into, or become a key complement for, a competing computer operating system that would reduce Microsoft's monopoly power in the operating system market.

Even though there was only an uncertain, multi-step connection between the harm to competing browsers and the maintenance of Microsoft's operating system monopoly, that connection was sufficient because Microsoft's conduct "reasonably appear[ed] capable of making a significant contribution to ... maintaining [its] monopoly power."[27] The requisite causal connection between the conduct at issue and harm to competition can be inferred "when exclusionary conduct is aimed at producers of nascent competitive technologies as well as when it is aimed at producers of established substitutes."[28]

The court held in the *Microsoft* case that a monopolist can violate Section 2 when it engages in anticompetitive conduct that reduces the likelihood that its monopoly power will be reduced, regardless of whether a reduction in its market power absent the conduct was more likely than not. That principle would seem to mean that a monopolist may not acquire a nascent competitor that poses a small but realistic threat to its monopoly power unless:

- The acquired firm is one of several potential competitors and the acquisition will thus not materially reduce the likelihood that the acquiring firm's monopoly power will be reduced

or

- there are substantial merger-specific efficiencies sufficient to offset the possible reduction in competition.

Some commentators, however, have suggested that the *Microsoft* case should not be read to support antitrust challenges to nascent acquisitions. Their arguments have focused on two issues, injury to competition and the conduct of the defendant.

Injury to competition

Douglas Ginsburg and Koren Wong-Ervin make two related arguments about injury to competition. They note that the court found the conduct at issue in the *Microsoft* case actually foreclosed Netscape from market opportunities, prevented it from gaining a critical mass of users, and thus reduced the likelihood that it would evolve into a viable operating system or to help others to do so.[29] In support of their argument, they also point to the D.C. Circuit's subsequent decision in *Rambus v. Federal Trade Commission*.[30] Together, these commentators argue, the foreclosure of Netscape and the *Rambus* decision mean that Section 2 is violated only when actual harm to competition in the relevant market is proven and that it is not enough to prove only anticompetitive conduct that has the potential to harm competition.[31]

There are two problems with this argument. First, these commentators have the foreclosure issue backwards. Microsoft's conduct was not found to have driven Netscape out of business or to have eliminated it as a separate entity or as a potential competitor to Microsoft in the operating system market. The only harm to competition proven in that case was the finding that Microsoft's conduct reduced the likelihood that Netscape would in the future enter, or help others to enter, the operating system market.[32] By contrast, the acquisition of a nascent competitor completely extinguishes both whatever existing competition exists between the acquired and acquiring firms in the relevant market and the possibility that the nascent competitor will develop in the future into a serious competitive threat to the monopolist in that market.

The court in *Microsoft* did say that Microsoft's conduct had an "anticompetitive effect." It is clear in context, however, that the court found only harm to Netscape in the separate browser market and that it meant by "anticompetitive effect" only harm to an individual potential competitor, Netscape, and a reduced likelihood of increased competition in the future. Indeed, the court made clear in its later discussion of the attempted monopolization and tying claims that the government had not proven actual harm to competition in the market as a whole, even in the browser market.[33]

Second, the *Rambus* case does not call into question the causation or injury to competition principles articulated in the *Microsoft* case. The *Rambus* case involved alleged misrepresentations by a potential entrant that had no market power. The misrepresentation had the potential to distort a specific decision by a standard-setting body made many years earlier and thereby to create monopoly power for the defendant. The court ruled for the defendant on the ground that the Federal Trade Commission explicitly did not find that the conduct actually distorted the decision of the standard-setting body. In substance, the court declined to adopt the unprecedented principle that ordinary business torts that did not harm competition might be found to violate Section 2 on the ground that the conduct might have harmed competition.

The *Microsoft* case was very different because it involved the maintenance of an existing monopoly and because the conduct in that case reduced the likelihood that Microsoft's monopoly power would be eroded in the future, including after the antitrust litigation. The court knew in the *Rambus* case that the conduct was not shown to have harmed competition in the past and could not do so in the future. The court could not know that in the *Microsoft* case. Not surprisingly, the court denied the Federal Trade Commission's petition for rehearing of *Rambus*, which was based on the argument that the *Rambus* decision was inconsistent with the *Microsoft* decision.

Acquisitions of nascent competitors are like the conduct at issue in the *Microsoft* case in two critical respects. They involve maintenance of an existing monopoly, and they reduce the likelihood that that monopoly will be eroded in the future.[34]

Conduct of the defendant

Other commentators have suggested that the *Microsoft* case does not support challenges to acquisitions of nascent competitors because the conduct found to be unlawful in the *Microsoft* case provided no procompetitive benefits.[35] Acquisitions of nascent competitors, by contrast, usually combine complementary assets and might therefore often provide at least some merger-specific efficiency benefits.

The problem with this argument is that the *Microsoft* court did not suggest anywhere in its lengthy opinion that its discussion of injury to competition and causation applied only to conduct found to have no benefits at all. And the court made clear elsewhere in the opinion that conduct can both provide efficiency benefits and be sufficiently undesirable to violate the antitrust laws if the harms outweigh the benefits.[36] In short, while the likelihood or magnitude of possible harm required to show that a merger or other conduct is anticompetitive is less when the conduct provides no efficiency benefits, there is no reason to think that otherwise anticompetitive conduct is in a safe-harbor whenever it can be shown to provide efficiency benefits, no matter how insubstantial they might be.

Policy considerations

Mergers involving nascent competition happen all the time. Amazon.com Inc., Apple Inc., Meta Platforms Inc.'s Facebook unit, Google, and Microsoft, for example, had themselves made a total of 825 acquisitions by the end of 2020.[37] It seems clear that each of those five firms has substantial market power in some markets, and it is likely that a majority of the acquired firms could be regarded as nascent competitors.

It seems equally clear that only a very small portion of the acquired firms would, but-for the acquisition, have developed into a significant competitor or input supplier sufficient to materially erode the acquiring firm's market power. Most would probably fail or remain insignificant. And even if several had the potential to become a significant competitive force, the success of one or more would surely have reduced the likelihood that the others would materially reduce the acquiring firm's market power. Especially in industries characterized by network effects and scale economies, there is room for only a few significant competitors. Therefore, only a small portion of mergers involving nascent competition are likely to end up harming competition.

Only a small portion of all corporate acquisitions harm competition. What makes acquisitions of nascent competitors especially vexing for antitrust law, however, is that it is especially hard to identify those acquisitions that are actually anticompetitive. Merger enforcement always involves substantial uncertainty because it requires comparing the worlds with and without the merger. Pre-merger review requires predicting the future of the merging parties and the relevant markets both assuming the merger is consummated and assuming it is not consummated. Even *ex post* merger review is burdened with unavoidable uncertainty because being able to observe what happened after the merger tells one very little about what would have happened in the counterfactual world in which the merger did not occur.

The antitrust enforcement agencies and courts have, however, developed a variety of tools for evaluating mergers involving relatively mature firms and markets. There is no comparable set of tools for identifying anticompetitive mergers when the acquired firm is not yet mature and neither its performance as a mature firm nor the nature of the market in the presence of that mature firm can be observed. There is therefore a real risk that antitrust enforcement aimed at mergers involving nascent competition will either be paralyzed by uncertainty or block or deter large numbers of benign mergers while searching for those that might really be anticompetitive.

The basic safeguard against excessive antitrust enforcement entails careful factual investigation and the use of sensible proxies. In cases brought under Section 7 of the Clayton Act, the proxies discussed above should be enough to create a presumption of harm to competition and to shift to the merging parties the burden of producing evidence to rebut that presumption or to justify the merger by proving that it will generate merger-specific efficiencies sufficient to offset the expected harm to competition.[38]

These proxies should also be sufficient to shift the burden in cases brought under Section 2 of the Sherman Act, with one difference. Instead of showing that the acquiring firm has substantial existing market power, the plaintiff in a Section 2 case should be expected to show that the acquiring firm either has monopoly power that is likely to persist, at least in the absence of the competitive threat posed by the acquired firm, or would be likely to obtain such monopoly power as a result of the acquisition. To be sure, these proxies are rather general and imprecise. So, too, are the antitrust statutes. With more experience by courts and agencies and more research by economists and lawyers, new, more refined proxies can be developed in the common law-like way in which antitrust doctrine evolves. New agency guidelines could aid this evolution. Antitrust enforcement has not in the past, and need not now, remain dormant while awaiting development of perfect tools.

Even with good proxies, however, one implication of a policy of condemning mergers on the basis of a negative expected value, and not requiring proof that the acquisition is more likely than not to harm competition, is that many of the prohibited mergers involving nascent competition will be harmless or maybe even procompetitive. There are several concerns about such a policy that need to be considered.

Error costs

For at least the past 40 years or so, U.S. antitrust law has been informed by the idea that false positives (mistakenly finding that the conduct violates the antitrust laws) are more damaging than false negatives (mistakenly finding that the conduct does not violate the antitrust laws) because the latter are likely to be corrected by market forces while the former are subject to no such market correction. The theory has been widely criticized on the grounds that it overstates the ability of the market to correct market power-creating conduct, underestimates the ability of parties to transact around false positives, fails to take into account magnitudes of harms from false positives and false negatives, and has led to underenforcement of the antitrust laws.[39]

Whatever the merits of a policy that tilts in favor of avoiding false positives as a general matter, it seems especially inappropriate with respect to acquisitions of nascent competitors. The error-cost argument for exercising caution in finding an antitrust violation is based on the premise that competition will correct inefficient conduct and ameliorate the consequences of anticompetitive conduct.[40] But in markets protected by entry barriers and dominated by a single large firm, competition depends on new entry and innovation. The premise that competition can be expected to correct false negatives has little application to acquisitions by the dominant firms in such markets that extinguish the possibility of competition from or aided by nascent competitors that are uniquely or unusually likely to erode the dominant firms' market power.[41]

The premise also has little application to acquisitions that increase network effects or other entry barriers protecting a dominant acquirer's market power. The concern about such acquisitions is precisely that they interfere with the corrective market processes on which the error cost argument is based.

Merger efficiencies

Mergers have the potential to generate efficiencies by combining complementary assets. In the case of acquisitions of nascent competitors, these benefits are most likely to involve the acquisition of intellectual property rights and human capital.[42] Prohibiting mergers that are unlikely to harm competition means the prohibition of mergers that would have turned out to be harmless. Many of those mergers would likely have generated valuable efficiencies.

This observation, however, is not sufficient to justify a merger involving nascent competition. The proposed policy regarding acquisitions of nascent competitors is based on expected values. It can be likened to an insurance policy. The idea is that society foregoes uncertain merger benefits of modest value in order to prevent less likely but much more substantial competitive harm from the merger. Mergers would be prohibited only if they are found to have a negative expected value after taking into account both the uncertain benefits and the uncertain harms. Only a small portion of mergers involving nascent competition are likely to be prohibited under the proposed standard.

The concern about foregone merger efficiencies has more purchase as a practical matter. The inquiry into the overall or expected value of the acquisitions includes assessment of possible merger- specific efficiencies. The burden of proving such efficiencies should be on the merging parties because they have better access to evidence about efficiencies and to avoid requiring the plaintiff to prove the negative—that there would be no such efficiencies. The plaintiff should have the opportunity to prove that the claimed efficiencies could be achieved by alternatives to the acquisition that pose less risk to competition.

This allocation of burdens mirrors that applied to merger enforcement in general.[43] But because efficiency defenses have rarely succeeded in justifying otherwise anticompetitive mergers, there is an understandable concern that they will rarely be found to justify mergers challenged on the basis of worst-case scenarios about extinguishing nascent competition.

There are, however, reasons to believe that concerns about lost efficiencies are not sufficient to justify standards that are more permissive of mergers involving nascent competition than the expected value approach proposed here. First, as explained above, while the law applicable to most mergers under Section 7 of the Clayton Act has been inhospitable to affirmative defenses based on claimed efficiencies, Sherman Act jurisprudence is based largely on the Rule of Reason, and defendants have had substantial success in cases litigated under the Rule of Reason.[44]

Second, because acquisitions of nascent competitors could be very damaging to economic welfare, the costs of false negatives in the assessment of such acquisitions can be especially large. The law needs to be sufficiently aggressive to avoid an undue risk of false negatives.

Third, acquisitions of nascent competitors—and "killer acquisitions" in particular—are especially likely to be motivated by a desire to extinguish competitive threats. Dominant firms have more to lose from new competition or important innovation by rivals, and dominant firms are more motivated than others to engage in anticompetitive acquisitions because they will realize a larger portion of the anticompetitive benefits of the acquisitions than would a firm with a smaller market share.[45]

More generally, as Nancy Rose and Carl Shapiro explain, "there is no robust body of empirical evidence showing that most mergers realize cognizable efficiencies."[46] To the contrary, Rose and Jonathan Sallet note that numerous studies "cast significant doubt on the assumption of widespread prevalence of merger-related efficiencies sufficient to overcome the adverse effects of increased market power."[47] These studies show, in particular, little evidence that firms realize predicted cost savings or revenue synergies.

The cited studies do not purport to measure directly more speculative efficiencies, such as increased likelihood of innovation as a result of aggregation of intellectual property or human capital. The studies do, however, demonstrate that acquiring firms either are overoptimistic about anticipated, measurable efficiencies or overstate the anticipated efficiencies for some other reason. There is no a priori reason to expect the more speculative anticipated efficiencies to be free from such biases. And Nicolas Petit and David Teece, although generally skeptical of antitrust intervention in dynamic industries, conclude that "antitrust should subject acquisitions to a more interventionist rule" because the academic literature suggests that dynamic capabilities are more likely to be developed organically than by acquisition.[48]

Moreover, many efficiencies are not merger specific.[49] This is especially likely to be the case with respect to benefits from the acquisition of intellectual property, which will often require no more than a non-exclusive license, and human capital, which is most often acquired apart from the acquisition of entire firms or the bulk of their assets.[50]

There is, however, some reason for caution in drawing from these studies inferences about efficiencies from acquisitions of nascent competitors. Most of the studied mergers were not recent, and the studies were based largely on mergers of mature firms and thus might say little about claimed efficiencies in the form of combining the size and marketing acumen of the acquiring firm with the novel software or business model of a nascent competitor. As UC-Berkeley economist Steve Tadelis put it, with a presumably intended pun, "[u]nlike pharma, where acquisitions can lead to killing competition, in tech they often lead to large scale execution, something start-ups almost always fail at."[51] The question in acquisitions of nascent competitors will often be whether the acquired firm or assets would have contributed as much to competition had they been owned by someone other than the acquired firm.

There is another reason for caution with respect to these studies. Even if there were compelling data that mergers are unlikely to, or even that they rarely, generate merger-specific efficiencies, some mergers surely do. And if expected-value analysis, rather than more-likely-than-not analysis, is appropriate for assessing harm from acquisitions of nascent competitors, then expected-value analysis should also be appropriate for assessing merger efficiencies. The relevant question is how to account for the possibility that the merger might result in substantial efficiencies even if that result is unlikely.

There is no consensus about how courts should determine whether merger-specific efficiencies proven by the merging parties outweigh the risk of harm to competition from the acquisition.[52] Courts usually avoid that question by finding either no harm or no benefit. Where they find both, a useful starting point might be to inquire whether the anticipated, merger-specific benefits are sufficient to justify the purchase price. If the benefits seem insufficient to justify the purchase price, then it can be inferred that the acquisition would make no sense for the acquiring party but-for its potential to extinguish new competition or innovation.[53]

Beyond that, courts should decide as best they can whether, on balance, the expected impact of the merger on economic welfare is negative or positive in light of the possibility that the merger will extinguish an important competitive threat and the possibility that it will enable realization of efficiencies otherwise not obtainable.[54]

The impact of heighted scrutiny of such mergers on venture capital investments

The efficiencies discussed in the prior section might be thought of as *ex post* efficiencies –or efficiencies that might be realized after the merger is consummated from combining the acquired and acquiring firms in an acquisition. Concerns about *ex post* efficiencies can potentially arise in any corporate acquisition, and they can be assessed when the acquisition is being assessed.

Proposals for more aggressive antitrust enforcement regarding mergers involving nascent competition have also given rise to a different concern—that blocking acquisitions of nascent competitors might deter investments by venture capital firms in new start-up companies in the future.[55] Without such investment, there would be far fewer start-ups and, presumably therefore, less innovation and less disruptive new entry. One might characterize this as a concern about *ex ante* efficiencies. It is a concern about how antitrust rules might affect investment, and it needs to be assessed when the rules are chosen.

The logic of the concern is something like this. Venture capital investments and other early-stage, high-risk investments in startups are generally made in anticipation of being liquidated within a few years. Because most start-up firms fail or are sold for modest sums, the investment strategy entails investing in a portfolio of start-ups in anticipation that some of them will be very successful. The portfolio strategy and the expectation of investors in VC funds generally require liquidation of, or exit from, earlier investments to create funds for future investments. Because non-controlling interests in privately held startups can be sold, if at all, only at a substantial discount, liquidation of the investment usually requires sale of the start-up entity (or the bulk of its assets). Confidence in the availability of such liquidation or exit opportunities is central to VC investments and other investments in startups.

Fewer than 10 percent of start-up firms are sold through an Initial Public Offering. Many simply fail, but a substantial portion—maybe a substantial majority—are sold to larger firms.[56] The concern is that heightened scrutiny of acquisitions of nascent competitors by dominant firms might deter such acquisitions and, by diminishing the interest of dominant firms in such acquisitions, might reduce buyer competition in the markets in which startups are acquired and, thus, reduce the purchase prices in acquisitions of nascent competitors even by firms that are not dominant.[57]

If venture capital investors and other early-stage investors anticipate such effects, then investment in startups might decline. But the risk of such a decline would be offset at least to some extent by the prospect of increased investment in startups if heightened antitrust scrutiny increases competition in, and reduces entry barriers to, markets otherwise dominated by monopolies[58] and by the preservation of competition from startups that would otherwise be acquired by incumbent monopolies.

There is not yet meaningful empirical evidence about the practical importance for future VC investment of these two competing conjectures. One recent, large study found a statistically significant increase in VC investment in industry segments in which large technology firms had acquired startups.[59] Notably, however, the study found no significant effects in the "highly dynamic" United States,[60] and the positive effects of start-up acquisitions on VC investment that the study did find "persist for a few months only and thus do not seem to have lasting impacts on the innovation incentives in the start-up ecosystem."[61]

Moreover, the study does not compare VC investment in the existing world in which large technology platforms make large numbers of acquisitions with that in a hypothetical alternative world in which more aggressive antitrust policies have resulted in more competitive tech markets or reduced barriers to entry in those markets.[62] Nor does it address the question whether the increased investment in the observed segments reflected an increase in total VC investment or simply a reallocation of investments from one segment to another.[63] Other studies are also equivocal.[64] A recent theoretical study suggests that acquisitions of startups by dominant technology platforms are likely to be followed by a decline in investments in startups in the same commercial space as that occupied by the acquired startups.[65]

In the absence of strong empirical evidence, the theoretical concern about VC investment seems to provide an insufficient basis for rejecting the kind of antitrust policy toward acquisitions of nascent competitors proposed here. In the first place, there is an abundance of investment in startups that reflects a variety of economic forces that are unlikely to be affected by the kinds of marginal changes in antitrust rules discussed in this chapter.[66] The issue raised by the approach discussed here is not whether most or all acquisitions of nascent competitors should be prohibited. It is, instead, whether a small percentage of such acquisitions that are found to be anticompetitive after investigation of the size and probability of their competitive effects and efficiency benefits should be prohibited.

That kind of targeted antitrust enforcement is very unlikely to deter investment in startups that are not expected at the outset to be unusually attractive acquisition targets of monopoly tech platforms. Tiago Prado and Johannes Bauer studied more than 32,000 VC deals from 2010 to 2020.[67] During that period, the five largest tech firms made fewer than 825 acquisitions. In other words, fewer than 3 percent of VC deals culminated in an acquisition by one of the largest tech firms.

Moreover, data collected by the Federal Trade Commission in its study of acquisitions by the large tech firms show that "most of the acquisitions are valued at below $15 million (and 38.6 percent are valued below $10 million); include a handful of employees [most between 1 and 10]; and involve companies that are five years or older" and have thus already had a reasonable opportunity to test their disruptive potential.[68] Only a small fraction of acquisitions like those are likely to be problematic, and even fewer are likely to be prohibited by a more aggressive but targeted antitrust enforcement program.

It is hard to imagine that the very small reduction in the expected value of a venture capital firm's portfolio implied by those numbers would materially reduce VC investment in startups.[69] And if it did reduce VC investment, it is likely to affect the most marginal portfolio opportunities, which overall are the least likely to have real social value.

Although the analysis is more complex, the conclusion seems to be the same, even for investment in startups made with a specific expectation that, if successful, the startup would be an attractive acquisition target for the dominant tech firms. This is so for several reasons.

First, most such acquisitions would be permitted under the standard proposed here, either because the startup poses no unique threat to an incumbent monopoly or because the acquisition is expected to generate substantial merger-specific efficiencies. It is not clear that a marginal reduction in the likelihood of antitrust clearance would deter VC investment.

Second, acquisition of a nascent competitor can injure competition only if it prevents the acquired firm from developing into an important competitive threat to the acquiring firm, and that can happen only if the acquired firm has a viable, promising alternative path without the acquisition. Antitrust enforcement will thus interfere with acquisitions only of those startups that are most likely to have good alternatives. The alternatives might be as a standalone business or as a party to a merger that does not raise serious competitive concerns. In other words, the prohibited acquisitions would be those for which attractive alternative exit paths are most likely.[70]

The venture capital investor might of course find selling a portfolio company to an incumbent monopoly to be more profitable than pursuing alternative exit options. In many cases, the higher profits available from an anticompetitive acquisition by an incumbent monopoly are likely to include a share of the increased or perpetuated monopoly profits expected as a result of the acquisition.[71] But no antitrust interest would be furthered by permitting the startup to be acquired by an incumbent monopoly, instead of pursuing viable and more benign alternatives, in order to obtain a premium for preserving the acquiring firm's monopoly.

Third, the acquisitions most likely to be prohibited, and thus the kinds of investments most likely to be deterred, by targeted antitrust scrutiny are likely to be of modest social value. One reason is that acquisitions that are likely to provide substantial efficiency benefits are unlikely to be prohibited.

Some or maybe most of the start-up companies intended at the outset to be attractive to a dominant incumbent firm will be focused on products or services that are complements to the dominant firm's business. Acquisitions of these startups will often provide efficiency benefits and will thus rarely be prohibited.[72]

Investments in such complementary firms will in any event often be of modest social value, in part because the prospect of acquisition by a dominant firm might divert venture capital from investments that are more socially valuable toward incremental improvements that might help the dominant firm increase its dominance.[73] Moreover, making acquisitions of complementary firms by dominant firms more difficult might result in increased R&D by the dominant firms themselves.[74]

To be sure, some complements might become important competitive threats to the acquiring firm, either by developing into a substantial competitor of the acquiring firm or, as was feared in the *Microsoft* case, by providing a uniquely valuable complement that enables substantial competition against the acquiring firm. The courts and enforcement agencies ought to take that possibility into account. But those cases are likely to be uncommon. Most complements will just be complements.

Acquisitions of startups that compete, or are focused on developing products or services that would compete, with a dominant firm are more likely to be prohibited by the standards proposed in this chapter. Application of the proposed standards, however, is unlikely to diminish socially valuable investment in startups. Not only would antitrust intervention be uncommon, but the alternative—the prospect of acquisitions by dominant firms, unconstrained by antitrust scrutiny—could itself diminish the social value of investments in startups intended to compete against incumbent firms. The prospect of such acquisitions could create incentives to imitate the incumbent inefficiently, instead of offering a more differentiated alternative.[75]

In addition, the prospect of such acquisitions is likely to induce otherwise inefficient investments made for the purpose of attracting acquisition interest by creating a competitive threat.[76] These investments are likely to be of little social value, especially if they are intended to result in "killer acquisitions," in which the startup is acquired and shut down, and even if the startup continues to be operated after its acquisition by the dominant firm.

Fourth, most harmful would be a reduction in investments in startups that pose a competitive threat to the monopoly and would flourish if they were not acquired by the monopoly firm. Paradoxically, however, a lax antitrust policy is likely to result in many of those startups being acquired by the monopoly, which will often have an incentive to pay a monopoly premium to acquire them.[77] It seems unlikely that antitrust interests would be served by permitting anticompetitive acquisitions of nascent competitors in the hope that doing so will induce future VC investments that will end up having substantial social value only if the startup flourishes and the threatened monopoly, even though free from antitrust constraint, does not acquire the startup.

Multiple acquisitions by the same firm

Multiple acquisitions, each of which has only a small likelihood of injuring competition, might in aggregate have a substantial risk of harming competition. Four acquisitions by an incumbent firm, for example—each of which has an independent 10 percent chance of harming competition—would in aggregate have almost a 35 percent chance of harming competition. It is tempting to think that, if the aggregate likelihood of harm is big enough, the group of acquisitions should be unlawful.

Antitrust violations require anticompetitive conduct. Courts have long made clear that multiple instances of aggressive but procompetitive conduct do not violate the antitrust laws, even if their cumulative effect is to drive less effective rivals from the market, because the aggregation does not change the character of the conduct and thus cannot justify deeming any of the conduct to be anticompetitive.[78]

That principle would seem to require assessing the lawfulness of a series of acquisitions by determining, separately for each one, whether the acquisition is anticompetitive. If so, while the other acquisitions might provide relevant evidence that sheds light on the acquirer's intent, the likelihood of merger-specific efficiencies, or competitive alternatives in the relevant markets, the fact that the acquisition was part of a series would be immaterial.

There are, however, two ways in which a series of acquisitions might appropriately change the outcome other than just by creating additional evidence. First, the earlier acquisitions might change the market circumstances by, for example, reducing the number of possible new entrants or by affecting the evolution of the monopoly firm's business and thus the commercial opportunities available to others. Those changes might make a later acquisition more (or less) likely to harm competition than if it had not been preceded by the others.[79]

Second, and more fundamentally, the principle that aggregation of multiple instances of lawful conduct does not make any of the conduct unlawful makes sense when the conduct is thought to be lawful because it is procompetitive. It is not clear that principle should apply to an acquisition that is thought to be lawful, not because it is expected to create procompetitive benefits, but rather because the risk of harm from the acquisition is thought to be too small. Thus, if a dominant firm makes a series of acquisitions involving nascent competition that provide no efficiency benefits, it might be appropriate to find a violation when the aggregate risk of harm from the acquisitions becomes great enough.

There are, however, arguments for not finding a violation in that situation on the basis of the aggregate risk of harm. Antitrust law requires predictability so that firms can know in real-time whether their conduct will be lawful or unlawful. That objective is undermined if firms have to imagine how a creative antitrust plaintiff might combine the pending acquisition with lawful acquisitions in the past or those contemplated for the future to argue that the combination is unlawful.

Aggregation of multiple acquisitions would also create other complexities. It would seem inappropriate to find all the acquisitions to be illegal because the last one caused the aggregate harm of the combined acquisitions to be great enough to support finding a violation. Yet prohibiting only the last acquisition would enable the monopolist to sequence its acquisitions in order to make the least problematic acquisitions the most likely to be found to be unlawful. This problem could be addressed by finding the set of acquisitions to be unlawful but restricting the remedies for the set of acquisitions to those appropriate to compensate for the harms caused by the particular acquisition (or acquisitions) that pushed the set across the line to illegality.

The issue of timing of antitrust challenges to mergers

Application of antitrust principles to pending mergers is often difficult because it requires predicting two different future states, the world with and without the merger. “Prediction is very difficult,” the late Nobel prize-winning physicist Niels Bohr famously observed, “especially if it’s about the future.”

One way to reduce the uncertainty would be to assess mergers involving nascent competition years after they have been consummated, with the benefit of knowledge about how the acquiring and acquired firms evolved in the interim. That knowledge might shed light on both the competitive importance of the acquired firm and any efficiencies generated by the merger.

There is no legal bar to antitrust challenges to previously consummated mergers. There have been several successful challenges to such mergers under both Section 2 and Section 7 both before and after passage of the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[80] 15 U.S.C. § 18a, which authorizes the antitrust enforcement agencies to review large proposed mergers before they are consummated.[81] As a practical matter, a court would probably want to know why the government waited to challenge the acquisition and, especially if it was subject to pre-merger review, what has changed to justify the later challenge.[82] But there is no basis for a court to reject a post-closing challenge to a merger as a matter of law.

There are, however, policy reasons why the enforcement agencies should be reluctant to defer merger challenges until long after consummation.[83] For one thing, merger remedies are much less likely to be effective when mergers are challenged after they have been consummated. The acquired firm might cease to exist as a separate entity, and its assets might have been dissipated or widely distributed throughout the acquired firm. Even if the firm exists within the acquiring firm, its ability to be a significant competitive threat to the acquiring firm is likely to be greatly diminished by the passage of time, market developments, and defensive actions taken by the acquired firm. And a divestiture remedy long after consummation of the merger is likely in any event to be very disruptive.[84]

There are other problems, too. The prospect of a post-merger challenge denies the merging parties the certainty that pre-merger review was intended to create and might chill its investment in efficiency-enhancing exploitation or integration of the acquired firm that would not be profitable if the merger were subsequently unwound. More serious might be perverse incentive effects from the prospect of post-merger challenges. The acquiring firm might suppress the acquired firm to avoid creating evidence of what a big competitive threat it might have become absent the merger, or it might inefficiently "scramble the eggs" to make divestiture less feasible and less likely. Either course would both inhibit the realization of merger-related efficiencies and reduce the likelihood of a successful post-consummation challenge to the merger.

Post-merger challenges will no doubt be appropriate in some cases. They might be a uniquely valuable means of establishing an important antitrust precedent.[85] They might be prompted by facts not appreciated or provable before the closing that demonstrate the likely anticompetitive consequences of the merger or an optimal merger remedy.[86] But such challenges should be rare. Antitrust functions best when it provides clear *ex ante* signals about the line between lawful and unlawful conduct and does not chill or distort incentives for efficient competition by the specter of *ex post* intervention.

Conclusion

Only a small portion of acquisitions involving nascent competition are likely to harm competition and reduce economic welfare. The rest will be either benign or procompetitive. But those that are harmful could be very harmful because they could extinguish uniquely valuable opportunities to reduce monopoly power of incumbent firms or innovative startups that might, if not owned by a firm motivated to protect its existing monopoly profits, contribute enormously to economic welfare by disrupting existing markets and spurring a process of creative destruction.

To prevent such harmful acquisitions, antitrust law must be prepared to prohibit acquisitions that are expected on balance to diminish economic welfare even if harm is less likely than not and even if the acquisitions would be likely to generate some merger-specific efficiencies. Existing antitrust doctrine, especially under Section 2 of the Sherman Act, is sufficient to prohibit mergers under these circumstances.

But antitrust law should be applied with great care in these circumstances. Only a small portion of mergers affecting nascent competition—those that pose an unusual risk to competition—should be prohibited. Such mergers should be prohibited only after careful assessment of both possible harms and merger-specific efficiencies. To the extent possible, mergers involving nascent competition should be challenged before (or, in the case of mergers not subject to pre-merger notification, shortly after) they are consummated. Later challenges to such mergers are appropriate only in unusual cases.

Endnotes

1 C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Penn. L. Rev. 1879, 1883 (2020), available at https://scholarship.law.columbia.edu/faculty_scholarship/2661/.

2 See, e.g., Jay Ezrielev, *An Economic Framework for Assessment of Innovation Effects of Nascent Competitor Acquisitions* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3810486.

3 For a discussion of the difficulties of predicting innovation, see Richard J. Gilbert & A. Douglas Melamed, I*nnovation under Section 2 of the Sherman Act*, 84 Antitrust L.J. 1 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3818303.

4 For this purpose, the acquiring firm is identified by looking at the economic substance of the transaction. The parties cannot avoid having their transaction regarded as an acquisition of a nascent competitor by structuring the deal as a reverse merger, in which the nascent competitor winds up being the nominal acquiring firm.

5 Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* 82 (1942).

6 "Network effects" are a phenomenon by which the value of a product or services increases as the number of users of the product or service increases . "Economies of scale" are reductions in the average per unit costs of output and are often associated with increased output by the firm.

7 In some situations, the threat might be both horizontal and vertical. In the *Microsoft* case, for example, Microsoft Corp., used anticompetitive conduct to weaken Netscape in the browser market. The conduct was found to have harmed competition in the computer operating system market by reducing the likelihood that Netscape would either evolve into a competitor in that market or increase its presence in the browser market and become an important complement for other operating system competitors. *United States v. Microsoft Corp.*, 253 U.S. 34 (D.C. Cir. 2001) (en banc). An acquisition of Netscape by Microsoft would have been somewhat more likely to cause the same competitive harm because it would have eliminated Netscape as an independent threat instead of just weakening it.

8 See generally, Richard J, Gilbert & A. Douglas Melamed, *Innovation: A Bridge to the New Brandeisians, Competition Policy International* (February 21, 2022), available at https://www.competitionpolicyinternational.com/innovation-a-bridge-to-the-new-brandeisians/.

9 See Nancy L. Rose and Carl Shapiro, *What's Next for Horizontal Merger Guidelines, Antitrust Magazine* (forthcoming 2022).

10 See generally, Colleen Cunningham, Florian Ederer, and Song Ma, Killer Acquisitions, 129 J. Pol. Econ. 649 (2021), available at https://www.journals.uchicago.edu/doi/10.1086/712506.

11 See, e.g., *United States v. Marine Bancorp*., 418 U.S. 602, 633 (1974) (there must be "substantial likelihood" that acquired potential entrant would have entered the market, "ultimately producing deconcentration"); *Tenneco, Inc. v. FTC*, 689 F.2d 346, 352 (2d Cir. 1982) (potential entrant "would likely have entered"); *FTC v. Steris Corp*., 133 F. Supp. 3d 962, 978 (N.D. Ohio 2015) (potential entrant "probably would have entered"); *FTC v. Arch Coal, Inc*., 329 F. Supp. 2d 109, 115 (D.D.C. 2004) (acquisition of existing competitor must be "likely substantially to lessen competition"); see also Hemphill & Wu, *supra* note 1, at 1895-96 (lower court cases under Section 7 require "probable" entry with procompetitive effects). But see *United States v. General Dynamics Corp*., 415 U.S. 486, 505 (1974) (Section 7 "deals in probabilities, not certainties").

12 Timothy J. Muris and Jonathan E. Nuechterlein, *First Principles for Review of Long- Consummated Mergers*, Criterion J. on Innovation 29, 30 (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3486469; see also Jonathan Jacobson and Christopher Mufarrige, *Acquisitions of Nascent Competitors, Antitrust Source* 1, 14 (August 2020), available at https://www.wsgr.com/a/web/28843/jacobson-0820.pdf (only if harm is more likely than not or if the evidence shows a risk of harm "so severe that it cannot be risked").

13 See Douglas H. Ginsburg and Jacob Philipoom, *A Certain Harm Overlooked: The Case of Nascent Competitors Revisited,* Concurrentialiste (April 2021), available at https://www.networklawreview.org/ginsburg-philipoom-nascent-competitors/.

14 In *United States v. Philadelphia National Bank*, 374 U.S. 321, 364 (1963), the Supreme Court said that a combined post-merger market share of 30 percent or more "threaten[s] undue concentration." That statement has given rise to the so-called "Philadelphia National Bank presumption" that a merger that results in a post-merger share of more than 30 percent should be presumed to be illegal. One commentator has suggested that a nascent acquisition by an incumbent monopoly is therefore presumed to be unlawful under Section 7. See Technology Policy Institute, *Big Tech Antitrust Reform Proposals: Good Policy or Counterproductive?* (Dec. 8,

2021), available at YouTube. But the Philadelphia National Bank presumption should not be construed to apply to nascent acquisitions. The case involved a merger of direct competitors, so it is inapplicable to acquisitions of startups that do not presently compete against the incumbent monopoly. Moreover, the acquired and acquiring firms in that case were the second and third largest firms in the market, and the merger would have increased the combined share of the two largest firms in the market from 44 percent to 59 percent. The court summarized its conclusion as follows: "Specifically, we think that a merger which produces 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, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." 374 U.S. at 363 (emphasis added). The case is thus best understood as describing circumstances in which a merger of mature existing competitors is likely to injure competition, rather than as describing a market share number that would condemn even acquisitions of small firms that are unlikely to harm competition.

15 Hemphill & Wu, *supra* note 1, at 891; see also Luis Cabral, *Big Tech Acquisitions* (June 2022) (manuscript on file with author) (economic model showing that "balance of harms" approach to assessing nascent acquisitions leads to an increase in welfare compared to "balance of probabilities" and, even more so, compared to complete ban on such mergers).

16 Joseph Simons and Malcolm Coate have proposed a "Net Present Value" model for merger analysis that is conceptually somewhat similar to the expected value approach proposed here. Joseph J. Simons & Malcolm B. Coate, *A Net Present Value Approach to Merger Analysis* (May 6, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4104499&dgcid=ejournal_htmlemail_io:regulation,:antitrust:privatization:ejournal_abstractlink. Their model, however, focuses on the kinds of price and cost factors that are relevant to assessing mergers among mature firms, not the kinds of evolutionary and strategic factors that are most important in assessing mergers involving nascent competition.

17 This will ordinarily require proof of unusual intellectual property, human capital, or business strategy assets. A first-mover advantage that is material to the likely competitive significance of the acquired firm could be such an asset if the acquiring firm is expected to continue to operate the acquired firm and exploit its first mover advantage. An acquired firm's first mover advantage could also be such an asset, even if the acquisition would remove the first mover impediment to other rivals, if the acquisition would materially delay the competitive threat to the acquiring firm.

18 If successful entry by one potential entrant would as a practical matter deter others from entering, the relevant question would be whether there would remain after the acquisition a sufficient number of comparable potential entrants so that the acquisition would not materially reduce the likelihood of competitively valuable entry. If entry by one potential entrant would not deter entry by others, then the relevant question would be whether the acquisition would materially reduce the aggregate expected increase in competition as a result of new entry by one or more firms. Some economists have argued that the likelihood of entry might be lower if there are multiple potential entrants because the incentive of each to enter will be reduced by the prospect that, if its entry is successful, others will enter and "take its profits away." See P. Dasgupta and J. E. Stiglitz, *Potential Competition, Actual Competition, and Economics Welfare*, 32 Eur. Econ. Rev. 569, 573 (1988); See also Sean P. Sullivan and Henry C. Su, *Antitrust Time Travel: Entry and Potential Competition* at 19-20 (revised October 17, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4088860. That concern does not affect the appropriateness of the requirement described in the text. If the number of potential entrants in large enough to deter entry, then the acquisition of one of them will not reduce the aggregate likelihood of entry and might even increase it.

19 See, e.g., *United States v. Microsoft*, *supra* note 7, at 79.

20 See, e.g., *United States v. Grinnell Corp*., 384 U.S. 563 (1966); *United States v. Standard Oil Co. of New Jersey*, 221 U.S. 1 (1911).

21 In a merger context, the plaintiff would be given the opportunity to show that the efficiencies were not merger- specific because they could have been achieved without the merger or acquisition. For example, the plaintiff might show that efficiencies based on the acquisition of intellectual property could have been achieved by acquisition of only a nonexclusive license to the intellectual property.

22 Douglas H. Ginsburg and Koren Wong-Ervin, *Challenging Consummated Mergers Under Section 2*, CPI (2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590703.

23 *Brown Shoe Co. v. United States*, 370 U.S. 294, 328-29 (1962).

24 *Id.* at 318 n.32 (quoting S. Rep. No. 81-1775, at 4296).

25 See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) ("from the beginning, the Court has treated the Sherman Act as a common law statute"); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

26 *United States v. Microsoft*, supra note, 7.

27 *Id*. at 79.

28 *Id*. For a more extended discussion of this aspect of the *Microsoft* case, see Hemphill and Wu, *supra* note 1, at 1897- 98.

29 Ginsburg and Wong-Ervin, *supra* note, 23.

30 522 F.3d 456 (D.C. Cir. 2008).

31 Ginsburg and Wong-Ervin, *supra* note, 23.

32 See *United States v. Microsoft*, *supra* note 7, at 61 (finding that the conduct at issue "protects Microsoft's monopoly from the competition that middleware might otherwise present") (emphasis added).

33 Id. at 81-84 (attempted monopolization), 95 (tying).

34 As discussed below, acquisitions of nascent competitors might be challenged long after they are consummated. It is possible that the court would conclude in such an *ex post* review on the basis of evidence not previously available that the acquisition did not eliminate a realistic threat to the acquiring firm's monopoly power. The acquisition should in that event be found not to be unlawful, just as an acquisition of a nascent competitor should be found not to be unlawful if the court finds after an *ex ante* review that the acquisition will not eliminate a realistic threat to an existing monopoly. Such findings would in no way entail a repudiation of the causation and injury principles articulated in the *Microsoft* case because those principles apply where the threat is realistic and the future competitive impact of the conduct at issue is uncertain.

35 E.g., Muris and Nuechterlein, *supra* note 12, at 39.

36 *United States v. Microsoft*, *supra* note 7, at 59.

37 Geoffrey Parker, Georgios Petropoulos, and Marshall Van Alstyne, *Platform Mergers and Antitrust* at 4-5 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3763513.

38 See page 41, supra.

39 See, e.g., Herbert Hovenkamp, *Antitrust Error Costs*, Univ. Pa. J. Bus. L. (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282; Jonathan B. Baker, *Taking the Error Out of Error Cost Analysis: What's Wrong with Antitrust's Right*, Antitrust L.J. 1 (2015), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2333736.

40 Then-professor and now judge Frank Easterbrook, who is generally credited with having first articulated the error cost argument, put it this way: "The fundamental premise of antitrust is the ability of competitive markets to drive firms toward efficient operation. The entire corpus of antitrust doctrine is based on the belief that markets do better than judges or regulators in rewarding practices that create economic benefit and penalizing others." Frank H. Easterbrook, *The Limits of Antitrust*, 65 Tex. L. Rev. 1, 15 (1984).

41 See Kevin Bryan & Erik Hovenkamp, *Startup Acquisitions, Error Costs, and Antitrust Policy*, 87 U. Chi. L. Rev. 331 (2020), available at https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/BryanHovenkamp_StartupAcquisitions_87UCLR331.pdf.

42 See text at note 68, *infra*.

43 See, e.g., U.S. Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines*, §10 (2010).

44 See Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827 (2009), available at https://lawreview.gmu.edu/wp-content/uploads/2022/01/SSRN-id1480440-1.pdf.

45 Hemphill & Wu, *supra* note 1, at 1891.

46 Rose and Shapiro, *supra* note 9.

47 Nancy L. Rose and Jonathan Sallet, *The Dichotomous of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right*, 168 U. Penn. L. Rev. 1941, 1966 (2020) (summarizing much of the literature), available at https://scholarship.law.upenn.edu/penn_law_review/vol168/iss7/3/.

48 Nicolas Petit and David J. Teece, *Big Tech, Big Data, and Competition Policy: Favoring Dynamic Over Static Competition*, Indust, and Corp. Change (2021) at 42-44, available at https://www.davidjteece.com/in-the-news/big-tech-big-data-competition.

49 See, e.g., Louis Kaplow, *Efficiencies in Merger Analysis*, 83 Antitrust L.J. 557, 585-586 (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3811790.

50 See Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 Yale L.J. 1901, 1994-95 (2021), available at https://www.yalelawjournal.org/article/antitrust-and-platform-monopoly.

51 Steve Tadelis on Twitter (September 15, 2021), available at Steve Tadelis on Twitter: "Unlike pharma, where acquisitions can lead to killing competition (@florianederer's excellent JPE paper), in tech they often lead to large scale execution, something start-ups almost always fail at. Is that distinction too subtle for regulators? https://t.co/c76GvB7arm" / Twitter.

52 Some of the alternative approaches gleaned from Sherman Act jurisprudence are summarized in A. Douglas Melamed, *Acquisitions of Nascent Competitors under Section 2 of the Sherman Act*, Concurrentialiste (February 2021) available at: https://leconcurrentialiste.com/melamed-nascent-competitors/.

53 While easy to summarize conceptually, this approach might have limited usefulness as a practical matter. In the first place, the court's estimate of the value of the efficiencies might differ from the parties' estimates. Perhaps more important, the rationality of the purchase price will depend in part on the acquiring firm's tolerance for risk, and that will often be difficult for the court to assess. In addition, if consummation of the merger depends on a low purchase price, the parties will have an incentive to reduce or conceal the actual purchase price.

54 In a very thoughtful speech, Federal Trade Commissioner Noah Phillips proposed challenging mergers if there is (i) "compelling evidence that the nascent rival is one of only a few firms with a decent chance of competing against the monopolist" even if (ii) there is also proof that "the merger could generate significant cognizable efficiencies." In other words, Commissioner Phillips would weight speculative harm more heavily than speculative benefit. He would not, however, challenge a merger if the evidence shows actual significant efficiency benefits but only speculative harm to competition. Noah Phillips, Reasonably Capable: Applying Section 2 to Acquisitions of Nascent Competitors at 9 (April 29, 2021), available at Prepared Remarks of Commissioner Noah Joshua Phillips: *Reasonably Capable? Applying Section 2 to Acquisitions of Nascent Competitors*, U.S. Federal Trade Commission (ftc.gov).

55 E.g., Gary Dushnitsky and D. Daniel Sokol, *Mergers, Antitrust, and the Interplay of Entrepreneurial Activity and the Investments That Fund It* (August 5, 2021), available at https://ssrn.com/abstract=3863580 or http://dx.doi.org/10.2139/ssrn.3863580.

56 See Mark A. Lemley and Andrew McCreary, Exit Strategy, 101 B. U. L. Rev. 1, 7 n.12 (2021) (9% of VC-funded startups exited by IPO from 2014-18), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506919.

57 I am grateful to Joe Grundfest for this insight.

58 See Vincenzo Denicolo and Michele Polo, *Acquisitions, Innovation and the Entrenchment of Monopoly* (December 20, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3988255; see generally Gilbert and Melamed, *supra* note 3, at 31-35 (summarizing studies showing that market concentration and high entry barriers are as a general matter inversely correlated with innovation).

59 Tiago S. Prado and Johannes M. Bauer, *Big Tech Acquisitions of Start-ups and Venture Capital Funding for Innovation*, 59 Information Economics and Policy 1 (2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3787127. The authors used a dataset consisting of more than 32,000 venture capital deals reported worldwide from 2010 to 2020.

60 *Id*. at 13. The paper elsewhere notes that, although the confidence intervals are wide, "they provide empirical ground for the claim that acquisitions of U.S.-based start-ups produce positive incentives for" investment in the affected industry segments in the two quarters following the acquisitions." Id. at 9.

61 *Id*. at 14.

62 *Id*. at 15.

63 *Id*. at 16.

64 E.g., Ian Hathaway, *Platform Giants and Venture-Backed Startups* (2018), Platform Giants and Venture-Backed Startups — Ian Hathaway; Oliver Wyman, *Assessing the Impact of Big Tech on Venture Investment* (2018), available at PowerPoint Presentation (oliverwyman.com).

65 Sai Krishna Kamepalli, Raghuram Rajan, and Luigi Zingales, *Kill Zone*, NBER Working Paper 27146 (February 2021), available at w27146.pdf (nber.org)..

66 See, e.g., *The $900 Billion Cash Pile Inflating Startup Valuations, Wall Street Journal* (December 27, 2021), available at https://www.wsj.com/articles/the-900-billion-cash-pile-inflating-startup-valuations-11640539562.

67 See *supra* note 59.

68 John Yun, Discriminatory Antitrust in the Realm of Potential and Nascent Competition (February 10,2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4045644.

69 Dushnitsky and Sokol suggest that smaller first-time funds might be more sensitive to incremental increases in antitrust risk. Dushnitsky and Sokol, *supra* note 55, at 16-17.

70 See generally, Richard J. Gilbert, *Innovation Matters: Competition Policy for the High Technology Economy* 105 (MIT Press 2020) (while a "prohibition on acquisitions would discourage innovation," prohibiting acquisitions when there are "alternative acquirers that . . . would have much less risk of harm" can "preserve innovation incentives").

71 It has long been clear that firms with market power have the incentive and ability to outbid others for acquisition partners or inputs, such as exclusive distribution rights, that enable them to preserve their market power. See, Richard J. Gilbert and David M.G. Newbery, *Preemptive Patenting and the Persistence of Monopoly*,

72 Am. Econ. Rev. 514 (1982); see also Stephen C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 Antitrust L.J. 371, 408 (2017) (maintaining market power is more valuable than maintaining or achieving viability in a competitive market).

72 Sai Krishna Kamepelli and co-authors suggest that the prospect of such acquisitions can deter customers and app developers from engaging with new entrants and thereby reduce the threat they pose to the incumbent firm and thus the amount of money the incumbent will pay to acquire them, with the result being the creation of "kill zones" in which future investment in startups is diminished. See Kamepalli, et al., Kill Zone, supra note 66; see also Koski, Heli, Kasssi, Otto and Braesemann, *Killers on the Road of Emerging Start-ups – Implications for Market Entry and Venture Capital Financing*, available at ETLA-Working-Papers-81.pdf. While any such "kill zone" effect might itself reduce overall welfare, it is largely unrelated to the antitrust concerns with which this chapter is concerned.

73 See Kevin Bryan and Erik Hovenkamp, *supra* note 41, at 349-50.

74 *Id*. (citing Joseph Schumpeter).

75 See Richard Gilbert and Michael L. Katz, *Dynamic Merger Policy and Pre-Merger Investment: Equilibrium Product Choice by an Entrant* (February 28, 2021), available at https://ssrn.com/abstract=3795782.

76 One commentator has called these investments "entry for buyout." Eric Rasmussen, *Entry for Buyout*, 36 J. Indus. Econ. 281 (1988).

77 See *supra* note 71. Acquisition by the incumbent is likely to provide investors the most valuable exit in most cases, but a startup that offers a drastic innovation that replaces the incumbent will not be more valuable to the incumbent than to other investors or acquirers. See Gilbert & Melamed, *supra* note 3, at 23.

78 See, e.g., *Abcor Corp. v. AM Intern, Inc*., 916 F.2d 924, 930-31 (4th Cir. 1990).

79 See, e.g., *United States v. Microsoft*, *supra* note 7, at 72.

80 E.g., *United States v. E.I. du Pont de Nemours & Co*., 353 U.S. 586, 597 (1957) (the government may challenge a merger under Section 7 "at any time that an acquisition may be said with reasonable probability to contain a threat that it may lead to a restraint of commerce or tend to create a monopoly of a line of commerce"); *United States v. Grinnell Corp*. (Section 2), and *United States v. Standard Oil Co. of New Jersey* (Section 2), *supra* note 19. See also *United States v. ITT Cont'l Baking Co*., 420 U.S. 223, 241-42 (1975).

81 See *Steves and Sons v. JELD-WEN, Inc*., 988 F.3d 690 (4th Cir. 2021); *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039, 1050 (8th Cir. 2000) ("Clayton Act claims are not limited to challenging the initial acquisition of stocks or assets . . . since holding as well as obtaining assets is potentially violative of section 7.").

82 The court might ask similar questions in deciding whether private post-closing merger challenges should be barred by laches. See, e.g., *State of New York v. Facebook*, Case No. 1:20-cv-03589-JEB (D. D.C. June 28, 2021). The laches defense does not apply in cases brought by the U.S. Department of Justice or the Federal Trade Commission. See, e.g., id.

83 The agencies might be unable to challenge before closing mergers that are not subject to pre-merger review under the Hart-Scott-Rodino Act. The policy considerations discussed in text suggest that the agencies should, where possible, challenge these mergers promptly after learning of them instead of waiting until long after they are consummated.

84 While merger remedies, including divesture orders, are less likely to be effective and more likely to be costly if they are implemented after the merger is consummated, such remedies are likely to be appropriate in some cases. See John Kwoka and Tommaso Valletti, *Unscrambling the Eggs: Breaking up Consummated Mergers and Dominant Firms*, 30 Industrial and Corporate Change 1286 (2021), available at https://academic.oup.com/icc/article/30/5/1286/6360491?login=false.

85 The Federal Trade Commission might view its pending case challenging Facebook's acquisitions of Instagram and What's App as such a case.

86 For example, the Federal Trade Commission's challenge to Evanston Northwestern Healthcare Corporation's acquisition of Highland Park Hospital was based largely on evidence of substantial price increases shortly after the transaction was consummated. See In the Matter of Evanston Northwestern Healthcare Corporation, FTC Docket No. 9315 (August 6, 2007).

Reconsidering the 'rule' against cross-market justifications in conduct cases

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Overview

Judge Milan Smith Jr. of the Court of Appeals for the 9th Circuit worried recently that antitrust law is experiencing "an unwitting expansion of the Rule of Reason inquiry."[1] His concern is over "cross-market" or "out-of-market" justifications for anticompetitive conduct. In rule-of-reason cases, the plaintiff bears the initial burden and must demonstrate that the defendant's conduct has significant anti-competitive effects in a relevant antitrust market.[2] If met, the defendant may then avoid liability by showing that its conduct, in fact, has legitimate, procompetitive effects.[3] Judge Smith noticed that defendants were avoiding liability by proving such procompetitive effects in *different* markets than where the plaintiff demonstrated the initial harm—a cross-market justification.[4]

In conduct cases, does the law require the defendant to show procompetitive effects in the same market where the plaintiff made its showing? Or will any market do? The answer has the power to change important case outcomes—including pending, high-stakes conduct cases against digital platform operators, such as Google Inc., Facebook Inc. (now Meta Platforms Inc.), and Apple Inc.

The recent U.S. antitrust reform movement has paid surprisingly little attention to out-of-market justifications. Over the past 5 or so years, antitrust law and policy have faced unprecedented demands for change. In particular, antitrust scholars and agency leadership who ascribe to the neo-Brandeisian school of antitrust thought seek to better capture harms from corporate transactions and misconduct, and to reverse developments of Chicago School antitrust law and economics over the past 40 years. Though the proposals for change vary, many share a common goal of making antitrust law less defendant-friendly. The law on cross-market justifications is squarely relevant to this reform effort. If defendants can prove that their conduct has significant procompetitive effects, they are likely to win the case.[5] Whether cross-market effects are credited as a procompetitive justification could well tip the scale decisively in a defendant's favor—or against it.

This chapter focuses on cross-market justifications in antitrust cases against large digital platforms. However, the same legal controversy—whether to credit cross-market justifications—is important to other areas of antitrust law. There has been a growing interest in using antitrust law to protect workers from anticompetitive conduct in U.S. labor markets. Yet a recent high-profile case permitted the National Collegiate Athletic Association to justify certain harms to student athlete labor market competition based on out-of-market justifications that benefitted consumers of college sports.[6] Both labor market and digital platform cases press the question of whether cross-market justifications are properly cognizable in antitrust law.

The law is clear for mergers: It generally bars the crediting of cross-market efficiencies.[7] Any procompetitive benefits must be demonstrated in the same market as the anticompetitive harms.[8] This rule is drawn from the text of Section 7 of the Clayton Antitrust Act of 1914, which bars anticompetitive transactions "in any line of commerce."[9] In its 1963 decision in *United States v. Philadelphia National Bank*, the Supreme Court confirmed that this Clayton Act phrase bars justification of a transaction based on procompetitive effects in another line of commerce.[10] The federal government successfully made its case, showing that the proposed merger of Philadelphia's second- and third-largest banks was likely to substantially lessen competition in commercial banking within a four-county area of Philadelphia.[11]

The defendant banks then tried to claim an out-of-market justification, arguing that the merger would provide them with the capital necessary to offer larger loans and thus to better compete with New York banks.[12] The Supreme Court refused to credit the procompetitive effects of the merger in this other market for New York commercial banking as a justification for the anticompetitive effects demonstrated in the initial market for Philadelphia commercial banking. The court reasoned that such cross-market effects were beyond the scope of Section 7 of the Clayton Act.[13] Crediting such effects, the court worried, would also lead to a slippery slope of justification for any merger that enabled competition against larger rivals elsewhere.[14] Since *Philadelphia National Bank*, courts have consistently found a bar against cross-market efficiencies in merger cases.[15]

For nonmerger or anticompetitive "conduct" cases, the law is much less clear. Section 1 of the Sherman Antitrust Act of 1890 prohibits concerted, unreasonable restraints of trade, and Section 2 prohibits unlawful monopolization or attempted monopolization.[16] Unlike the Clayton Act, the Sherman Act is silent on cross-market justifications. For conduct cases, the Supreme Court has not decided the law, though certain cases acknowledge the legal issue of whether to credit cross-market effects.[17] Courts of appeal describe the law on such cross-market justifications variously as "not settled"[18] and not "squarely addressed" by precedent.[19] Yet certain lower courts and commentators still declare a "rule" against cross-market justifications in conduct cases under the Sherman Act.[20] Such declarations are inevitably based on the Supreme Court's decision in *United States v. Topco Associates, Inc.*[21] and find clarity that the decision itself lacks.

This chapter begins with an explanation of why the law on cross-market justifications matters for pending digital platform cases. These cases tend to involve multiple, interconnected markets, which predisposes them to claims of cross-market effects.

To inform the law on cross-market justifications in these digital platform cases, the chapter then re-examines the *Topco* decision and its lineage. It finds that *Topco* does not establish a "rule" against cross-market justification in conduct cases, despite being the case most-often cited for such law. From *Topco* onward, there is a persistent gap in the law on cross-market justifications. The chapter argues that this gap has become increasingly problematic. Courts are either engaging in workarounds that distort established principles of market definition, as in *Ohio v. American Express Co.*,[22] or simply not addressing the law at all, as in the *National Collegiate Athletic Association v. Alston et al.*[23] decision. This legal duct-taping could be avoided by deciding the law on cross-market justifications.

The chapter concludes with guidance for courts seeking to develop this long-overdue rule of law. It contends that nothing in existing law prevents courts from developing legal rules on cross-market justifications. If anything, existing cases express more concern with permitting such effects than limiting them, emphasizing concern over the fairness and judicial administrability of analyzing cross-market justifications. Still, the chapter finds support in appellate, commentator, and agency guidance for consideration of cross-market justifications in a narrow situation: when the procompetitive effects are significant in magnitude and closely related to relatively minor competitive harms.

Cross-market justifications in digital platform conduct cases

The law on cross-market justifications is well worth examining. It has the power to change case outcomes, including in pending agency cases against digital giants. As outlined above, most antitrust cases proceed based on a burden-shifting framework. The plaintiff must first make a *prima facie* showing that the defendant engaged in anticompetitive conduct.[24] If the plaintiff makes its initial case, then the burden shifts to the defendant.[25]

The defendant may then avoid antitrust liability by showing a "plausible (and legally cognizable) competitive justification" for its conduct.[26] If the defendant proves that its conduct has significant procompetitive effects, then the research suggests that the defendant will often prevail. Although there are important additional steps in the rule-of-reason analysis,[27] courts rarely reach these steps (and if courts do, the tendency is still to find for the defendant).[28]

U.S. federal and state antitrust enforcers are in the midst of the most significant anti-monopolization cases yet against modern technology giants.[29] This includes a major U.S. Department of Justice Antitrust Division case alleging Google engaged in unlawful monopoly maintenance pursuant to the Sherman Act.[30] The government claims that Google is the dominant provider of online search and used exclusionary agreements to foreclose search competition.[31] The case alleges that these agreements made Google's search engine the default, preset option for virtually all search access points.

The Federal Trade Commission is also litigating a major conduct case against the leading online social networking company, Facebook. The agency alleges that Facebook engaged in a pattern of acquisitions and other conduct, described as a "buy or bury" strategy, to unlawfully monopolize the market for personal social networking.[32] There has also been a flurry of significant state antitrust litigation filed against Google, Facebook, and Amazon.[33] These cases, along with similar private litigation,[34] are likely to raise claims of cross-market justifications. The defendants operate multisided online platforms.[35] This means the cases are likely to involve multiple interrelated but distinct markets, between which the defendants intermediate. The Department of Justice complaint against Google, for example, alleges separate markets for online "search" and types of "search advertising," with Google operating across both.[36] In its case against Facebook, the Federal Trade Commission alleges not only a relevant market of "personal" social networking[37] but also harm from Facebook's conduct to advertisers, in what is a presumably separate market.[38]

Although the Supreme Court has examined more traditional two-sided platforms, such as newspapers (which intermediate between readers and advertisers),[39] this is the first generation of government conduct cases against dominant digital platforms. The characteristics of digital platforms and markets are likely to present new issues to courts, as one Supreme Court decision has already acknowledged.[40]

Competition on the various sides of these digital platforms is often distinct but intertwined through significant cross-side network effects.[41] For Google, the search traffic from users—one "side"—affects the success of the advertising side of the business. In simple terms, the more search traffic, the more tailored search results Google can produce, at least up to a certain point. And the more search traffic, the more likely advertisers are to place and value ads that reach the users of search. Similarly, end-user engagement on Facebook's social network drives the value of advertising on that network through cross-side effects. The attention of users attracts advertisers that fund these platform with paid ads.

Cross-side effects appear in several cases on the distribution of apps as well.[42] Apple, for example, operates an online app store that depends on multiple sides—end users who download and use apps and the developers who create the apps that attract such users to Apple's online store.

These characteristics shared by many digital platforms—intermediation between multiple, interconnected markets with cross-side effects—create the potential for distinct competitive effects on each side, and thus for claims cross-market justifications. Harm may be inflicted on one "side" of users to the benefit of the other side, which faces a distinct set of competitors and market conditions.[43] Many of the government cases against large digital platforms are at a relatively early stage, but the nature of these businesses make cross-market justifications arguments likely to appear.

Take the recent example of *Epic Games Inc. v. Apple Inc.*[44] in the Northern District of California. The plaintiff, a developer of video gaming apps, met its initial burden under Section 1 of the Sherman Act by demonstrating the anticompetitive effects of certain rules that Apple imposed on developers who distribute through the Apple app store.[45] Epic demonstrated these effects in the market for mobile game transactions. Apple then successfully established two procompetitive justifications for its conduct. First, the court accepted that some of the app store rules improved the privacy and security of Apple's operating "ecosystem," which benefitted end consumers and encouraged them to engage in mobile gaming transactions.[46] Second, this improvement of privacy and security, in turn, improved competition between mobile devices.[47] The latter justification credits an out-of-market justification. The plaintiff demonstrated anticompetitive effects in the market for mobile gaming transactions, yet the court accepted a second procompetitive justification in the likely separate (although related) market for mobile devices.[48]

Revisiting *Topco*: There is no 'rule' against cross-market justifications

Courts and scholars invariably invoke *Topco* when identifying a "rule" against cross-market justifications. The decision is often cited but rarely examined, and its meaning has been lost over years of recitation. This section reexamines *Topco*. It argues the decision offers mixed *dicta* both for and against the crediting of cross-market justifications but does not decide the law.

In *Topco*, the government sought injunctive relief against the defendant based on alleged violations of Section 1 of the Sherman Act.[49] Topco was a cooperative composed of small- and medium-sized grocery store chains. Topco acted as a procurement agent, sourcing private-label food products that were sold to its members for their retail stores.[50] The government's case focused on a rule that the Topco co-op imposed on its members, which required each member to sell only within its assigned territory—a geographic market division. The government argued that this horizontal restraint between Topco members violated Section 1 as a conspiracy in restraint of trade.[51] The government also challenged a second Topco rule that prohibited members from selling any Topco-branded products at the wholesale level (a vertical restraint).[52]

Topco argued that these territorial divisions were necessary to the existence of its private-label program—it contended that the cooperative could not be successful without these restraints.[53] Topco argued that this successful private-label program, in turn, increased competition by enabling its members to compete with larger regional and national chains.[54] The district court applied the rule of reason, inquiring into the effects of Topco's practices to find them reasonable and procompetitive.[55] The government appealed directly to the Supreme Court, as permitted at the time. The Supreme Court found that Topco's practices were unlawful applying instead a *per se* standard.[56] Unlike the rule of reason, under the *per se* rule, courts need not inquire into effects on competition. Instead, the conduct is presumed unlawful based on judicial experience that indicates its "pernicious effect on competition and lack of any redeeming virtue."[57]

Justifications are considered only under the rule of reason, not when the *per se* standard is applied.[58] How, then, did *Topco*—ultimately a *per se* case—become the precedent for a purported bar on cross-market justifications? In what became the most-cited passage against crediting such effects, the Supreme Court explained that the Sherman Act is the "Magna Carta of free enterprise" and thus guarantees every business the "freedom to compete."[59] Invoking this freedom and *Philadelphia National Bank*, the Supreme Court found that the lower court lacked the authority to foreclose competition "with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy."[60]

Such matters, the court continued, are better left to Congress. It explained that "courts are ill-equipped and ill-situated for such decision-making," which would require them to "analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy."[61]

It is easy to see how these statements, read out of context, have been taken as a bar on cross-market justifications. The sentiment is strong. On closer examination, though, the *Topco* case does not establish a rule against out-of-market justifications, for several reasons. First, although *Topco* is invoked to bar cross-market justifications under the rule of reason, the Supreme Court decided in favor of Topco under the *per se* rule. This means the legal question of whether to credit such justifications was never before the court, and the comments on cross-market balancing under the rule-of-reason analysis are only *dicta*.

In fact, read in context, much of the Supreme Court's reasoning is merely a defense of the *per se* rule in general. The court is narrating the *per se* rule's benefits over the rule of reason. The most-cited passage of *Topco*, described above, is preceded by a lengthy explanation that *Topco*'s horizontal, territorial restraint is subject to the *per se* standard, not the rule of reason that the district court had mistakenly applied. The Supreme Court explains that:

> *Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.*[62]

In short, the Supreme Court is simply talking about which analytical standard applies to the case at hand.

In its general defense of the value of *per se* rules, the Supreme Court elaborates on the difficulties inherent in weighing the various effects on competition under the rule of reason. The effects-based inquiry under rule-of-reason inquiry certainly demands more of courts than the application of *per se* rules. That is uncontentious. But the *Topco* decision provides no definitive answer to the more specific question of whether, once a court decides the rule of reason applies, cross-market justifications may be credited within that the rule-of-reason analysis.

In fact, *Topco* describes the rule-of-reason analysis as difficult because it demands that courts consider "the industry involved, as well as related industries."[63] This argument—that *per se* rules are useful because they avoid the need for weighing across industries—necessarily implies that such cross-industry weighing may be a part of rule-of-reason cases. Although *dicta* within the *Topco* decision discourages courts from "choosing" between industries, this implicitly acknowledges that the rule of reason may demand that courts do precisely that.[64]

The law has changed in several ways since *Topco* such that the case would likely be decided under the rule of reason today.[65] The Supreme Court has since said that the rule of reason "presumptively applies,"[66] and more and more conduct has become subject to it. In particular, over the past 40 years, courts have developed the ancillary restraints doctrine, applying it to conduct tied to legitimate joint ventures similar to the Topco cooperative.[67] The ancillary restraints doctrine serves to distinguish between "naked" restraints on competition, which remain subject to the *per se* rule, and restraints that are reasonably related to, and necessary to achieve, the procompetitive benefits of a joint venture.[68] The latter category—restraints that advance the legitimate and efficient objectives of a joint venture—are instead subject to scrutiny under the more lenient rule of reason. Precise formulations of the ancillary restraints doctrine vary, but this is its function.[69]

The majority in *Topco* does not address the ancillary restraints doctrine, but Chief Justice Warren Burger's dissent echoes the direction this law later took. Chief Justice Burger explains that Topco's members agreed to "certain minimal ancillary restraints" for the lawful purpose of marketing their private-label product line, which would be cost-prohibitive for any one member to develop alone.[70] He reiterates the district court finding that the removal of Topco's restraints was not likely to increase competition between sellers of Topco's private label but would instead likely lead to the demise of the Topco private-label brand, which would become economically infeasible.[71]

Lastly, since *Topco*, Supreme Court jurisprudence on the rule of reason has begun to distinguish between cross-brand competition and same-brand competition. *Topco* treats same-brand competition and cross-brand competition as equal in significance under the Sherman Act, reasoning that cooperative members should have the freedom to choose which is more important.[72] But since the 1977 decision in *Continental T.V. Inc. v. GTE Sylvania Inc.*, a number of Supreme Court cases have emphasized that cross-brand competition is "the primary concern of antitrust law."[73] *GTE Sylvania* and its progeny recognized that competition between brands could actually be improved by restraints on same-brand competition, particularly vertical restraints imposed on same-brand retailers.[74] Both the ancillary restraints doctrine discussed above and the *GTE Sylvania* jurisprudence develop a more nuanced view than *Topco* on the promotion of competition. Each recognizes that in certain circumstances, the elimination of specific subtypes of rivalry among same-brand producers could, in fact, produce consumer welfare benefits.[75]

But even if the Supreme Court had applied the rule of reason in *Topco*, all of the effects were in the same market for the challenged territorial restraints.[76] The government alleged that Topco's territorial restrictions on its cooperative members reduced competition in the market for grocery retailing. Topco then asserted a justification in the same market. It claimed that its territorial restraints enabled its small member chains to better compete against larger grocery retailers.[77] Both the restraints and the justification were in the market for grocery retailing. No cross-market justifications were at issue on the facts for Topco's territorial restraint, so this particular claim did not present an opportunity for the Supreme Court to address the cognizability of such justifications.[78]

Finally, *Topco* premises its aversion to choosing between "sectors" of the economy on *Philadelphia National Bank*.[79] While it is not uncommon to borrow from merger cases in the law of monopolization (and vice versa), in this case, the Supreme Court left unaddressed an important statutory difference. Although *Philadelphia National Bank* also included a Sherman Act Section 1 claim, the Supreme Court's reasoning for the clear prohibition on cross-market efficiencies was based on the text of Section 7 of the Clayton Act, which prohibits combinations that substantially lessen competition "in any line of commerce."[80] This is read to require a separate market-by-market evaluation of merger effects[81]—since a substantial anticompetitive effect in any single relevant market is sufficient to bar the transaction, by implication, a procompetitive effect in another market cannot cure that violation.

The Supreme Court confirmed this view in *Philadelphia National Bank*, reasoning that the defendant's claimed justifications would require a reckoning of "social or economic debits and credits" beyond the scope of the statutory language of Section 7.[82] The merger substantially lessened competition in Philadelphia, and the transaction's broader economic benefits elsewhere could not save it from condemnation under the Clayton Act. For conduct cases, though, the Sherman Act contains no equivalent statutory language that could be read to bar cross-market justifications. *Topco* adopts *Philadelphia National Bank* without addressing this statutory difference.

As this discussion illustrates, much of the confusion regarding cross-market justifications traces back to *Topco* itself. *Topco* relies on law from a merger case without addressing statutory differences for conduct cases. In *Topco*, the Supreme Court had no occasion to consider cross-market justifications on the facts or the law as applied under the *per se* rule. Viewed in context, much of the *Topco* reasoning is just a defense of such *per se* rules, which the court found less complex to apply than the rule of reason. This defense seems to admit that the rule of reason is complex because it may require courts to consider cross-market justifications. To whatever extent *Topco* developed the law on cross-market justifications, it did not create a rule against considering or crediting such effects.

Topco's legacy: Continuing ambiguity in the law of cross-market justifications

Later cases reinforce the ambiguity of *Topco* as a precedent on cross-market justifications. Since the decision, appellate courts have displayed a striking pattern of declining to clarify whether such justifications are barred in conduct cases. The few cases that actually acknowledge this question of law have observed for decades now that no appellate court has "squarely" addressed the law,[83] and that it is "not settled."[84] Several of these decisions canvas the ambiguous support for and against a bar against cross-market justifications, then—frustratingly—decline to decide the law, leaving the doctrine just as unclear as they found it.[85]

More often, appellate cases do not address the legal question directly. Instead, the tendency is to engage in the evasive approaches discussed below. This section argues that this eternally unsettled law on cross-market justifications is problematic for precisely this reason—it is pushing courts to engage in at least two workarounds. The first ignores the unsettled legal question and instead simply credits the cross-market justifications claimed by defendants. The second contorts established principles of market definition to render out-of-market effects "in market," as in the Supreme Court's *Ohio v. American Express Co.*[86] decision, one of the most significant recent cases to reference—but not decide—the law of cross-market justifications.

Ambiguity in the law: Crediting cross-market justifications without addressing the legality

If there is a rule against cross-market justifications, courts seem to disregard it with regularity in conduct cases. Recent, high-profile decisions such as *NCAA v. Alston*[87] and *Epic v. Apple*[88] credit such effects without addressing the legality of doing so. This is not a minor issue—if the law barred cross-market justifications, that would change the outcome of certain claims in both of these cases.

In *NCAA v. Alston*, student athletes challenged the National Collegiate Athletic Association's various limits on athlete compensation as an unreasonable restraint of trade in violation of Section 1 of the Sherman Act.[89] Most importantly here, the lower courts permitted the NCAA to justify a restraint on student athlete compensation based on its out-of-market benefits to consumers of amateur sports.[90]

At the first step in the rule-of-reason analysis, the student athletes proved that the NCAA's restrictions decreased their compensation to below competitive levels in the input market for student athlete labor.[91] But the NCAA managed to prove that certain of its rules had procompetitive effects in a different market—the output market for amateur sporting events.[92] The district court cautiously credited the NCAA's justification that its restrictions on athlete compensation preserved amateurism, finding that the NCAA's compensation limits may have some effect in maintaining consumer demand for amateur sport by helping to differentiate amateur from professional sport.[93]

At the next step in the rule-of-reason analysis, the district court then considered whether the NCAA could achieve these claimed procompetitive benefits using a substantially less restrictive alternative. It reached different conclusions for two distinct types of restraints that the NCAA had imposed on athletes. The court found that the NCAA's limits on benefits based on athletic performance were reasonably tailored to this justification of preserving amateurism and thus were lawful. But the NCAA's limits on education-related compensation were struck down. There was no real evidence that the educational-benefit limits served to differentiate amateur sports, and further, there were less restrictive rules that could still achieve the same benefit of preserving consumer demand for amateur sports.[94]

The Court of Appeals for the 9th Circuit affirmed the district court findings, and the majority did not address the legality of cross-market justifications.[95] Judge Milan Smith Jr., however, issued a concurring opinion that objected to the NCAA's out-of-market justification on the grounds of judicial unadministrability and nonjuridicability.[96] It was in this opinion that Judge Smith expressed the concern where this chapter began—that the "Rule of Reason framework has shifted toward this cross-market analysis without direct consideration or a robust justification."[97]

The NCAA appealed to the Supreme Court on numerous grounds, but the parties did not raise the issue of cross-market justification.[98] This was because only the NCAA appealed, seeking a ruling that its education benefits, which had been struck down by the lower court, in fact survived antitrust scrutiny. The Supreme Court thus did not have occasion to consider the athletic performance rules that remained in place—and for which the NCAA had received a favorable ruling from the lower courts based on its out-of-market justifications.

Despite this, the Supreme Court observed twice in its *NCAA* decision that this legal question of cognizability of cross-market justifications is lurking in the background of the case.[99] The Supreme Court also noted, but declined to address, an *amici* argument that courts ought not trade off competition between markets, on the grounds that input market competition in the labor market is "incommensurable" with output market competition in the consumer market for amateur sporting events.[100] The Supreme Court decision left virtually all of the lower court reasoning intact and affirmed the injunction barring the NCAA's restraints on education-related compensation.

Ultimately, this course of litigation against the NCAA permitted "significant" anticompetitive harms to the student athlete labor market.[101] The unchallenged aspects of the lower court decisions allowed restraints on athletic performance compensation to be offset by marginal benefits to consumers in the market for amateur sports. The legality of crediting cross-market justifications was not decided, yet those effects determined the result in the litigation for those restraints the NCAA justified. If the law had barred such cross-market justifications, then the NCAA would have had no apparent justifications for either of its compensation limits. The student athletes would have prevailed in challenging all of the restraints, ending the case before any need to consider potentially less restrictive alternatives.

Another recent, high-profile case—this time involving an online platform—has similarly bypassed the question of whether it is lawful to credit cross-market justifications. As mentioned above, in *Epic v. Apple*, the Northern District of California credited an out-of-market justification argued by tech giant Apple.[102] Epic, a video game app developer, challenged the rules for app distribution and payment imposed by Apple on many of the developers who distribute their apps through its app store. Epic demonstrated that the rules were *prima facie* anticompetitive in the market for mobile gaming transactions.[103] But Apple successfully argued that its rules were justified based on their competitive effects in the likely separate market for mobile devices and related operating systems.[104]

One of the justifications the court accepted was that Apple's rules enabled the company to maintain privacy and security protections in its online ecosystem and thus to better compete with other mobile operating systems—particularly Google Android.[105] Importantly, the *Epic* decision does not address the law on whether such out-of-market effects are cognizable as a justification.[106] The court stopped short of engaging in any balancing of the procompetitive and anticompetitive effects, meaning that Apple avoided Section 1 liability based on its justifications. As of the publication of this chapter, the case is on appeal to the 9th Circuit Court of Appeals.

NCAA v. Alston and *Epic v. Apple*, along with other cases, consider or credit cross-market justifications without addressing whether this is permitted by law. This creates an opacity problem in law and policy. The Court of Appeals for the 1st Circuit observed this problem in its 1994 decision in *Sullivan v. National Football League*.[107] The court explains that the crediting of cross-market justifications without any express consideration of their legality is problematic because it makes it "impossible to tell whether [courts are] consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets" or "simply not being very careful and inadvertently extend[ing] the rule of reason past its proper scope."[108]

Cases such as *NCAA v. Alston* and *Epic v. Apple* suggest that the "rule" on cross-market justifications either does not exist in law or that it is regularly being disregarded. The courts do not reveal which it is. Lower courts in particular are left without guidance on the law, and some have concluded that the law requires the opposite—a barring of cross-market justifications.[109]

Another effect of this legal obscurity is to bury related policy questions. Should courts accept trade-offs between labor markets and consumer markets, such as that in *NCAA v. Alston*? If courts expressly examined the law of cross-market justifications—whether they found such effects to be cognizable or not—it would drive such policy dilemmas to the surface, fuel debate, and perhaps prompt changes or development of U.S. antitrust law. Of course, the courts themselves are not necessarily to blame—as in the appeal to the Supreme Court from *NCAA v. Alston*, the parties do not necessarily place legal questions of cross-market effects squarely before the court to decide. The law and policy on cross-market justifications has, over time, remained persistently unclear.

Ambiguity in the law of cross-market justifications prompts distorted market definitions

The perceived bar on cross-market justifications is pushing courts toward another problematic workaround: distortions of market definition. Courts will sometimes lump multiple markets together into one, effectively moving those cross-market justifications "in-market." This unprincipled collapsing of markets occurred in the highly criticized Supreme Court decision *Ohio v. American Express Co*.[110] Instead of distorting market definition principles, the *American Express* case should have directly addressed cross-market justifications.

In *American Express*, the Antitrust Division of the U.S. Department of Justice and several states brought a Section 1 of the Sherman Act challenge against credit card company American Express.[111] The case disputed the company's "anti-steering" provisions in its merchant agreements.[112] These provisions barred merchants from suggesting or inducing cardholders to use other credit cards at the point of purchase.[113] Without these rules, such "steering" was likely, because other cards charged merchants much lower transaction-processing fees than American Express.[114] When consumers use those cards, the merchants take home more of the transaction amount. The district court considered the competitive effects of the American Express rules on merchants and found anticompetitive effects. The rules drove up merchant processing fees, not just for American Express cards but for all types of payment cards.[115]

At the next stage in the rule-of-reason analysis, American Express then argued two justifications for its rules, one of which involved cross-market effects.[116] The company claimed the challenged rules were required to maintain its distinct business model, which emphasized cardholder spending and enhanced cardholder benefits. While its competitors earned interest from cardholder balances, American Express did not—its profits came only from cardholder spending. American Express argued that this difference made its margins critical to fierce competition with credit cards issued by Visa Inc., MasterCard Inc., and Discovery Ltd.—all of which had the benefit of another source of earnings in the form of interest from cardholders.

This argument of American Express, the district court explained, would require the court to balance the restraints of procompetitive effects in a "separate, though intertwined, antitrust market" against the anticompetitive effects on merchants.[117] American Express was, in essence, saying it needed to limit steering to maintain its margins in the network services market because those margins enabled the company to offer enhanced cardholder benefits that fueled its competitiveness in cardholder issuance, a separate market. In analyzing this argument, the district court cited *Topco*, explaining that "[a]s a general matter … a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market."[118]

Despite this, the district court concluded that the relevant law was undecided, as no Court of Appeals for the 2nd Circuit cases had determined whether to weigh cross-market justifications in the specific situation of interrelated markets that "together comprise a single two-sided platform" like the American Express credit card business.[119] Thus, even if the law on cross-market effects was generally decided in *Topco*—itself a questionable conclusion—that case did not answer the specific question before that court.[120] Leaving its analysis of the law at that, the district court went on to explain that even if cross-market balancing was permitted, American Express would lose the case because it failed to establish that its rules were reasonably necessary to competition on the cardholder side of the platform or that any such gains offset the competitive harm in the market for merchant services.[121]

The Court of Appeals for the 2nd Circuit reversed, finding the anti-steering provisions did not violate federal antitrust law.[122] The Supreme Court then affirmed on appeal. This difference in outcomes at the *American Express* trial and appellate court levels was primarily due to market definition. The district court defined two separate (albeit interrelated) markets in the case: the market for merchant services and the related-but-distinct market for cardholders.[123] The 2nd Circuit Court and Supreme Court majority, however, adopted a different approach, collapsing two separate markets into a single "two-sided" market for credit card transactions, which encompassed both the merchant side and cardholder services.[124]

This difference led the Supreme Court to conclude that the government had failed to prove adequate competitive harm by "wrongly" establishing harm only to the merchant "side" of the market.[125] The Supreme Court found that the government had to prove harm to both merchants and cardholders to carry its initial burden of showing anticompetitive effects.[126]

American Express is one of the most criticized antitrust decisions of the 21st century, in no small part because the Supreme Court upset well-established principles of market definition.[127] Market definition is deeply rooted in the concept of substitutability of demand (and sometimes also supply substitution).[128] If prices rose for one product, what would buyers choose as an alternative to a particular product? This is a common measure used to identify competitors and the bounds of markets. The market the Supreme Court adopted in *American Express* lacks this key feature of demand substitution.[129] Merchant services and cardholder services are not substitutable for each other.[130] Consumers would not use merchant-side payment processing services to make a purchase on their credit cards—the two services are distinct in their role and function.

The *American Express* majority realized, correctly, that these two sides of the platform were interrelated, and that it needed to consider whether and how to evaluate the competitive effects on both sides (merchants and cardholders) to understand the impact of American Express' conduct. Credit card networks intermediate between cardholders and merchants such that the market for merchant services could affect competition in cardholder services or vice versa. Declining competition in merchant fees, for example, might enable American Express to raise its fees and, in turn, to fund greater card rewards offered on the cardholder side (as American Express argued in the case).

The problem was in how *American Express* chose to account for these effects. The potential for these cross-side competitive effects does not automatically make cardholder services and merchant services part of the same market. The court had at least two potential options to frame its analysis: Contort market definition to find a transaction market (as it did), or define the market under existing law and economics, then consider whether to credit out-of-market effects.[131] The Supreme Court took the first approach, defining a "transaction's worth" of credit-card processing in a two-sided market lumping together cardholder and merchant services. This distorted principles of market definition in a cumbersome and confusing way.

Instead, *American Express* should have taken the second approach, applying the established principles of market definition to each side of the platform, evaluating the competitive effects in each market, then considering any relevant cross-market justifications.[132] This alternative approach usefully disentangles the market definition from its competitive-effects analysis.[133] It accounts for the economic reality of potential cross-side effects, while staying consistent with established principles of market definition in economics and law.

A perceived lack of authority to consider cross-market justifications may have nudged the Supreme Court majority toward its problematic market definition in *American Express*. In fact, a prediction of this very problem appears in a discussion of out-of-market effects for mergers, where one scholar worries that "lacking legal authority" to consider cross-market justifications, "a court could abandon sound market delineation principles."[134] This is precisely what occurred in *American Express*.

In Justice Stephen Breyer's *American Express* dissent, he notes that he would have considered cross-market justifications directly.[135] Yet his dissent still manages to leave the law on such effects unclear. Justice Breyer reasons that American Express should have had "an opportunity to ask" the 2nd Circuit Court whether its procompetitive benefits in the cardholder market offset the demonstrated anticompetitive effects in the market for merchant services.[136] But he immediately follows this with an observation that proving such effects would have been an "uphill battle" for American Express, as "[a] Sherman Act § 1 defendant can rarely, if ever, show that a pro-competitive benefit in the market for one product offsets an anticompetitive harm in the market for another."[137]

Justice Breyer also quotes *Topco*'s *dicta* in support of this conclusion. He repeats its warning that Congress is better suited than the courts to determine whether competition in one portion of the economy should be sacrificed for greater competition in another—a decision, he writes, that courts are "ill-equipped and ill-situated" to make.[138]

Some scholars interpret Justice Breyer's comments as support for a bar on cross-market justifications in the law, although they acknowledge the reasoning is less than clear.[139] But Justice Breyer's invocation of *Topco* can just as easily be read the other way. If such effects were barred by law, then there would be more than just an "uphill battle required to prove them," and there would be no reason to encourage lower courts to consider such evidence, as he does. His comments seem to be about the evidentiary difficulties of proving out-of-market effects, particularly for American Express. The dissent leaves the law about as ambiguous as it found it.

The *American Express* majority opinion is now driving incorrect analysis and outcomes in other cases with multisided platforms, a concerning effect of the decision.[140] *American Express* threatens to do the same in pending and future cases against large technology platforms, many of which may involve cross-side network effects akin to *American Express*. That case was correct only insofar that courts, in their evaluation of competitive effects, might consider the various separate sides of a platform where there is evidence of cross-side effects.

Consider, for example, Google's search and search advertising businesses. Online ads and online search are decidedly related but also not within the same market. Yet it may be appropriate to consider how Google's restraints on search competition affect advertising competition. Despite such effects being cross-market, they could prove relevant to a full understanding of the allegedly anticompetitive restraints imposed by Google.

At the same time, search and search advertising are likely different markets because services on each side of the platform are not interchangeable from a demand perspective in this context. End-users of online search services would not substitute advertising services offered to the other "side" of the platform, or vice versa. Lumping these different services into one market would repeat the mistakes of *American Express*.

Clear law on cross-market justifications would help to avoid similar market definition mistakes in pending and future cases against digital platforms. As the *American Express* dissent predicts, cases with significant cross-market justifications may be rare. But even if rare, such litigation may also be high-stakes, as demonstrated by *NCAA v. Alston*, *American Express* (if it had been correctly framed), and *Epic v. Apple*. This makes the law of cross-market justifications well worth addressing.

Developing the law on cross-market justifications

This chapter argues that the law on cross-market justifications is unsettled, despite its common depiction otherwise. The discussion leads, of course, to the normative question of what the law should be. A full examination of the potential formulations of a legal rule on cross-market justifications, and their pros and cons, could easily fill another chapter. Instead, this short chapter offers three important observations for courts seeking to shape the law in this space.

First, there is nothing in the existing law that prevents judicial development of the law on cross-market justifications. As this chapter argues, *Topco* and other appellate cases simply have not addressed this law. In many cases, courts have not been presented with the legal question of whether to credit such effects when they could have been. In others, courts have stopped short of addressing this law or have bypassed it by relying on other, problematic approaches. This has left a lacuna on the law of cross-market justifications that remains open for the courts to fill in conduct cases. Other scholars have argued similarly that courts have the power to determine the law on cross-market effects, albeit in the more specific context of labor market cases.[141]

While legislative intervention would be useful to clarify this law more quickly, there is nothing stopping courts from developing the law of cross-market justifications in the common law tradition. As the Supreme Court observed in *National Society of Professional Engineers v. United States*, "Congress … did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition."[142] Since *Topco*, courts have shaped many of the doctrinal intricacies of the rule of reason, and courts could continue to do so here for cross-market effects.[143] Such judicial development of the law would be preferable to the long-ambiguous state of this doctrine now.

Second, although appellate cases do not establish a clear rule against cross-market justifications, the jurisprudence tends to suggest a trajectory for development of this law. Courts have primarily expressed hesitancy in one direction—the concern is over permitting cross-market justifications, not over limiting them.[144] Since the time of *Topco*, courts have rooted their aversion to crediting such effects in two primary concerns: judicial administrability and fairness to those in the market with demonstrated anticompetitive conduct.[145]

Topco observed that cross-sector analysis may be impractical for courts, as it requires them to "analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions."[146] This judicial administrability concern was reiterated recently by Judge Smith of the 9th Circuit Court in his *NCAA v. Alston* concurrence.[147] Leading scholars also imagine an ever-expanding inquiry into competitive effects that would become unmanageable for courts.[148]

The other primary concern is unfairness. By crediting cross-market justifications, are judges making an unfair choice between the value of competition in different markets? Judge Smith's *NCAA v. Alston* concurrence contends that, whether implicitly or explicitly, permitting cross-market justifications may mean the court "make[s] value judgments by determining whether competition in the collateral market is more important than competition in the defined market."[149] Similar concerns echo in the *Topco* majority.[150] If the Sherman Act guarantees freedom to compete, then crediting cross-market justifications, in effect, may deny this freedom in the initial market where the plaintiff demonstrated harm.[151]

Between the administrability and fairness concerns, these cases give the impression of judicial opposition to law that allows widespread admissibility of cross-market justifications. At the same time, it is difficult to justify a complete bar on cross-market justifications. While judicial administrability is a weighty concern, it has limits. Chief Justice Warren Burger observed, in his *Topco* dissent, that courts should not abdicate their analytical role "with no justification other than the enhancement of predictability and the reduction of judicial investigation."[152]

The "whole point" of analysis under the rule of reason is to determine the competitive effects of the restraint.[153] Market definition is not the end goal of antitrust analysis—it is a tool that serves this purpose of assessing competitive effects. In fact, there is growing recognition that market definitions may not even be necessary when there is direct evidence of effects on competition.[154] If the evidence demonstrates procompetitive effects on competition that are interrelated and closely intertwined with alleged harms, a total bar on cross-market effects would value formalism over substance. Such effects would be barred because they fall outside of the market as defined, not because they lack relevancy to understanding how the impugned conduct affects competition. Particularly where the in-market harms to competition are small, and the defendant demonstrates out-of-market effects that are intertwined and significant in their procompetitive benefits, such effects seem hard to ignore.[155] Even commentators who support a general bar on cross-market justifications seem to concede that in these narrow circumstances—small, in-market harms to competition that are inextricably interrelated with significant out-of-market benefits—the law may need to permit defendants some leeway to argue cross-market justifications.[156]

Even in the merger context, federal antitrust agencies recognize some narrow but analogous flexibility in cross-market efficiencies. The joint guidance on horizontal mergers from the Federal Trade Commission and the U.S. Department of Justice provides that the agencies will ordinarily challenge mergers that are anticompetitive in any relevant market.[157] The guidance, however, also concedes that, as a matter of prosecutorial discretion in determining which mergers to challenge, the agencies may consider out-of-market efficiencies that are "inextricably linked" to the relevant market such that any remedy could not feasibly eliminate the anticompetitive effects without sacrificing the linked efficiencies in the market.[158] The agencies observe that such efficiencies are likely rare but will most often make a difference where there are small in-market anticompetitive effects relative to significant out-of-market efficiencies.[159]

As discussed above, there is a much clearer statutory and common law bar against cross-market efficiencies in mergers than there is for cross-market justifications in conduct cases. Despite clearer law against crediting such effects, U.S. agencies have still chosen to recognize this quasi-exception for mergers, rooting their flexibility in prosecutorial discretion. This sliver of permissiveness suggests that, at a minimum, conduct cases might also consider narrow concessions for cross-market justifications that are significant and closely intertwined with anticompetitive effects.

Appellate decisions also offer some support for this view. The Court of Appeals for the 9th Circuit in *Paladin Associates Inc. v. Montana Power Co.* contemplated that "closely related" markets "might be distinguished" from the *Topco* dictum that is so often read to discourage cross-market justifications.[160] However, the court declined to decide the law on such an exception.[161] The Court of Appeals for the 1st Circuit in *Sullivan* expressed similar sentiment when it described the only judicial consensus it could find on cross-market justifications (but flips the logic to discourage unrelated justifications):

> *[W]e can draw at least one general conclusion from the caselaw at this point: courts should generally give a measure of latitude to antitrust defendants in their efforts to explain the procompetitive justifications for their policies and practices; however, courts should also maintain some vigilance by excluding justifications that are so unrelated to the challenged practice that they amount to a collateral attempt to salvage a practice that is decidedly in restraint of trade.*[162]

Ultimately, it remains open to courts to determine whether and when to consider cross-market justifications in conduct cases. In doing so, courts will find support in related jurisprudence, scholarship, and agency guidance for a general bar against cross-market justifications with a narrow exception for significant, interrelated effects.

Conclusion

Courts and commentators refer to a "rule" that bars cross-market justifications in conduct cases. This chapter argues there is no such rule. The law on cross-market justifications is unclear for conduct cases and has been since the 1972 *Topco* decision. We should stop assuming that existing law prohibits such cross-market justifications—it does not, or at least it does not do so clearly enough for courts to bypass this legal issue. This long-ambiguous law is worth clarifying because it has the power to change the outcome of significant cases, in particular the breaking wave of digital platform litigation.

This chapter argues that the persistent ambiguity in the law of cross-market justifications is, in itself, creating problems. It has led courts to ignore the legal question and simply credit cross-market justifications, as in *NCAA v. Alston* and *Epic v. Apple*. This unclear law has also pressed courts into workarounds that distort more established doctrine, such as the unusual market definition in *American Express*.

The chapter concludes with several observations to assist courts in developing the law on cross-market justifications. First, it contends that courts have the power to shape this law, as they have other facets of the rule of reason. Nothing in the existing law on cross-market justifications precludes the judicial development of this doctrine. Second, while the law on cross-market justifications is undecided, related cases suggest more concern over permitting such effects than limiting them, based on judicial administrability and fairness. Still, the chapter finds it is difficult to justify a complete bar on cross-market justifications, given their potential relevance to the competitive effects of challenged conduct. It concludes with the suggestion that appellate, commentator, and agency guidance provide scope for a narrow consideration of cross-market justifications, particularly when the out-of-market benefits to competition are significant and closely interrelated with the in-market harms.

Endnotes

1 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1266 (9th Cir. 2020) aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) [hereinafter, Alston v. NCAA (9th Cir.)].

2 United States v. Microsoft Corp., 253 F.3d, p. 59 (describing a burden-shifting framework under the rule of reason).

3 Ibid. ("[I]f a plaintiff successfully establishes a prima facie case under § 2 [of the Sherman Act] by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct." (citing *Eastman Kodak Co. v. Image Tech. Servs*., 504 U.S. 451, p. 483 (1992)).

4 *NCAA v. Alston* (9th Cir.) 958 F.3, p. 1266 (permitting the National Collegiate Athletic Association to justify a restraint on student athlete compensation because it had out-of-market benefits to consumers of amateur sports); *Epic Games Inc. v. Apple Inc*., 559 F. Supp. 3d 898, pp. 1068–69 (N.D. Cal., 2021) (crediting a justification in mobile device operating systems/devices where anticompetitive effects were demonstrated in the market for mobile game transactions). This chapter uses the terms "out-of-market justification" or "cross-market justification" interchangeably to refer to such potential procompetitive justification in conduct cases. In discussing mergers, it refers to an out-of-market or cross-market "efficiency."

5 Michael A. Carrier, "The Rule of Reason: An Empirical Update for the 21st Century," George Mason Law Review 16 (4) (2009): 827, 828 (finding that only about 2 percent of rule-of-reason cases in the survey period proceed beyond analysis of justifications).

6 *NCAA v. Alston* (9th Cir.), 958 F.3d 1239, *aff'd sub nom*. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021) (affirming the lower court decision (i) permitting the NCAA's restraints on athletic performance-based compensation in the labor market, based on procompetitive effects in the market for amateur sport consumption, but (ii) prohibiting the NCAA's restraints on education-related compensation based on the availability of less restrictive alternatives to achieve the claimed procompetitive effects). Note the out-of-market justification issue was not on appeal before the Supreme Court. The case prompted calls to limit defendants' ability to justify anticompetitive restraints on labor by establishing benefits to consumers in another market. Laura Alexander and Steven C. Salop, "Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers," *Georgetown Law Faculty Publications and Other Works* 2447 (2022), available at https://scholarship.law.georgetown.edu/facpub/2447; Ted Tatos and Hal Singer, "The Abuse of Offsets as Procompetitive Justification: Restoring the Proper Role of Efficiencies After Ohio v. American Express and NCAA v. Alston," *Georgia State University Law Review* 38 (4) (2022): 1179. See also a similar debate in the merger context in Ioana Marinescu and Herbert J. Hovenkamp, "Anticompetitive Mergers in Labor Markets," *Indiana Law Journal* 94 (3) (2019): 1031 (calling for some rethinking of merger policy for mergers that harm labor markets).

7 Though not law, the Horizontal Merger Guidelines recognize a narrow exception in the form of prosecutorial discretion, permitting the agencies to consider cross-market efficiencies when so "inextricably linked" that any remedy could not feasibly eliminate the anticompetitive effects in the relevant market without sacrificing efficiencies in other markets. See U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010), n. 14. However, it is not clear that current agency leadership shares this view, given the recent repeal of vertical merger guidance based, in part, on that prior guidance recognizing overly-broad merger efficiencies. See Federal Trade Commission, "Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines," September 15, 2021, available at https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf ("The [Clayton Act] does not distinguish between 'horizontal' and 'vertical' mergers, nor does it contain exceptions for mergers that lessen competition but also create some form of efficiency.").

8 *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, p. 370 (1963); Daniel A. Crane, "Balancing Effects Across Markets," *Antitrust Law Journal* 80 (2) (2015): 397 (discussing the bar on cross-market efficiencies in merger cases).

9 15 U.S.C. § 18.

10 *Philadelphia Nat'l Bank*, 374 U.S. 321, p. 370.

11 Ibid., pp. 359–365 (defining the relevant geographic market as a comprising a four-county Philadelphia metropolitan area and finding on competitive effects); Ibid., p. 323 (complaint charging violations of Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 7 of the Clayton Act, 15 U.S.C. §18).

12 Ibid, pp. 370–71. Premerger, strict capitalization rules for banks had the effect of driving Philadelphia banking customers above a certain size to use New York City banks for loans. The banks argued that the merger would enable the parties to offer those large loans in Philadelphia instead, enhancing their ability to compete with New York banks. The banks also argued a second justification: that the merger should be permitted because it would bring economic development to the city of Philadelphia.

13 *Philadelphia Nat'l Bank*, 374 U.S., Ibid, p. 371.

14 Ibid., p. 370 ("If anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader."). Since any efficiencies must be established in the same market where the anticompetitive effects were found, this is sometimes termed a "market specificity" rule. See Crane, "Balancing Effects Across Markets," p. 397.

15 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶972a (4th ed., 2022), (noting "courts have consistently so held" that there is a bar on cross-market efficiencies in merger law).

16 15 U.S.C. §§ 1-2.

17 See discussion in section of this chapter titled "*Revisiting* Topco*: There is No "Rule" Against Cross-Market Justifications*."

18 *NCAA v. Alston* (9th Cir.) 958 F.3d, p. 1257 n. 14, *aff'd sub nom*. Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141 (2021).

19 *Sullivan v. National Football League*, 34 F.3d, pp. 1091, 1111 (1st Cir. 1994) ("To our knowledge, no authority has squarely addressed this issue [of the law on cross-market justifications]."); *Paladin Assocs. v. Mont. Power Co*., 328 F.3d, pp. 1145, 1157 n. 11 (9th Cir. 2003) (finding "[i]t may be" that "procompetitive effects in a separate market cannot justify anti-competitive effects in the market ... under analysis" but going on to find that *Topco's* language may not be controlling "because it is a dictum or incomplete or obsolete.").

20 Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Cambridge, MA: Harvard University Press, 2019), p. 292, n.51 (observing that "*Topco* has been treated by lower courts as precluding cross-market welfare trade-offs in non-merger litigation."); *Apotex Inc. v. Cephalon Inc*., No. 2:06-cv-2768, 2017 U.S. Dist. LEXIS 227960, at p. 11 (E.D. Pa. May 24, 2017) (finding that "increased competition in one market cannot justify anticompetitive conduct in an unrelated market." (citing *United States v. Topco Assocs. Inc*., 405 U.S. 596, 610 (1972)); *United States v. Am. Exp. Co.,* 88 F. Supp. 3d 143, 229–30 (E.D.N.Y. 2015) ("[a]s a general matter ... a restraint that causes anticompetitive harm in one market may not be justified by greater competition in a different market"), rev'd and remanded sub nom. *United States v. Am. Express Co*., 838 F.3d 179, 229-230 (2d Cir. 2016), aff'd sub nom. *Ohio v. Am. Express Co*., 138 S. Ct. 2274, 201 L. Ed. 2d 678 (2018); *Law v. NCAA*, 902 F. Supp. 1394, 1406 (D. Kan. 1995) ("Procompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market." (citing *Topco*, 405 U.S., p. 610)).

21 405 U.S. 596 (1972); See cases citing *Topco*, Ibid note 20.

22 138 S. Ct. 2274.

23 141 S. Ct. 2141 (2021).

24 *United States v. Microsoft Corp*., 253 F.3d 34, 58–59 (D.C. Cir. 2001) (per curiam) (describing the burden-shifting framework); Herbert J. Hovenkamp, "The Rule of Reason," *Faculty Scholarship at Penn Law* 1778 (2018): 83, available at https://scholarship.law.upenn.edu/faculty_scholarship/1778 (noting "most antitrust claims" are evaluated under the rule of reason, which typically employs the burden-shifting framework described).

25 *Microsoft Corp*., 253 F.3d, p. 59.

26 *Polygram Holding Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005).

27 In the event the defendant demonstrates a valid justification for the challenged restraints, plaintiffs must then prove either that the challenged restraints are not reasonably necessary to accomplish defendants' legitimate objective, that the same objective may be "achieved by less restrictive alternatives, that is, those that would be less prejudicial to competition as a whole," or that the procompetitive effects shown by the defendant are outweighed by the plaintiff's demonstrated anticompetitive harms. *Capital Imaging Assocs. P.C. v. Mohawk Valley Med. Assocs*., 996 F.2d 537, 543 (2d Cir. 1993). In some of the rule-of-reason cases discussed here, the courts engage in certain of these additional analytical steps after the defendant has established a justification. This chapter focuses on the second step in the analysis: whether or not the defendant can demonstrate a procompetitive justification.

28 Carrier, *supra* note 5 at 828.

29 Amended Complaint, *United States v. Google LLC.*, No. 1:20-cv-03010 (D.D.C. Jan. 15, 2021); *FTC v. Facebook Inc*., 581 F. Supp. 3d 34, 40 (D.D.C. 2022).

30 Amended Google Complaint, Ibid.

31 Ibid., pp. 4–5.

32 Substitute Am. Compl., ¶77, *FTC v. Facebook Inc.*, No.: 1:20-cv-03590-JEB (D.D.C. Sept. 8, 2021); *FTC v. Facebook Inc.*, 560 F. Supp. 3d 1 (D.D.C. 2021) (granting Facebook's motion to dismiss the claims, without prejudice); *FTC v. Facebook Inc.*, 581 F. Supp. 3d 34, 40 (D.D.C. 2022) (granting Facebook's motion to dismiss on one of the FTC's claims, but allowing the amended claims related to Facebook's acquisition strategy to proceed).

33 Complaint, *Utah v. Google LLC*, Docket No. 3:21-cv-05227 (N.D. Cal. Jul 07, 2021) (alleging unlawful monopoly maintenance in Google's app store and in-app payment processing); Complaint, *Colorado v. Google LLC*, No. 20-cv-03715 (D.D.C. Dec. 17, 2020); In re Google Digital Advert. Antitrust Litig., No. 21-CV-6841 (PKC), 2022 WL 4226932, at *44 (S.D.N.Y. Sept. 13, 2022) (denying Google's motion to dismiss all but one of the state's Section 1 and 2 Sherman Act claims); Complaint, *California v. Amazon.com Inc.*, Docket No. (Cal. Super. Ct. Sept. 14, 2022) (alleging price parity policies are anticompetitive); Complaint, *District of Columbia v. Amazon.com Inc.*, Docket No. 2021 CA 001775 B (May 25, 2021) (same); Complaint, *Texas v. Google LLC*, Docket No. 1:21-cv-06841 (S.D.N.Y. Aug. 13, 2021) (alleging Google has monopolized digital advertising); Complaint, In re: Google Digital Advertising Antitrust Litigation, Docket No. 1:21-md-03010-PKC (S.D.N.Y. Aug. 12, 2021) (same); Complaint, In re: Google Play Store Antitrust Litigation, Docket No. 3:21-md-02981) (N.D. Cal. Feb. 5, 2021) (alleging Google monopolized app distribution); Complaint, *New York v. Meta Platforms Inc.*, Docket No. 1:20-cv-03589-JEB (D.D.C. Dec. 9, 2020) (alleging Facebook monopolized social media through acquisitions and conduct).

34 *Epic Games Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1033 (N.D. Cal., 2021) (video-game maker Epic alleging that Apple imposed a series of anticompetitive restraints and engaged in anticompetitive practices in its app store to monopolize the markets for app distribution and in-app payment solutions). The market was instead defined by the court as that for "mobile gaming transactions." The Northern District of California found that Apple's rules did not violate Section 1 or Section 2 of the Sherman Act but did violate state unfair competition law. Ibid. Appeals are pending before the Court of Appeals for the 9th Circuit.

35 A multisided platform offers distinct products or services to different groups who depend on the platform to intermediate between them. The more common term of a "two-sided" platform may be a misnomer in the context of many of these businesses, which involve not only consumers and advertisers (the typically referenced two "sides") but also other sides, such as developers of apps and other third-party services and publishers of advertising, each of which interoperate with the platform. See, for instance, *Ohio v. Am. Express Co.*, 138 S. Ct. p. 2280 (defining a "two-sided platform" as "offer[ing] different products or services to two different groups who both depend on the platform to intermediate between them.").

36 Amended Complaint, *U.S. Dep't of Just. v. Google LLC.*, No. 1:20-cv-03010 at 3 (D.D.C. Jan. 15, 2021). This is consistent with international cases, which have similarly defined separate markets for "online search" and various types of "search advertising." See European Commission "Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising," Press release, March 20, 2019.

37 This market definition was preliminarily accepted by the court, in decisions responding to two initial motions to dismiss by Facebook. *FTC v. Facebook Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022); FTC v. Facebook Inc., 560 F. Supp. 3d 1 (D.D.C. 2021).

38 Substitute Am. Compl., ¶10, *FTC v. Facebook Inc.*, No.: 1:20-cv-03590-JEB (D.D.C. Sept. 8, 2021).

39 *Times–Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953); *Loraine Journal Co. v. United States*, 342 U.S. 143 (1951).

40 *Ohio v. Am. Express Co.*, 138 S. Ct., p. 2286 (distinguishing newspaper markets from the credit-card platform at stake in the case, as newspapers have "weak indirect network effects" and behave "much like a one-sided market.").

41 David S. Evans, "The Antitrust Economics of Multi-Sided Platform Markets," *Yale Journal on Regulation* 20 (2003): 320, 334–35.

42 Complaint, *Utah v. Google LLC*, Docket No. 3:21-cv-05227 (N.D. Cal. Jul 07, 2021); *Epic Games Inc. v. Apple Inc.*, 559 F. Supp. 3d 898 (N.D. Cal., 2021).

43 Nancy L. Rose and Jonathan Sallet, "Ohio v. American Express: The Exception That Should Not Become a Rule," *Antitrust* 36 (3) (2022): 76, 80 (describing scenarios with potentially varying effects on users on distinct sides of a multisided platform).

44 559 F. Supp. 3d, p. 898.

45 Ibid.

46 Ibid., p. 1002 (finding of fact) and p. 1038 (accepting two justifications in law). But see Erika M. Douglas, "Data Privacy as a Procompetitive Justification: Antitrust Law and Economic Analysis," Notre Dame Law Review 97 (5) (2022): 430 (examining whether it was correct in law to recognize these justifications in *Epic. v. Apple* and arguing that privacy protections are cognizable as a justification in antitrust law only if those protections also have procompetitive effects).

47 Ibid.

48 The markets are related in that apps are designed to work only with specific mobile operating systems. Devices that use Apple's operating system cannot, for example, download or use apps designed for the Google Android operating system (or vice versa) due to technological differentiation.

49 *United States v. Topco Assocs. Inc*., 405 U.S. 596, 597 (1972) (alleging unlawful restraint of trade under 15 U.S.C.A. § 1).

50 Ibid., p. 598.

51 Ibid., p. 601.

52 Ibid., pp. 603–4 (challenging Topco's prohibition on member wholesaling of Topco products. Members could seek permission to engage in wholesale sales, but permission had to be granted by the other members. Such permission was often sought but always denied.).

53 Ibid., p. 605.

54 Ibid.

55 See *Topco* (District Court), 319 F. Supp., p. 1043 (finding that whatever the anticompetitive effect of the practices, it is "far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories.").

56 *Topco*, 405 U.S., p. 612.

57 *Northern Pacific R. Co. v. United States*, 356 U.S. 1, p. 5 (1958).

58 The existence of a justification may also influence the court in its initial choice to apply the rule of reason standard rather than the *per se* rule. John M. Newman, "Procompetitive Justifications in Antitrust Law," *Indiana Law Journal* 94 (2) (2019): 501, 506–508 (discussing the "two fold role" justifications play, in that the presence or absence of a plausible justification may influence the court's initial choice to apply the rule of reason or the *per se* rule, and then again in consideration of the justification under the rule of reason, if applied).

59 *Topco*, 405 U.S., p. 610.

60 Ibid. (citing *Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963)).

61 Ibid., p. 611–12.

62 *Topco*, 405 U.S., p. 609–10.

63 Ibid., p. 607 (quoting *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 2 L.Ed.2d 545 (1958)) (describing the utility of *per se* rules as "avoiding the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, *as well as related industries*.").

64 *Paladin Assocs., Inc. v. Mont. Power Co*., 328 F.3d p. 1145, p. 1157 n.11 (9th Cir. 2003) (noting the "Supreme Court's comment" in *Topco* on trading-off effects in different sectors of the economy and commenting that "perhaps that language from Topco is not controlling because it is a dictum or incomplete or obsolete").

65 *Rothery Storage & Van Co. v. Atlas Van Lines Inc*., 792 F.2d 210, pp. 226-229 (D.C. Cir. 1986) (tracing the development of the law on horizontal restraints to find that *Topco* would now likely be evaluated under the rule of reason (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc*., 441 U.S. 1 (1979), *National Collegiate Athletic Association v. Board of Regents*, 468 U.S. 85 (1984), and *Northern Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co*., 472 U.S. 284 (1985)).

66 *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

67 This doctrine is often traced back to commentary in *United States v. Addyston Pipe & Steel Co*., 85 E 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899), but emerged in a more explicit way only more recently. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 203, 130 S. Ct. 2201, 2216, 176 L. Ed. 2d 947 (2010) ("When 'restraints on competition are essential if the product is to be available at all,' per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.") (citing *NCAA*, 468 U.S., p. 101); *Texaco Inc. v. Dagher*, 547 U.S. p. 7 (the "[ancillary restraints] doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities,"); *Broad. Music, Inc. v. Columbia Broad. Sys. Inc*., 441 U.S. 1, 21 (1979) (finding the impugned restraint ancillary as "a necessary consequence of the integration necessary to achieve the[] efficiencies" of the agreement); *Nat'l Soc. of Pro. Engineers v. United States*, 435 U.S. 679, 689 (1978) (implying the existence of an ancillary restraints doctrine by describing the rule of reason as "a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction"). See Thomas A. Piraino Jr., "The Antitrust Analysis of Joint Ventures After The Supreme Court's Dagher Decision," *Emory Law Journal* 57 (4) (2008): 735, 744 (tracing the emergence of the ancillary restraints doctrine in cases since *Topco*, from around 1979 onward).

68 U.S. Department of Justice and Federal Trade Commission, "Antitrust Guidelines for Collaborations Among Competitors," § 1.2 at 4 (2000) ("Agreements not challenged as per se illegal are analyzed under the rule of reason to determine their overall competitive effect. These include agreements of a type that otherwise might be considered per se illegal, provided they are reasonably related to, and reasonably necessary to achieve procompetitive benefits from, an efficiency-enhancing integration of economic activity.").

69 Piraino Jr., "The Antitrust Analysis of Joint Ventures After The Supreme Court's Dagher Decision," pp. 745–47 (observing a lack of clear and consistent means to distinguish which restraints are considered "ancillary"); Gregory J. Werden, "The Ancillary Restraints Doctrine after Dagher," *The Sedona Conference Journal* 8 (2007): 17, 21–24 (describing the different articulations of the law on how to determine which restraints are ancillary or core to a joint venture, and of the law applied to evaluate ancillary restraints once identified).

70 *Topco*, 405 U.S., p. 613 (Burger, C.J., dissenting); *United States v. Topco Assocs. Inc*., 319 F. Supp. 1031, 1038 (N.D. Ill. 1970), rev'd, 405 U.S. 596 (1972) (finding that Topco's territorial restraints improved competition with other supermarkets and were "ancillary and subordinate to the fulfillment of the legitimate, procompetitive purpose of the Topco cooperative, reasonable and in the public interest.").

71 *Topco*, 405 U.S., pp. 623–24 (Burger, C.J., dissenting).

72 *Topco*, 405 U.S., pp. 610–612 (insisting that the impugned restraints deny Topco members "the right to ascertain for itself" which type of competition is more desirable, and that the freedom of both is guaranteed). Though *GTE Sylvania* involved vertical restraints rather than *Topco's* horizontal restraints—an important distinction—the *Sylvania* decision still seems to lessen the force of *Topco's* insistence that same-brand competition must be preserved to the same extent as cross-brand competition. Topco was a cooperative composed of and controlled by horizontal competitors, which, in effect, imposed restrictions on each other. *GTE Sylvania Inc*., 433 U.S., p. 38 (describing the vertical nature of the restraints, imposed by a manufacturer on same-brand retailers); *Topco*, 405 U.S., p. 608 (finding the restraints in the case horizontal).

73 433 U.S. 36, 52 (1977).

74 Ibid.; See also *Leegin Creative Leather Prod. Inc. v. PSKS Inc*., 551 U.S. 877, 890 (2007) (The promotion of interbrand competition is important because the primary purpose of the antitrust laws is to protect [this type of] competition.) (internal quotation omitted); *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) ("Our analysis is also guided by our general view that the primary purpose of the antitrust laws is to protect interbrand competition." (citing *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 726 (1988)).

75 *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 103 (1984) ("a restraint in a limited aspect of a market may actually enhance marketwide competition.") (citing *Continental T.V. Inc. v. GTE Sylvania Inc*., 433 U.S. 36, 51–57, 97 S.Ct. 2549, 2558–2561, 53 L.Ed.2d 568 (1977)); Herbert Hovenkamp, "On The Meaning of Antitrust's Consumer Welfare Principle," *Faculty Scholarship at Penn Carey Law* 2152 (2020), available at https://scholarship.law.upenn.edu/faculty_scholarship/2152 (observing recent confusion and debate over the term "consumer welfare" but noting the common usage to refer to "the aggregate welfare of consumers as consumers, disregarding the welfare of producers.").

76 Milton Handler, "Twenty-Five Years of Antitrust," *Columbia Law Review* 73 (3) (1973): 415, 421-–2 (observing that this issue in *Topco* involved a single market "to wit, the retail distribution of food products.").

77 Ultimately, the district court came to its conclusion not on this justification, but rather at the final weighing step in the analysis, finding the effects of increasing competition with national chains "far outweighed" the reduction in competition from the territorial division. *Topco*, 319 F. Supp., pp. 1042–43.

78 If anything, cross-market justifications could have been an issue on the second count, and then only if the Supreme Court applied the rule of reason. This count challenged Topco's prohibition on member wholesaling of its private-label products.

79 *Topco*, 405 U.S., p. 612 (citing *Philadelphia Nat'l Bank*, 374 U.S., p. 371).

80 15 U.S.C. § 18.

81 *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962) ("it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition"); Robert Pitofsky, "Proposals for Revised United States Merger Enforcement in a Global Economy," *Georgetown Law Journal* 81 (2) (1992–1993): 195, 246 (The key language in the Clayton Act describing impermissible mergers "refers to anticompetitive effects 'in any line of commerce ... in any section of the country'"; clear indication that Congress intended that the effects of mergers be judged in single markets.); Areeda and Hovenkamp, *Antitrust Law*, ¶972a (similarly finding that "An acquisition is declared to be unlawful if it has the requisite anticompetitive effects 'in any line of commerce in any section of the country.' The statute thus plainly contemplates that mergers may involve more than one market, *yet it bases legality on a separate market-by-market appraisal*."); But see also Gregory J. Werden, "Cross-Market Balancing of Competitive Effects: What Is the Law, and What Should It Be?" *The Journal of Corporation Law* 43 (1) (2017): 119, 122 (challenging the common view of *Philadelphia National Bank* as barring cross-market efficiencies as a misreading of the case).

82 *Philadelphia. Nat'l Bank*, 374 U.S., p. 371. The decision also articulated a second basis for rejecting the defendant's justification claims, that "[i]f anticompetitive effects in one market could be justified by pro-competitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader." (p. 370).

83 *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (finding that "no authority has squarely addressed" the law of out-of-market effects); *NCAA v. Alston* (9th Cir.) (Smith, J., concurring) (observing that neither the 9th Circuit nor the Supreme Court has "squarely addressed" the legality of cross-market justifications) *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

84 *NCAA v. Alston* (9th Cir.) 958 F.3d, p. 1257 n. 14, *aff'd sub nom. Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021). Some lower courts have found the law against crediting cross-market justifications to be more concrete; see cases cited at note 20, *supra*.

85 *NCAA v. Alston* (9th Cir.) 958 F.3d, P. 1257, R. 14; *Sullivan*, 34 F.3d, p. 1112 (nearing a tentative statement of the law, acknowledging "arguably" that the "closely related" effects in the two football markets of the case are such that the procompetitive effects and anticompetitive harms could be compared, but finding no need to enter the "dangerous waters" of deciding this law to resolve the dispute before the court); *King Drug Co. of Florence Inc. v. Smithkline Beecham Corp*., 791 F.3d 388, 410 n.34 (3d Cir. 2015) ("It may also be (*though we do not decide*) that 'procompetitive effects in one market cannot justify anticompetitive effects in a separate market'" (quoting Brief for Nat'l Ass'n Chain Drug Stores Amici Curiae Supporting Appellants, *King Drug Co. of Florence Inc. v. Smithkline Beecham Corp*., 791 F.3d 388 (2015) (No. 14-1243) and citing Topco (emphasis added)); *Paladin Assocs., Inc*., 328 F.3d, p. 1157 n.11 (9th Cir. 2003) (considering "perhaps that language from Topco is not controlling because it is a dictum or incomplete or obsolete or because the case of such closely related markets as those for transport of natural gas and the natural gas itself might be distinguished," but deciding "[i]n any event, *we need not and do not reach this issue* on the permissible bounds of rule of reason inquiry"(emphasis added)). But see also a Court of Appeals for the 3rd Circuit dissent that finds clarity in the law where others do not in *Larry V. Muko, Inc. v. Sw. Pa. Bldg. & Constr. Trades Council*, 670 F.2d 421, 439 (3d Cir. 1982) (Sloviter, J., dissenting) ("antitrust cases have always rejected the premise that a procompetitive effect in one market will excuse an anticompetitive effect in another." (citing *United States v. Topco Assocs., Inc*., 405 U.S. 596, 609–11 (1972)).

86 *Ohio v. American Express Co*., 138 S. Ct. 2274 (2018).

87 In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (N.D. Cal. 2019), *aff'd*, 958 F.3d 1239 (9th Cir. 2020), aff'd sub nom. *Nat'l Collegiate Athletic Ass'n v. Alston*, 210 L. Ed. 2d 314, 141 S. Ct. 2141 (2021) [hereinafter *NCAA v. Alston* (District Court)].

88 *Epic v. Apple* , 559 F. Supp. 3d, p. 898.

89 *NCAA v. Alston* (District Court), 375 F. Supp. 3d, p. 1091.

90 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1260 (affirming the district court findings on justification); *NCAA v. Alston* (District Court) 375 F. Supp. 3d, p. 1082–83 (accepting the NCAA justification for its the restraint on athletic performance compensation only).

91 Ibid., pp. 1067–70 (district court finding that the NCAA's limits on athlete compensation "produce significant anticompetitive effects" in the market for student-athlete labor).

92 Ibid., pp. 1082–83 (accepting the NCAA justification for its restraint on athletic performance compensation only).

93 Ibid., p. 1082. The NCAA argued three justifications, but only this one was accepted by the District Court.

94 Ibid., p. 1097.

95 *NCAA v. Alston* (9th Cir.), 958 F.3d., p. 1266.

96 See further discussion of these objections and Judge Smith's concurrence, *infra*.

97 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1269–71 (Smith, J., concurring). Judge Smith is using the term "justification" here to mean "rationale" rather than justification as the term is used in this chapter.

98 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2155 (2021) ("the parties before us do not pursue this line.").

99 Ibid., p. 2152 ("Admittedly, this asserted benefit accrues to consumers in the NCAA's seller-side consumer market rather than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so."); Ibid., p. 2155. ("Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the consumer market.").

100 Ibid., p. 2155 (observing that *amici* argue "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off" sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. ... But the parties before us do not pursue this line." (citing Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12)).

101 Ibid., p. 2152 (district court finding that the NCAA's limits on athlete compensation "produce significant anticompetitive effects" in the market for student-athlete labor). In his concurrence with the Supreme Court decision, Justice Kavanaugh doubts the credibility of the NCAA's amateurism justification, but based on its circularity rather than its out-of-market nature. The NCAA, he says, "asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA, is that the student athletes are not paid. In my view, that argument is circular and unpersuasive." Ibid., p. 2167 (Kavanaugh, J. concurring).

102 *Epic Games Inc. v. Apple Inc*., 559 F. Supp. 3d, pp. 1038–40.

103 Ibid., p. 1038.

104 Ibid.

105 Ibid., pp. 1038–39.

106 For a discussion of the cognizability of privacy protections as a justification, see Erika M. Douglas, "Data Privacy as a Procompetitive Justification: Antitrust Law and Economic Analysis," *Notre Dame Law Review* 97 (5) (2022): 430 (arguing that privacy protections are cognizable as a justification in antitrust law only if those protections also have procompetitive effects).

107 34 F.3d, p. 1111 n.9.

108 Ibid.

109 See lower court cases cited at note 20.

110 138 S. Ct. 2274 (2018). See *Sullivan*, 34 F.3d, pp. 1112–13. After canvasing the mixed law on cross-market justifications, *Sullivan* declines to decide what the law is and proceeds to credit justifications from out of market, convoluting its analysis to find the effects "indirectly" related to the market at issue (and thereby considered in-market and credited).

111 *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018). The initial claim was against other credit card companies as well, but the other defendants settled.

112 Ibid., p. 2283.

113 Ibid.

114 Ibid.

115 *United States v. Am. Exp. Co*., 88 F. Supp. 3d 143, 229 (E.D.N.Y. 2015), rev'd and remanded *United States v. Am. Express Co.*, 838 F.3d 179, 229-230 (2d Cir. 2016), aff'd sub nom. *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018).

116 Ibid., p. 225. The second justification, which the court rejected, was in-market and so it is not addressed here. American Express claimed its rules prevented merchants from "free-riding" on its investments in merchant and cardholder value propositions.

117 Ibid., p. 229.

118 Ibid.

119 Ibid. The district court mentions only the 2nd Circuit in its conclusion and does not consider whether the law of any other circuit court is potentially relevant.

120 Ibid., pp. 229–30.

121 Ibid.

122 *United States v. Am. Express Co*., 838 F.3d 179, 206-07 (2d Cir. 2016), aff'd sub nom. *Ohio v. Am. Express Co*., 138 S. Ct. 2274 (2018).

123 *United States v. Am. Exp. Co*., 88 F. Supp. 3d p. 143, pp. 151-52 (E.D.N.Y. 2015), rev'd and remanded *United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016). The Supreme Court dissent also endorsed this approach in *Ohio v. Am. Express Co*., 138 S. Ct., p. 2295 (Breyer, J., dissenting).

124 *United States v. Am. Express Co*., 838 F.3d, p. 200; *Ohio v. Am. Express Co.,* 138 S. Ct, p. 2287.

125 *Ohio v. Am. Express Co*., 138 S. Ct., p. 2287 (noting plaintiffs failed to carry their burden by "wrongly" focusing on "only one side [the merchant side] of the two-sided credit-card market).

126 Ibid., p. 2288.

127 Steven C. Salop and others, "Rebuilding Platform Antitrust: Moving on from Ohio v. American Express," *Georgetown Law Faculty Publications and Other Works* 2414 (2022), available at https://scholarship.law.georgetown.edu/facpub/2414 (noting the Supreme Court's "tortured analysis [in *Ohio v. Am. Express Co.*] has left courts, agencies, and businesses with a host of puzzles; triggered a flurry of scholarship and commentary, mostly very critical, and invited a flurry of ill-conceived litigation arguments.").

128 U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010), p. 7 ("Market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or a corresponding non-price change such as a reduction in product quality or service. The responsive actions of suppliers are also important in competitive analysis.").

129 Michael Katz and Jonathan Sallet, "Multisided Markets and Antitrust Enforcement," *Yale Law Journal* 127 (2018): 2142, 2158 (observing that the "single-market approach" may fail "to accurately account for product substitution and competitive conditions in multisided platform industries.").

130 Salop and others, "Rebuilding Platform Antitrust," p. 19.

131 Ibid., pp. 24-27 (contrasting the approach of the court in *Ohio v. Am. Express Co*. with a cross-market justification analysis).

132 Ibid., pp. 19–20.

133 Ibid., p. 27 (suggesting that "[i]nstead of the Court's mangled approach of defining a single two-sided platform market, we propose that it makes more sense to balance cross-platform harms and benefits experienced by consumers on the two sides of the platform, defined as two separate markets.").

134 Werden, "Cross-Market Balancing of Competitive Effects," p. 122 ("If the delineation of the relevant market determines which effects of a merger are considered in determining its legality, a court might delineate the relevant market in a manner designed primarily to avoid constraint from the any-market rule.").

135 *Ohio v. Am. Express Co*., 138 S. Ct., p. 2303 (Breyer, J., dissenting).

136 Ibid. (Breyer notes that the district court found "no such effects" in the shopper market).

137 Ibid.

138 Ibid. (citing *United States v. Topco Associates Inc*., 405 U.S., p. 611) (distinguishing vertical price-fixing cases from the allegations in *Ohio v. Am. Express Co*.).

139 Salop and others, "Rebuilding Platform Antitrust," p. 24 (citing Breyer's dissent as "a basis for thinking that [the rule against cross-market justifications] applies also in conduct cases," but acknowledging "the Supreme Court has not been entirely clear").

140 *United States v. Sabre Corp*., 452 F. Supp. 3d 97 (D. Del. 2020) (refusing to enjoin the acquisition of Farelogix by Sabre as Farelogix competed only with one "side" of the Sabre platform. Farelogix sold to travel agencies, while Sabre interacted with both sides (travel agencies and airlines) and, per *Ohio v. Am. Express Co*., two-sided platforms can "only" compete with other two-sided platforms. This conclusion on competition was drawn despite a "preponderance of the evidence" showing that Farelogix was a competitor to Sabre.).

141 Alexander and Salop, "Antitrust Worker Protections," pp. 20–22 (observing, similarly, that the law on cross-market justifications in nonmerger cases has not been clearly decided but explaining that there is a "path to adoption" in prior law to construct such a rule).

142 435 U.S. 679, 688 (1978) (citing 21 Cong. Rec. 2456 (1890) (comments of Sen. Sherman)).

143 See text accompanying notes 65–75 (discussing post-Topco developments in the rule of reason).

144 *Alston* (9th Cir.), 958 F.3d, p. 1271 (Smith, J. concurring) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by Congress and not by private forces or by the courts. (citing *Topco*, 405 U.S., p. 611)). Judge Smith's concurrence in *Alston* also links this concern to administrability, as courts cannot simply "net … out" the effects in one market against those in another, finding no defensible method for courts to do so. Ibid.

145 At times, justiciability has also been raised as a reason for a bar on cross-market justifications. See Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondents at 11, *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021).

146 *Topco*, 405 U.S., pp. 611–612.

147 *NCAA v. Alston* (9th Cir.) (Smith, J. concurring) ("Realistically, the Rule of Reason analysis is judicially administrable only if it is confined to the single market identified from the outset.").

148 Baker, *The Antitrust Paradigm*, pp. 191–92 ("once the analysis extends beyond the market in which harm is alleged, there may be no principled stopping point short of undertaking what is unrealistic if not impossible: a general equilibrium analysis of harms and benefits throughout the entire economy.").

149 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1270 (Smith, J. concurring).

150 *Topco*, 405 U.S., p. 610.

151 *NCAA v. Alston* (9th Cir.), 958 F.3d, p. 1267 (Smith, J. concurring) ("The Sherman Act and related antitrust laws were designed to preserve our economic freedom." (citing Topco, 405 U.S., p. 610)). A more specific but less commonly articulated version of this argument goes further, arguing that if courts choose among markets, that is likely to exacerbate longstanding inequality between consumers and other groups (such as labor). Tatos and Singer, "The Abuse of Offsets as Procompetitive Justification."

152 *Topco*, 405 U.S. 622 (Burger, C.J., dissenting).

153 *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct., p. 2160 (quoting *Ohio v. Am. Express Co*., 138 S. Ct., p. 2284); *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238 (1918) ("[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

154 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61(1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition; proof of actual detrimental effect, such as a reduction in output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effect." (internal quotes omitted)).

155 Salop and others, "Rebuilding Platform Antitrust," p. 25 (observing that ignoring effects on some consumers could "lead the court to condemn conduct that is beneficial to consumers in some overall sense"). This chapter examines only the justifications stage of the rule-of-reason analysis. Other commentators have observed that, should the analysis proceed to the final balancing step in the rule of reason, the varying nature of the in- and out-of-market effects may present challenges in assessing incommensurable harms. See Alexander and Salop, "Antitrust Worker Protections." The Supreme Court also noted this potential concern in *dicta* in *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct., p. 2155 (citing Brief for American Antitrust Institute as *Amicus Curiae* 3, 11–12)).

156 Baker, *The Antitrust Paradigm*, pp. 192–93 (supporting cross-market justifications analysis narrowly when "it is evident from a qualitative comparison that harmful competition in one market is small while the benefit to competition in another market is vastly greater and there is no practical way to obtain the benefits without accepting the harms"); Areeda and Hovenkamp, *Antitrust Law*, ¶ 972 (generally supporting a bar on out-of-market effects for "statutory, administrative, and practical reasons" but excepting "rare" cases, such as when anticompetitive effects in one market are small in proportion to the procompetitive gains in another market); Salop and others, "Rebuilding Platform Antitrust," p. 28.

157 U.S. Department of Justice and Federal Trade Commission, "Horizontal Merger Guidelines" (2010), n. 14 ("The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s).").

158 Ibid.

159 Ibid.

160 *Paladin Assocs. v. Mont. Power Co.*, 328 F.3d 1145, 1157 n.11 (9th Cir. 2003).

161 Ibid. (declining to decide the law on cross-market justifications because the in-market procompetitive benefits were so significant that no cross-market justifications need be considered to decide the case).

162 *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (emphasis added).

Reviving intent in digital platform cases under Section 2 of the Sherman Act

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Overview

The dominance of today's largest digital platforms is staggering.[1] This raises questions about the ability of U.S. antitrust law to constrain these platforms' exploitation of their market power to distort competition.[2] As it is currently applied, Section 2 of the Sherman Act[3]—which condemns "every person who shall monopolize"—indeed may not be up to that task.[4]

One reason is that implementation of that section of the law, and of U.S. antitrust law in general, has evolved into a strict economic approach that seemingly demands or expects quantitative evidence to demonstrate anticompetitive effect, a prerequisite to establishing a violation. This strong focus on quantifying harm results in problems of proof for the antitrust enforcement agencies and private plaintiffs alike in all cases, except those involving the simplest of goods markets, because the datasets necessary for analysis are sometimes unavailable, incomplete, flawed, or simply too costly and difficult to obtain and process.

The problems are exacerbated when monopolization claims implicate markets with rapidly changing technologies, especially those involving the major digital platforms. That is because firms compete more on innovation than on price in those markets, and the main risk of harm from the foreclosure of competition is reduced innovation in the long run, with costly consequences for long-term U.S. economic growth and prosperity. But innovation and other nonprice harms often defy quantification.

Further enhancing the difficulties is the business model used by some digital platforms, such as Meta Platforms Inc.'s Facebook unit and Alphabet Inc.'s Google unit, both of which do not charge a monetary price on the consumer-facing side of their platforms. Quantifying consumer harm under this type of business model is an uphill battle. Furthermore, certain distinct characteristics of many digital platforms—substantial network effects (economic parlance for the greater value consumers inherently derive from a platform as the platform's user base grows) and the centrality of big data and scale—tend to generate efficiencies and other benefits as well, all of which are equally difficult to quantify and balance against the harms.

Against this backdrop, this chapter argues that intent evidence is an additional useful analytical tool in Section 2 monopolization cases.[5] In this chapter, "intent" means a defendant's state of mind or motive (the desire or need that prompted its challenged action), the defendant's purpose in so acting (what it sought to accomplish), or the defendant's awareness of the act's probable anticompetitive consequences.

While embracing intent evidence is not a panacea, it can help overcome some of the problems inherent in an empirics-focused approach and improve antitrust enforcement,[6] particularly in digital platform markets. Knowledge of a dominant firm's motive and purpose for an act can help in three ways:

- Interpreting facts and predicting competitive consequences, which are often ambiguous
- Balancing anticompetitive and procompetitive effects, which are often incommensurable and unquantifiable
- Evaluating a dominant firm's justifications to determine if they are pretextual

Furthermore, this chapter makes the case that, contrary to some skeptics' assumptions, courts, juries, and antitrust enforcers are all competent to assess the reliability of intent evidence in antitrust matters. Fact-finders in our judicial and law enforcement systems are expected to, and routinely do, evaluate the reliability of intent evidence in many areas of the law. That task is no different in antitrust cases than in other cases, though the best criteria to guide the assessment may vary.

This chapter argues that, in antitrust cases, the following considerations may have particular importance when it comes to evaluating intent evidence:

- The existence and degree of any contradictory evidence
- The timing of the intent statement in relation to the alleged exclusionary act
- The context in which the intent statement was made and whether it was made in a setting that affects company decision-making

Some critics express strong objections to the use of intent evidence. But their assertions essentially go to the issue of the reliability of the evidence and do not merit an explicit or implicit skepticism of intent evidence. Overall, the objections are overstated in that the difficulty of assessing intent evidence is not unique to antitrust cases, and courts and juries are capable of making the requisite assessment, taking into account the circumstances distinct to antitrust.

In the pages that follow, I will begin with a brief discussion of the historical recognition of intent's probative value in earlier monopolization cases. Then, I will examine the substantial diminishment of its role when antitrust law evolved to take on a narrow, economic-focused approach beginning in the early 1980s. I will then explore the willingness of the court in *United States v. Microsoft Corp*. in 2001 to look to intent in the context of a complex monopolization case.[7]

Understanding this evolution clarifies that reviving the role of intent should not require legislative action or the judicial overruling of any major case. The use of intent evidence only calls for recognizing that a "norm" that developed and hardened as the application of antitrust law grew increasingly economic-oriented over the past four decades has become increasingly unworkable, at times unreliable, and in need of adjustment.

Evolution of the role of intent

The high-level objective of Section 2 of the Sherman Act is commonly understood to prohibit a firm with monopoly power from preserving or increasing that power by foreclosing rivals from competition, while permitting it to compete on the merits even if rivals are excluded as a result.[8] Under long-established legal doctrine, Section 2 requires proof of two elements: a defendant's monopoly power in a relevant market and its use of improper (or "exclusionary") conduct to attain, protect, or extend that power.[9] The rule later evolved to clarify that the conduct must have "anticompetitive effect"—that is, it must harm consumers and not merely one or more competitors.[10]

Intent is not and has never been a required element that must be proven under the Sherman Act, except in criminal antitrust cases[11] and attempted monopolization cases.[12] And, to be clear, I am not suggesting that it should be added as an element that must be proven in all other antitrust claims. Rather, my contention is that intent has probative value and should be considered in Section 2 analysis, as it was historically.

In this section of the chapter, I will demonstrate that intent was valued historically as a tool to help courts "interpret facts and predict consequences."[13] Though the role of intent has become greatly diminished since the early 1980s, and many critics now deride its use, some courts have continued to turn to intent in monopolization cases as a supplemental analytical tool, as seen in the 2001 decision in *United States v. Microsoft*.[14] Intent evidence also remains key to the analysis of "business justification," a defense which is available to defendants in all non *per se* antitrust cases.[15]

Relevance of intent historically

Although intent was not determinative of liability, it was the hallmark of many Sherman Act cases in the early years.[16] In his famous formulation of the rule of reason to determine liability in *Chicago Board of Trade v. United States*, U.S. Supreme Court Justice Louis Brandeis in 1918 expressly included intent as one of many factors to be considered under the test, "not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."[17] Under the law of unilateral refusals to deal, historically, a "purpose to create or maintain a monopoly" could create an exception to the general rule that any firm is free to choose with whom it will or will not deal.[18]

The emphasis on intent in pre-1980 monopolization cases was evident from the frequent use of the words "purpose" or "intent" in judicial opinions.[19] The Supreme Court, for example, spoke of the defendant's "intent and purpose" to improperly maintain its dominance to find an antitrust violation in its *Standard Oil Co. v. United States* ruling in 1911.[20] Also in 1911, in *American Tobacco Co. v. United States*, and then in 1948, in *United States v. Griffith*, the Supreme Court said that the power to exclude competitors, "coupled with the purpose or intent to exercise that power," was sufficient to find a monopolization offense.[21]

As recently as 1985, in A*spen Skiing Co. v. Aspen Highlands Skiing Corp*., another Section 2 case, the Supreme Court considered intent "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive,'"[22] or whether it was merely vigorous competition on the merits. Moreover, until the Supreme Court handed down its decision in *Matsushita Electronics Industrial Co. v. Zenith Radio Corp*. in 1986,[23] summary judgment was infrequently granted in antitrust cases precisely because intent evidence was deemed important, and that evidence is typically incomplete or cannot be evaluated in summary procedures.[24]

Diminishment of intent's role

Yet the role of intent in Section 2 analysis began to diminish substantially beginning in the late 1970s and early 1980s, when, under the influence of the Chicago School, economic efficiency became antitrust law's main objective and neoclassical economic (or price) theory the preferred analytical tool.[25] Under the price-theory approach, evaluating the competitive effects of an alleged exclusionary practice focused on whether the challenged conduct caused or would probably cause prices to increase above, or output to decrease below, competitive levels.[26]

During this time, antitrust law also turned strongly in favor of quantitative evidence and economic analytical tools. While antitrust law did not fully adopt the strict price-theory orientation advocated by orthodox Chicago School adherents and continued to consider nonprice harms as adverse competitive effects, the precepts of the Chicago School had a lasting effect. Because intent evidence is unmeasurable and unquantifiable, many came to consider it irrelevant,[27] or at least of little probative value, in antitrust matters.[28]

This skeptical view of intent was reflected in some judicial opinions, particularly from the U.S. Court of Appeals for the Seventh Circuit. In his 1989 *A.A. Poultry Farms v. Rose Acre Farms* decision—a Section 2 case alleging predatory pricing—Judge Frank Easterbrook declared that "[i]ntent does not help to separate competition from attempted monopolization"; that intent evidence was likely to be "misleading"; and that its use "both increases the costs of litigation and reduces the accuracy of decisions."[29]

Former Judge Richard Posner was similarly dismissive, stating in 1984, in *General Leaseways Inc. v. National Truck Leasing Association*, for example, that while "internal company documents used to show anticompetitive intent" may "sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect."[30] The U.S. Court of Appeals for the Ninth Circuit, in its 1996 *California Dental Association v. Federal Trade Commission* decision, likewise minimized the value of "ambiguous indications of intent," stating that they are "of no value to a court analyzing a restraint under the rule of reason."[31]

Objections to intent also were raised in legal and economic scholarship. The leading antitrust treatise by legal scholars Phillip Areeda and Herbert Hovenkamp, for example, asserted that "bad intent is easily proven but seldom serves to distinguish situations where the defendant's conduct deserves condemnation from those in which it should be left alone."[32] Other scholars have voiced similar criticisms.[33] If one were to focus primarily on pronouncements made in commentaries and in some cases such as these, then one might assume that there is no useful role for intent evidence in contemporary antitrust analysis. That is not, however, the reality.

Continued consideration of intent in *United States v. Microsoft*

A careful examination of *United States v. Microsoft*,[34] probably the most consequential Section 2 case in the United States over the past three decades, suggests that intent evidence played an important, albeit implicit, role in the judicial finding of Section 2 liability against Microsoft.[35] Although neither the U.S. Court of Appeals for the DC Circuit nor the district court before it explicitly relied on intent evidence, both opinions were replete with references to Microsoft's anticompetitive purpose and motives. Additionally, there was little or no quantitative evidence of the actual or probable effect of Microsoft's bad conduct. Thus, the *Microsoft* decision cannot be explained under a quantitative effects analysis alone.

To elaborate, the theory of the case against Microsoft was that it had an operating systems monopoly through its product, Windows, perceived a future threat to that monopoly from Netscape's browser, and proceeded to remove the Netscape browser threat by impeding its distribution and, thereby, its user growth.[36] Notably, Netscape's threat was merely nascent at the time. Its product, a browser, was not an operating system and also had not yet fully developed the capabilities of an operating system's critical functions,[37] without which it could not effectively threaten Windows' operating systems monopoly. Additionally, there was no demonstrable evidence that, but for Microsoft's interference, Netscape would have eventually developed those capabilities to the degree necessary to threaten Microsoft's operating systems monopoly.[38]

In short, though Microsoft's conduct had undoubtedly cut Netscape off from its most efficient means of distribution, empirical data and quantitative evidence of the effects—actual or probable—of that conduct were lacking. The Antitrust Division of the U.S. Department of Justice, for example, did not attempt to show through quantitative analysis that Microsoft's tactics prevented Netscape from reaching the critical mass of users necessary to operate at a minimum efficient scale[39] or that, but for Microsoft's conduct, Netscape's browser would have developed to the degree that would have fostered competition in the operating systems market.[40] There was also no quantifiable evidence of harm to consumers in the form of higher prices, lower output, or reduced quality or innovation.

Yet the U.S. Court of Appeals for the DC Circuit, sitting *en banc*, unanimously upheld the lower court's finding of Section 2 liability.[41] Both opinions described in detail Microsoft's anticompetitive purpose and motives, including numerous references to Bill Gates' perceptions of the serious threat the Netscape browser posed to Windows[42] and his thoughts on how that threat must be handled.[43] Both opinions also cited other senior Microsoft executives' expressions of fear that the Netscape browser was moving "in a direction that could diminish" the entry barriers protecting Microsoft's Windows monopoly,[44] as well as their concerns, expressed in numerous documents and statements, that if action was not taken to impede its growth, Netscape (and another promising product, the Java programing language) posed substantial future threats to the company's operating systems monopoly.[45]

These references, together with the finding of liability that could not have been based on a pure economic effects analysis, suggest that the appeals court must have relied, to some degree, on evidence of Microsoft's motives for its effects analysis. A lesson that can be drawn from the *Microsoft* case is that, at least in complex monopolization cases where economic measurement tools are not useful and quantitative evidence is lacking, some courts continue to implicitly take intent evidence into account in their analyses.[46]

The inadequacy of a strict economic effects analysis, particularly in digital platform markets

In theory, the doctrinal requirement that, to establish a prima facie case under Section 2, antitrust plaintiffs must demonstrate "exclusionary conduct" with anticompetitive effect[47]—in addition to monopoly power—does not seem to pose unusual problems of proof. In practice, however, to the extent that many courts focus on precise measurements of harm and expect quantitative evidence, the current effects analysis has resulted in substantial problems of proof for antitrust plaintiffs in all except the simplest price-centric goods markets.

These problems are intensified for markets marked by fast-changing technologies, where firms compete more on innovation than on price, because of the inherent difficulty of measuring and predicting risk of harm to innovation in these markets. They are especially pronounced when the alleged exclusion involves digital platforms with business models that do not involve the payment of a monetary price by users on the consumer-facing side of their digital platforms, such as Facebook or Google.

Additionally, the relationship between certain distinct characteristics of digital platforms—network effects and the centrality of scale and big data—tends to produce some efficiencies and other consumer benefits alongside potential competitive harms. These efficiencies and benefits also are hard to quantify, further highlighting the weaknesses of a pure economic effects analysis for these types of cases. In this section of the chapter, I look at why quantitative measurement tools alone can be insufficient in Section 2 cases, especially those involving digital platforms.

General problems of a quantitative-focused analysis

Proof of conduct with anticompetitive effects in a Section 2 case typically requires some demonstration that the challenged conduct has raised prices or decreased output, reduced quality, choice, or innovations, or will probably do so.[48] Even in cases involving ordinary goods markets, insisting that these harms be shown through hard metrics and quantitative evidence not only sets a very high bar for plaintiffs but also may not necessarily be reliable.

Why? First, nonprice dimensions of harms, such as quality, choice, or innovation, are real harms that are as important to consumer welfare as price or output harms.[49] But, being nonprice, these harms are not readily measurable or quantifiable. Expecting them to be demonstrated through methodologies that are ill-equipped for that task greatly increases a plaintiff's evidentiary burden and the risk of false negatives.

Second, sometimes even price or output harms can be difficult to prove with some degree of certainty when relying only on quantitative evidence. That is because the data needed for such analysis may be unavailable, incomplete, flawed, or simply too costly to obtain and process.[50] Additionally, some economic concepts, such as marginal costs, cannot be easily quantified.[51]

Direct proof of anticompetitive effects, of course, is not essential to establish Section 2 liability, and even conservative antitrust economists agree that adverse effects may be proven indirectly through substantial foreclosure of rivals.[52] Even so, an insistence on quantitative evidence can be burdensome and costly for plaintiffs.

For instance, where the economic theory of harm in a Section 2 case is foreclosure of a rival's access to a key input, indirect proof of effects based on quantitative evidence would generally require proof that the monopolist prevented an actual or potential rival from securing the volume of inputs necessary to operate at a minimum efficient scale.[53] But the data required to make this showing are seldom complete, without flaws, or readily available at a reasonable cost.

In short, the preferred quantitative analysis of effects will often fail to properly identify instances where a dominant firm's exclusion of a rival has indeed caused competitive harm, even when markets characterized by new and rapidly changly technologies (or high-technology markets) are not implicated.

Enhanced difficulties of proof in high-technology markets, particularly those served by major digital platforms

The problems of proof and other inadequacies of a quantitative analysis, just described, are enhanced when the challenged conduct concerns fast-moving technology markets. In these markets, the major dimension of competition among actual or potential rivals is innovation, not price, and assessing the competitive impact on innovation of any alleged exclusion through quantitative evidence is far more difficult than predicting price or output effects.[54]

The problems are greater still in digital platform markets where the business model does not involve users paying a monetary price on the consumer-facing side, such as Facebook and Google.[55] Moreover, many digital platform markets have certain distinct characteristics—substantial network effects, scale, and the centrality of big data—that combine to produce procompetitive benefits as well,[56] which are also hard to quantify and to measure against the harms. Let's examine each of these enhanced difficulties of proof in turn:

- Measuring risk of harm to innovation
- Showing harm when a product or service has no quantitative price on the consumer-facing side
- Measuring benefits and balancing effects in markets that feature substantial network effects and where scale and big data are central

Measuring risk of harm to innovation

In markets where success is mostly driven by rapid technological changes, the major competitive concern over an incumbent's foreclosure of rivals is more likely reduced innovation rather than higher prices or lower output.[57] Predicting or assessing long-run innovation harm is very difficult. As described by one commentator, it would require showing "first, a counterfactual inference that innovators would have invented new products but for the predatory conduct and, second, that those products would have been better or cheaper."[58]

Furthermore, where innovation competition is key to success, a monopolist has strong incentives to exclude a nascent rival while the potential rival's novel technology or product is in the early stages of development, as was the case in *Microsoft*. In those circumstances, the magnitude of the potential competitive harm from exclusion can be great because the market has lost the promise of a future rival that could disrupt the incumbent's dominance, were the rival allowed to develop to its full potential.

Yet a conventional economic effects analysis would likely find no consumer harm, precisely because the nascent technology or product was unproven when it was quashed by the monopolist's bad conduct, and there therefore would be little or no quantitative evidence of harmful effects. A methodology that, if strictly applied, would almost always fail to demonstrate anticompetitive effect so long as the monopolist expelled a rival early on is clearly deficient.

Showing harm when a product or service has no quantitative price on the consumer-facing side

A quantitative effects analysis is even more ineffectual where the business model of a digital platform does not involve the payment of a monetary price on the consumer-facing side, but rather the medium of "payment" is personal data and attention.[59] Consumers do not pay Google, for instance, a monetary price to search the internet on its search engine. They "pay" instead with the personal data left behind from their search queries. Access to those data and to users' attention allows digital advertisers to generate targeted advertisements for each individual user, and the advertisers pay Google for the opportunity to do so.

In digital platform markets that follow this business model, a quantitative price metric is not a meaningful tool for gauging the consumer effect of any reduced competition due to exclusion. Because there is no monetary price, there obviously is no monetary price impact. But the absence of a monetary price increase is not necessarily equivalent to an absence of any negative competitive impact.[60]

There are at least three reasons why. First, as some scholars have pointed out, less competition may result in consumers having to surrender more personal data or receive less content/value in exchange for their data than would have happened in a more competitive market.[61] Second, economic theory suggests that without the pressure of competition, dominant incumbents have less incentive to innovate or to perform their best in the long run, leading to consumer harm.[62] Third, reduced competition can cause consumers to lose choice and the opportunity to benefit from potential innovations of new companies that have difficulty entering the market or scaling up.

An appropriate effects analysis, then, should consider all of these potential harms. But the current practice of expecting or strongly favoring quantitative evidence makes such an analysis virtually impossible because, quite simply, these harms cannot be easily quantified or even measured.

Measuring benefits and balancing effects in markets that feature substantial network effects and where scale and big data are central

The relationship between three characteristics of many digital platform markets—network effects, big data, and scale—can generate consumer benefits, as well as provide conditions that an incumbent can easily exploit to exclude actual or potential rivals.[63] Just as the anticompetitive effects of exclusionary conduct are particularly hard to quantify in digital platform markets, the same is also true for potential competitive benefits. Furthermore, the task of balancing harms against benefits, often both present in these markets, is equally difficult because the good and bad effects are both unquantifiable and incommensurable.

A social network, such as Facebook, is a perfect example of such a market. Facebook enjoys substantial network effects and benefits from scale and big data. A market is said to be characterized by "direct" network effects if its users derive greater value from the provider's product or service as the user base increases[64] and by "indirect" network effects if the value to users increases because of third parties' development of additional compatible products.[65] Facebook users benefit more from the social network as more users join because that gives them a larger pool of potential social connections (direct network effects). The larger Facebook's user base grows, the more it draws third-party developers to create apps compatible with the social network, generating even more value for Facebook users (indirect network effects). Scale, therefore, is also a feature of these markets that can generate benefits.

Big data is typically central in these markets, and it magnifies the impact of network effects.[66] Broadly (and in this context), big data refers to detailed personal data left behind by consumers' use of a platform, which is very valuable to the platform.[67] Such data can allow a platform to better anticipate and satisfy its users' needs, which is a consumer benefit.

The relationship between network effects, scale, and the centrality of big data, therefore, can generate considerable consumer benefits by providing economies and other efficiency advantages.[68] Quantifying the efficiencies and other benefits, however, is often as difficult as quantifying anticompetitive harms. Because legal analysis of effects must consider consumer benefits, as well as competitive harms, the difficulty of quantifying potential benefits adds to the difficulty of a narrow approach that focuses heavily on quantitative analysis.

Furthermore, the same characteristics of a digital platform that can generate benefits may also be exploited by a dominant platform seeking to foreclose competition and maintain its market power.[69] While an incumbent can use big data to better serve its users, for instance, a widening data advantage held by a dominant platform over its actual or potential rivals can also entrench the incumbent's market power. Additionally, because of the natural benefits of network effects, incumbents can more easily use exclusionary techniques, such as tying, refusals to deal, or exclusive contracts, to preserve their dominance. Denying an existing or nascent competitor access to customers or to key inputs, for example, can prevent the rival from achieving the scale necessary to have a reasonable opportunity of success.[70] This, in turn, would fortify the incumbent's shield from competition that comes from network effects.

That was essentially the basis of a core theory of harm in *Microsoft*. Microsoft blocked Netscape's access to the most efficient distribution channels for its browser. That prevented the browser from reaching the scale needed to grow to its full potential, which could have led to the introduction of competition in the operating systems market.

This also is one of the allegations in the Federal Trade Commission's pending monopolization case against Facebook.[71] Facebook is alleged to have terminated a few potential rivals' access to the technical information necessary to interconnect with Facebook's users.[72] That, in turn, prevented these competitors from gaining the scale needed to potentially evolve into a competitive threat to Facebook. Denial of access to customers or inputs as an exclusionary strategy, of course, is not unique to platforms, but network effects enhance the competitive impact of such conduct and facilitate its use.

Moreover, in markets with network effects, the dominant firm has particular incentives to oust a fringe or potential rival before the rival's product is fully developed. In that case, proof of harm through quantitative evidence is close to impossible because the harmful effect is merely anticipated.

In short, in digital platform markets where network effects are substantial, and scale and big data play an important role, it may be particularly unclear whether a dominant firm's strategy has anticompetitive or efficiency effects—or, most likely, both. In that case, expecting or strongly preferring a quantitative analysis of effects is unrealistic.

Intent as a useful additional analytical tool

Antitrust law instead should turn to intent evidence as an additional analytical tool. As the U.S. Supreme Court recognized long ago, intent evidence has significant value in antitrust cases because it "may help the court to interpret facts and to predict consequences."[73] It can also assist in the task of balancing harms and benefits where both effects are present. Additionally, it is useful in assessing business justifications that defendants routinely offer in Section 2 cases.[74] Let's look in turn at each of these ways that intent evidence can assist in antitrust analysis.

Interpreting facts and predicting competitive consequences

In cases alleging exclusion by a dominant firm, there are usually two competing theories or explanations offered—one procompetitive and the other anticompetitive. For the reasons mentioned earlier, the choice between the two stories, in most cases, cannot be made based on economic theory and empirical data alone. Intent evidence could aid in the analysis because it can help clarify otherwise-ambiguous strategies taken by a dominant firm and predict their competitive effects. That could, in turn, inform the decision-maker's judgment on the relative plausibility of the two sides' competing stories.

Intent evidence is probative because it is reasonable to assume that firms, particularly dominant incumbents, understand better than anyone else the market in which they operate, including where their strongest competitive threats lie and the likely competitive consequences of their strategies.[75] Thus, if a strategy is anticompetitively motivated, it is usually safe to assume that the strategy has (or will have) anticompetitive impact, despite the absence of quantifiable evidence of such effects. In contrast, if the same ambiguous strategy was implemented for a competitive purpose, we can reasonably assume, for the same reason, that the likely effect is procompetitive, even though there may be no clear evidence of that yet.

For instance, assume that a dominant platform acquires a promising start-up firm in an adjacent market.[76] The anticompetitive story is likely that the transaction would nip a competitive threat in the bud and remove a potential future threat to the dominant platform.[77] The competing procompetitive story may be that the acquisition would enable the dominant platform to incorporate new features or technologies into its own product and thus improve it more quickly and at lower costs than it could have done otherwise, thereby benefiting its users. Quantitative evidence is unlikely to be available to sufficiently support either theory.

Suppose, however, that internal emails show the executives at the dominant firm discussing, before the acquisition, their beliefs about why and how the acquisition target, though not a present competitor, could develop into a formidable future competitive threat. And then, the emails show that the executives further debate paying a premium to acquire the target if necessary. In that case, these emails have value as intent evidence to help a fact-finder choose exclusion of a nascent rival as the more plausible explanation for the acquisition.

What's more, the evidence would support a prediction that foreclosure of competition in the dominant platform's market is the likely consequence of the acquisition. Because dominant firms generally know their markets better than outsiders, if the incumbent platform expected the acquisition to help maintain its monopoly power by eliminating a nascent threat, then it would be reasonable to conclude that is (or would be) the likely effect of the transaction, even without supporting quantifiable evidence.

Balancing anticompetitive and procompetitive effects

Intent evidence also can help assess competitive harms relative to benefits when a challenged act results in both types of effects, which is often the case in complicated technology markets. Suppose that Google, a dominant search engine, modified a search algorithm, and there is objective evidence that the change had both anticompetitive and procompetitive effects by reducing the search-result ranking of its rival in an adjacent market and also by improving the quality of the search results or search experience for users.[78] Establishing liability under antitrust doctrine requires a balancing of positive and negative effects, and finding net harm. Because the competitive harms and benefits in this hypothetical are incommensurable and difficult to quantify, reliance on the usual economic tools for balancing is unlikely to be useful.

Intent evidence can provide an alternative method to predict and assess the overall magnitude of the two effects. To continue with the Google hypothetical, suppose internal correspondence shows Google executives' increasing and intense concerns with the firm's rival in a vertical market. These emails were followed by a search algorithm tweak that reduced its vertical rival's ranking in the relevant search results (anticompetitive) but also improved the quality of the search results for users (procompetitive). There was also no contemporaneous evidence that improved user experience was a motive for the tweak.

Under these facts, the executives' statements (if considered) could help a fact-finder conclude that the anticompetitive harm from the algorithm change likely outweighed the benefits, without undertaking a difficult, if not impossible, quantitative comparison. It is reasonable to assume that if repressing a rival, not quality improvement, was the driving force behind the algorithm change, then the magnitude of the competitive harm likely exceeded the consumer benefit. It is also a fair way to resolve any ambiguities about likely effects against the perpetrator that were intended to harm a competitor.

Assessing a dominant firm's business justifications

Knowledge of a dominant firm's intent is useful in assessing efficiency and other justifications regularly raised by defendants in Section 2 cases. In all non per-se antitrust cases, defendants may offer legitimate business reasons for conduct that would otherwise be deemed anticompetitive. Demonstrating the reason for one's conduct is, of course, equivalent to explaining one's purpose and intent.

Interestingly, intent skeptics opposed to the use of intent evidence to help prove exclusionary conduct and adverse effects are seemingly not averse to probing intent to benefit the defendant. University of Pennsylvania Law School professor Herbert Hovenkamp, for example, argues specifically that a dominant firm's "pre-innovation intention" to implement a product improvement should control in the examination of whether an innovation justification exists for an alleged anticompetitive product redesign, such that an intention to innovate would be considered a lawful justification regardless of the actual results of the innovation effort.[79]

I do not disagree with this view. To the extent that innovation is a lawful justification in monopolization analysis, focusing on whether the monopolist intended an innovative or efficient outcome that incidentally harmed a rival—rather than on whether the effort succeeded—seems reasonable and fair. But if antitrust law is willing to consider intent probative in finding legitimate justification to benefit a monopolist, then it is inconsistent to dismiss its value when the evidence tends to tip the scale in favor of finding exclusionary conduct and anticompetitive effects.

Reliably assessing intent evidence in antitrust cases

Today's objections to intent developed mostly over the past few decades as strong dependence on economic analytical tools became the accepted norm in antitrust cases. Skepticism of intent seems largely based on critics' perception of its unreliability and the accompanying risk of adjudicatory error.[80] As mentioned earlier, intent is not inherently less reliable than quantitative evidence as the latter is only as good as the datasets and methodology used. If the data are incomplete or flawed, or the economic modeling has errors, then reliance on quantitative evidence alone may be inadequate, even in analyzing price effects.

This section of the chapter further argues that courts and juries are as competent to assess intent evidence in antitrust cases as in other cases, although the criteria that should guide the assessment may differ. I demonstrate below that the strong objections that some critics express do not warrant the repudiation of intent evidence in antitrust cases. At most, they speak to the need for fact-finders to carefully assess the reliability of such evidence, sensitive to the context of antitrust, before assigning it evidentiary weight.

Fact-finders are as competent to assess intent evidence in antitrust cases as in other cases

Implicit in the opposition to intent evidence in antitrust cases is an assumption that assessing that evidence may be too difficult a task for courts and juries. Skeptics of intent evidence say variously that the intent to exclude competition anticompetitively and the intent to do so competitively are indistinguishable,[81] that assigning "intent" to firms is extremely difficult and prone to error,[82] that fact-finders may misconstrue business rhetoric and poor choice of words as evidence of anticompetitive intent,[83] and that the presence or absence of intent evidence is "often a function of luck and of the defendant's legal sophistication."[84]

All of these arguments are unpersuasive. Evaluating intent evidence is definitely a task for fact-finders in our judicial system, and there is no basis to believe that they are less capable of assessing that evidence in antitrust than in other cases. Here, I address four objections that skeptics of intent evidence tend to raise and explain why each is at least overstated.

Distinguishing between intent to exclude anticompetitively and intent to win competitively

One frequently raised objection to intent evidence posits that "the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively."[85] The essence of this argument is that every firm wishes to beat its competition, but it is difficult to tell if the dominant firm seeks to do so by anticipating and fulfilling customers' needs or by exclusionary tactics that have little to do with improving efficiencies or customer satisfaction.[86]

While not without merit, this criticism is overstated. It is true that the line between an intent to compete vigorously on the merits and an intent to exclude competition anticompetitively may be murky. Still, it should be well within the institutional competence of fact-finders in our judicial system to make the fine factual distinctions that are necessary to tell the two intents apart.

As former U.S. Supreme Court Justice John Paul Stevens noted in an antitrust dissent in the 1980s, "motivation matters," not only in antitrust cases, but also in many other areas of the law, "and fact-finders are able to distinguish bad from good intent."[87] Courts and juries, and law enforcers, are expected to determine who did what and why in a variety of ambiguous situations in numerous areas of the law. It is unclear why they should be considered less capable of doing so in antitrust cases than in other ones.

Attributing intent

Another objection to intent evidence relates to the perceived difficulty of assigning corporate intent. The gist of this criticism is that comments by corporate employees who do not speak for the corporation could be mistakenly attributed to the defendant corporation as evidence of its bad intent.[88] But the question of whether a particular employee's statement should be attributed to his or her employer, the corporation, is one that fact-finders frequently face in numerous areas of the law.

Corporations, after all, are entities that can act only through their employees or other agents. Indeed, without the basic principle of attribution, no corporation could ever be found criminally liable even in a straightforward per-se price-fixing antitrust case. Thus, critics' suspicion of intent evidence in antitrust cases based on fears of mistaken attribution is a bit puzzling.[89]

These concerns are particularly overstated, given our adversarial judicial system, in which counsel for defendants and plaintiffs are free to cross-examine witnesses, present evidence, and argue to the court or jury. So, if an antitrust plaintiff attempts to rely on a nonmanagerial employee's "bad intent" statement as evidence of corporate intent, then counsel for the defendant firm will likely strenuously argue and explain why that statement cannot and should not be attributed to the corporation.

In contrast, if the statement were made by one of the defendant corporation's senior executives, then counsel for the plaintiff would undoubtedly argue that a corporation's executive officers constitute a firm's top management and act on its behalf, and their statements obviously express the corporation's intent. Surely, courts and juries are competent to assess the facts and circumstances, including the speaker's corporate position and responsibilities, to determine whether a statement of a particular corporate employee should be attributed to the corporation.[90]

Of course, attribution may be more difficult in some instances, such as where the speaker or author of an internal document is a mid-level manager—not an executive or senior manager, but also not a nonmanagerial employee. Even then, the question is not beyond the competence of courts or juries to determine. We would expect the fact-finder to inquire into other relevant facts, such as whether the mid-level manager's statement relates to a matter within the manager's areas of responsibility and over which the manager has policymaking authority, and make a judgment on attribution accordingly.

Objections to intent evidence based on the difficulty of attribution also seem inconsistent with the applicable federal rules of evidence, which are quite expansive in this regard. Under the rule on party admissions, statements made by employees concerning a matter within the scope of their employment are admissible, as hearsay exceptions, if they are offered against the employer.[91] Clearly, the federal rules of evidence do not exhibit the hyper-concerns about wrong attributions that intent critics have, further suggesting that the risks of error are exaggerated.

Interpreting the language of businesspeople

Some skeptics of intent evidence also object to intent evidence on the ground that fact-finders may misinterpret language used by businesspeople, taking at face value words that were not so intended, resulting in adjudicatory error.[92] This criticism rests on the notion that businesspeople frequently use rhetoric, loose language, or colorful war and sports metaphors in describing competition, their rivals, and their own actions. Such "clumsy choice of words to describe innocent behavior"[93] could be misconstrued as anticompetitive intent.

The argument that intent evidence should not be trusted because fact-finders may misunderstand the evidence seems convoluted because it is precisely the function of fact-finders in our system to assess this evidence, including whether speakers meant what they said, taking into account the context. When faced with a statement vowing to cut off an opponent's "air supply," for example, it should be the role of fact-finders to determine whether the statement has evidentiary significance or should be dismissed as hyperbole or bluster.

Fact-finders, be they judge or jury, or agency enforcers reviewing investigatory facts, are generally expected, and considered competent, to make judgments on the probative value of any intent evidence in a variety of cases. There is no reason to treat antitrust cases differently. To the extent that a specific statement or document may be too prejudicial or may confuse the issues or mislead the jury, an antitrust defendant can always seek to exclude it under the federal rules of evidence, just as in any other litigation.[94]

Factoring in luck and sophistication

Finally, a few critics contend that intent evidence has little value because whether it is found in a given case "is often a function of luck and of the defendant's legal sophistication."[95] Former Judge Richard Posner, for example, said that firms with good legal counsel "will not leave any documentary trail of improper intent," whereas firms unschooled in antitrust law will be trapped by their "clumsy choice of words to describe innocent behavior."[96] While there is certainly some truth to that observation, this should not render intent evidence unreliable or of little probative value as a whole. After all, this argument resonates not just in antitrust cases but also in the many other areas of the law where intent matters.

Yet few, if any, lawyers, legal scholars, or policymakers would seriously argue that because our legal system is generally biased in favor of those who have resources and the benefit of expensive legal counsel, the entire system is suspect, and intent inquiries cannot be trusted. A better solution would be for fact-finders to take that bias into account in assessing intent evidence and assigning weight to it.

Furthermore, it is questionable whether former Judge Posner's observation that large firms are unlikely to leave "a documentary trail of improper intent" holds true as much today as it did years ago. Today, communicating informally through emails, texts, and other digital avenues is convenient, efficient, and woven into the fabric of our lives, probably including that of corporate executives and managers. In this digital age, it is hard to imagine even the highest-level corporate officers in the largest firms managing to avoid those means of communication altogether and limiting their internal interaction to formal business memoranda or business plans carefully crafted to sidestep potential antitrust pitfalls.

Ultimately, then, the luck-and-sophistication bias factor is one that courts and juries are fully capable of taking into account when assessing the probative value of any intent evidence offered.

Criteria helpful in assessing intent evidence in antitrust cases

Assessing intent evidence in antitrust cases is fundamentally no different than in other cases, though the criteria that would best guide the assessment may vary. I argue that, in evaluating the probative value of intent evidence in antitrust, the following considerations would be helpful:

- The existence and degree of any contradictory evidence
- The timing of the intent statement in relation to the alleged exclusionary act
- The context in which the intent statement was made, and primarily whether it was made in a setting that affects company decision-making

I examine each of these considerations in turn below.

The existence and degree of any contradictory evidence

One useful gauge of the credibility of a statement of intent is the existence and the degree of any contradictory evidence. If there is no inconsistent evidence, or the inconsistency is insubstantial, then the intent evidence in question warrants being accorded high probative value. Conversely, if substantial contradictory evidence exists, then the intent evidence could be assigned much less, or even no, evidentiary weight.

Assume, for example, that a dominant firm acquires a nascent competitor, and there is evidence that before the acquisition, the acquiring firm's senior executives had expressed their perceptions about the potential competitive threat posed by the nascent rival. Assume they also discussed the advantages of acquiring the target to remove that threat. If the subsequent investigation reveals no evidence that is substantially inconsistent with the executives' statements, then those statements should be considered highly probative.

In contrast, if the executives had additionally discussed the target's significant value in helping the incumbent improve its products, then the same executive statement could be assigned much less weight, especially if the dominant firm subsequently paid a "normal" price, and not an unusually high premium, for the target.[97]

The use of this factor in assessing the probative value of intent evidence should bolster confidence in its reliability.

The timing of the intent statement in relation to the alleged exclusionary act

Another useful indicator of the probative value of an intent statement is its timing relative to the alleged exclusionary act. If the statement was made contemporaneously with the challenged act or close in time to it, then it is likely to be more reliable and should be accorded more evidentiary weight. But if the date of the intent statement was further removed in time from the alleged exclusionary act, then there may be reason to doubt its probative value.

Suppose there is evidence, in an email conversation, in which a dominant firm's executives express concerns about a nascent rival's potential competitive threat and explore strategies to slow the rival's growth. In one hypothetical scenario, these emails were followed shortly by the dominant firm taking action that impeded the rival's access to key inputs or customers. In that case, the executives' emails were likely credible expressions of the dominant firm's intent to repress the rival by its conduct and were not merely idle, inconsequential remarks.

In a second hypothetical scenario, however, the dominant platform did not take the challenged action until long after the alleged "hot" emails were written. In that event, the "bad intent" statement may be less credible because of the distance in time between the statement and the alleged exclusionary act. The dominant firm's later action could have been driven, instead, by an efficient or procompetitive reason.

The context of the statement

Yet another important indicator of the probative value of an intent statement involves the setting or context in which it was made. If an email, memorandum, or document was made in a context that affects company decision-making or otherwise has cost consequences for the firm, then that statement is likely to be a credible expression of intent. But if the setting is such that the statement has no bearing on decision-making, then it should be considered less probative.

An email from an executive advising employees of a business strategy and exhorting them to act accordingly is most likely a highly credible piece of intent evidence and not merely an off-the-cuff expression. That is because others within the company are expected to act upon it, and it would be costly to the company if those directives or suggestions were not intended to be taken seriously. Those statements, therefore, should be given heavier weight in understanding the defendant's conduct or its probable effect.

Conversely, an informal conversation among employees casually discussing strategies and the expected impact on competition may be less reliable as intent evidence because no one was expected to act upon the statements. In that context, because the speakers do not expect to affect decision-making, questions about their knowledge and the reliability of their statements as evidence of intent are probably justifiable ones to raise. Fact-finders may reasonably attribute less, or minimal, probative value to that intent evidence.

Conclusion

The dominance of the largest digital platforms today is provoking intense debate over whether and how Section 2 of the Sherman Antitrust Act can be improved to prevent these platforms from exploiting their market power to exclude competition. The exclusion of competition from these markets would further entrench the incumbents' dominance, potentially hurting future innovation and overall U.S. economic competitiveness.

I argue in this chapter for reviving the role of intent evidence in monopolization analysis. The chapter explains why a strict economic approach that demands or expects quantitative evidence to demonstrate anticompetitive harm runs a high risk of missing exclusionary conduct with adverse competitive effects, particularly when the conduct involves the largest digital platforms. While many legal scholars and jurists express objections to its use today, intent played an important role in Section 2 cases historically, and no U.S. Supreme Court case has prohibited its consideration.

Indeed, the most consequential contemporary Section 2 case, *United States vs. Microsoft Corp*., demonstrates the continued relevance and value of such evidence. Embracing intent evidence will not necessarily broaden current doctrine, but it can help overcome some of the problems of proof that exist and thereby improve Section 2 antitrust enforcement—even without legislative action or judicial overruling of any major case.

Endnotes

1 For example, recent data from September 2021 show that Google's search engine handles 86.64 percent of all general internet searches worldwide. See "Worldwide desktop market share of leading search engines from January 2010 to July 2022," available at https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/ (last accessed September 27, 2022). Data from October 2021 show that Amazon.com Inc. garners 68 percent of e-book sales and 41 percent of all e-commerce retail sales in the United States. See "Market share of leading retail e-commerce companies in the United States as of June 2022," available at https://www.statista.com/statistics/274255/market-share-of-the-leading-retailers-in-us-e-commerce/#:~:text=As%20of%20October%202021%2C%20Amazon,by%20eBay%2C%20with%204.2%20percent (last accessed September 27, 2022); "Ebook Industry News Feed: Breaking news from the world of digital books," available at https://about.ebooks.com/ebook-industry-news-feed/ (last accessed September 27, 2022). Data from October 2021 show that Meta Platforms Inc.'s Facebook unit is by far the most popular social media network worldwide, outside of China, with 72 percent of the worldwide social media market. See "Social Media Stats Worldwide, August 2021-August 2022," available at https://gs.statcounter.com/social-media-stats (last accessed Setpember 27, 2022).

2 John M. Newman, "Antitrust in Digital Markets," *Vanderbilt Law Review* 72 (5) (2019): 1497; Erik Hovenkamp, "The Antitrust Duty to Deal in the Age of Big Tech," *Yale Law Journal* 131 (5) (2022): 1483; Lina M. Khan, "Amazon's Antitrust Paradox," *Yale Law Journal* 126 (3) (2017): 710; Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (New York: Columbia Global Reports, 2018), at 16-19; Jonathan B. Baker, "Exclusion as a Core Competition Concern," *Antitrust Law Journal* 78 (3) (2013): 527, 529-530; Howard A. Shelanski, "Information, Innovation, and Competition Policy for the Internet," *University of Pennsylvania Law Review* 161 (6) (2013): 1663; Spencer Weber Waller, "Antitrust and Social Network," *North Carolina Law Review* 90 (2011): 1771; Marina Lao, "No-Fault Digital Platform Monopolization," *William & Mary Law Review* 61 (3) (2020): 755.

3 15 U.S.C. §2 ("Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony…").

4 Throughout this chapter, I take Section 2 doctrine as a given, without entering into the debates on whether those doctrines are normatively desirable. I also do not discuss or weigh in on the pros and cons of the American Innovation and Choice Online Act, or AICOA, now under consideration in the U.S. Senate. See *American Innovation and Choice Online Act*, S.2992, 117th Cong. (2021), available at https://www.congress.gov/bill/117th-congress/senate-bill/2992/text. My focus, instead, is on the deficiency in the implementation of the current standard, with its strong emphasis or insistence on quantitative evidence, and what can be done to fulfill Section 2's mission, short of legislation or judicial overruling of cases.

5 Intent has different meanings. It can mean specific intent, which is acting with the purpose of causing the probable consequences of one's actions, or general intent, which is the mere knowledge that such consequences will follow. *United States v. United States Gypsum Co*., 438 U.S. 422, 445 (1978). It can also mean purpose or motive, as I define it in this chapter.

6 Marina Lao, "Reclaiming a Role for Intent Evidence in Monopolization Analysis," *American University Law Review* 54 (1) (2004): 151; Marina Lao, "Reimagining Merger Analysis to Include Intent," Emory Law Journal 71 (5) (2022) 1035.

7 253 F.3d 34 (D.C. Cir. 2001).

8 Probably the most widely quoted definition of monopolization is that it "has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp*., 384 U.S. 563, 570-71 (1966).

9 Ibid.

10 See *United States v. Microsoft Corp*., 253 F.3d 34, 58 (D.C. Cir. 2001) ("[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive process and thereby harm consumers."). There is now considerable debate over the "consumer welfare" underpinning of antitrust law—whether it is descriptively accurate and whether it is normatively too restrictive. See Marshall Steinbaum, "The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory" (New York: Roosevelt Institute, 2017), available at https://rooseveltinstitute.org/2017/12/11/the-consumer-welfare-standard-is-an-outdated-holdover-from-a-discredited-economic-theory/; Joe Kennedy, "Why the Consumer Welfare Standard Remains the Best Guide to Promoting Competition," *Competition Policy International*, January 27, 2019, available at https://www.competitionpolicyinternational.com/why-the-consumer-welfare-standard-remains-the-best-guide-for-promoting-competition/. In this chapter, however, I do not enter into that debate.

11 *United States v. Gypsum Co*., 438 U.S. 422, 435-36, 443 (1978) (holding that specific intent is an element of a criminal antitrust offense, but that that does not change the general rule that civil antitrust violations do not require proof of specific intent).

12 *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 459 (1993) (holding that "specific intent to monopolize" is required to find liability for attempted monopolization).

13 *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

14 253 F.3d 34 (D.C. Cir. 2001). See also *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). In finding exclusionary conduct, the Third Circuit Court of Appeals in *LePage's* referred often to the defendant's intent to use bundled rebates and exclusive dealing contracts to exclude a competitor.

15 *Eastman Kodak Co. v. Image Technical Servs. Inc*., 504 U.S. 451, 483 (1992) (reviewing Kodak's proffered business justifications); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 608 (1985) (discussing defendant's inability to persuade the jury that its conduct was competitively justified); *United States v. Microsoft Corp*., 253 F.3d, at 59 ("[I]f a plaintiff successfully establishes a prima facie case under §2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct.").

16 *United States v. Griffith*, 334 U.S. 100, 106-07 (1948); *American Tobacco Co. v. United States*, 328 U.S. 781, 809-14 (1946); *Standard Oil Co. v. United States*, 221 U.S. 1, 75-77 (1911); *Lorain Journal v. United States*, 342 U.S. 142, 149 (1951); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973). See also Herbert Hovenkamp, "The Monopolization Offense," *Ohio State Law Journal* 61 (3) (2000): 1035, 1037-1038 (noting, though criticizing, the historical role of intent in monopolization cases).

17 *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

18 *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919).

19 *American Tobacco Co. v. United States*, 328 U.S. at 809; *United States v. Griffith*, 334 U.S. at 106; *Standard Oil Co. v. United States*, 221 U.S. at 75.

20 221 U.S. 1, 75-77 (1911).

21 *American Tobacco Co. v. United States*, 328 U.S. at 809-14; *United States v. Griffith*, 334 U.S. at 106-07.

22 472 U.S. 585, 602 (1985).

23 475 U.S. 574 (1986).

24 *Poller v. Columbia Broad. Sys*., 368 U.S. 464, 473 (1962) ("[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles…").

25 Richard Schmalensee, "Thoughts on the Chicago Legacy in U.S. Antitrust." In Robert Pitofsky, ed., *How the Chicago School Overshot the Mark* (Oxford: Oxford University Press, 2008); Thomas E. Kauper, "Influence of Conservative Economic Analysis on the Development of the Law of Antitrust." In Robert Pitofsky, ed., *How the Chicago School Overshot the Mark* (Oxford: Oxford University Press, 2008).

26 *Sanderson v. Culligan Int'l Co*., 415 F.3d 620, 623 (7th Cir. 2005) ("Antitrust law condemns practices that drive up prices by curtailing output."); Robert H. Bork, T*he Antitrust Paradox: A Policy at War with Itself* (Bork Publishing, 1978) (discussing the neoclassical efficiency model's assumption that only practices that artificially restrict output are economically inefficient); Frank H. Easterbrook, "When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?," *Columbia Business Law Review* 2003 (2) (2003): 345, 346 (describing anticompetitive harm as "the allocative loss that comes about when firms raise price over long run marginal cost"); Timothy J. Muris, "The FTC and the Law of Monopolization," *Antitrust Law Journal* 67 (3) (2000): 693, 697 (describing anticompetitive effects as "the ability to raise price and restrict output"). See, generally, John M. Newman, "The Output-Welfare Fallacy: A Modern Antitrust Paradox," *Iowa Law Review* 107 (2) (2022): 563 (criticizing hardline Chicagoans' equation of output with consumer welfare, such that only acts that reduce output are considered detrimental to consumer welfare).

27 *Olympia Equipment Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) ("If conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors … is irrelevant.").

28 *Gen. Leaseways Inc. v Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595-96 (7th Cir. 1984) ("[I] nternal company documents used to show anticompetitive intent … cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect."); *A.A. Poultry Farms Inc. v. Rose Acre Farms Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989).

29 881 F.2d 1396, 1402 (7th Cir. 1989).

30 *Gen Leaseways Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595-96 (7th Cir. 1984). See also *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379-80 (7th Cir. 1986). Judge Posner was equally critical of intent evidence in his legal scholarship. See Richard A. Posner, *Antitrust Law*, 2d ed. (Chicago: University of Chicago Press, 2001).

31 224 F.3d 942, 948 (9th Cir. 1996).

32 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, vol. 3, 3rd ed. (New York: Wolters Kluwer, 2006), p. 5, ¶601.

33 Hovenkamp, "The Monopolization Offense,"16 at 1039; Posner, *Antitrust Law*, at 214-15; Timothy J. Brennan, "Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in *United States v. Microsoft*," *George Washington Law Review* 69 (2001): 1042, 1092 ("From an economic perspective, which focuses on effects, an emphasis on intent seems misplaced."); Geoffrey A. Manne and E. Marcellus Williamson, "Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication," *Arizona Law Review* 47 (3) (2005): 609, 610; Joseph F. Brodley and Ching-to Ma, "Contract Penalties, Monopolizing Strategies, and Antitrust Policy," *Stanford Law Review* 45 (5) (1993): 1161, 1201 ("[I]ntent evidence is generally inferior to objective evidence because competitive and anticompetitive motivations are often indistinguishable"); Frank H. Easterbrook, "Monopolization: Past, Present, and Future," *Antitrust Law Journal* 61 (1992): 99, 102-133.

34 253 F.3d 34, 53-54 (D.C. Cir. 2001) (en banc) (per curiam).

35 Lao, "Reclaiming a Role for Intent Evidence in Monopolization Analysis," at 184-88 (discussing in detail judicial attention to intent in the case).

36 *United States v. Microsoft Corp.*, 253 F.3d at 53-54; *United States v. Microsoft Corp.*, 84 F.Supp. 2d 9, at ¶¶ 68-77 (D.D.C. 1999).

37 *United States v. Microsoft Corp.*, 84 F. Supp. 2d at ¶77.

38 *United States v. Microsoft Corp.*, 87 F. Supp. 2d at 44 (concluding that "the evidence does not prove that [the Netscape browser and another threat, Java] would have succeeded absent Microsoft's actions"); *United States v. Microsoft Corp.*, 84 F. Supp. 2d at ¶ 77 (D.D.C. 1999) (finding that the Netscape browser's "technologies have a long way to go before they might imperil the applications barrier to entry," protecting Windows). See also Brennan, "Do Easy Cases Make Bad Law? Antitrust Innovations or Missed Opportunities in *United States v. Microsoft*" (asserting that the economic theory of the Microsoft case was inconsistent with the evidence).

39 Joshua D. Wright, "Moving Beyond Naïve Foreclosure Analysis," *George Mason Law Review* 19 (5) (2012): 1163, 1166 (discussing the conditions for anticompetitive harm from foreclosure).

40 *United States v. Microsoft Corp.*, 87 F. Supp. 2d at 44.

41 Though the D.C. Circuit did rebuke District Court Judge Thomas Penfield Jackson for his extrajudicial comments on Microsoft, remanded the tying claim for a rule of reason analysis, and vacated the divestiture remedy, it upheld most of the district court's rulings in favor of the government's claims, including claims that Microsoft's various exclusive dealing arrangements were exclusionary and violated Section 2. United *States v. Microsoft Corp.*, 253 F.3d 34, 46-47, 89-95, 107-11 (D.C. Cir. 2001).

42 *United States v. Microsoft Corp.*, 84 F. Supp. 2d at ¶ 72 (referring to Bill Gates' warning to Microsoft's executives that Netscape was "pursuing a multi-platform strategy" that would "commoditize the underlying operating system").

43 *United States v. Microsoft Corp.*, 253 F.3d at 62 (D.C. Cir. 2001) (quoting Bill Gates' warnings of the need to stop OEMs from pre-installing the Netscape browser and internet providers, such as AOL, from using that browser).

44 Ibid.

45 Ibid., at 76-77 (citing internal Microsoft documents, such as emails, that confirmed Microsoft intended to deceive third-party application developers writing for Sun Microsystems' product Java, Microsoft's perceived other threat, to work on Microsoft's version of Java so as to slow the growth of applications written for the Sun version); *United States v. Microsoft Corp.*, 84 F. Supp. 2d at ¶¶ 166-69 (quoting Microsoft executive emails that said Microsoft's own browser could not compete on the merits against Netscape's browser and therefore its own browser must be integrated with Windows); Ibid., at ¶ 169 (quoting internal email communications and other documents stating that Microsoft's strategic goal was to "[k] ill cross-platform Java by grow[ing] the polluted

Java market"); Ibid. at ¶ 394 (quoting internal statements that said the company "should just quietly grow [its Java version] and assume that [third party app developers] will take more advantage of [it] without ever realizing that they are building" apps for the Windows-version of Java only]"); Ibid. at ¶ 406 (referring to internal statements stating that Microsoft hoped to cause "Intel to stop helping Sun" with its Java product).

46 *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). In finding exclusionary conduct, the 3rd Circuit Court of Appeals referred often to the defendant's intent to use bundled rebates and exclusive dealing contracts to exclude a competitor.

47 *United States v. Microsoft Corp.*, 253 F.3d at 58 ("[T]o be condemned as exclusionary, the act must have an 'anticompetitive effect,'" and anticompetitive effect means "it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.").

48 There is general agreement that quality, choice, and innovation—not just price—are features that have value to consumers and are dimensions over which rivals compete. Thus, a demonstration that the challenged conduct is likely to have an adverse impact in any of those dimensions should satisfy the "anticompetitive effect" requirement.

49 Steven C. Salop and Fiona Scott Morton, "The 2010 HMGs Ten Years Later: Where Do We Go From Here?," *Review of Industrial Organization* 58 (1) (2021): 81, 93 ("[E]conometric techniques exist to address only some competitive concerns but not others. … Competitive concerns that lack econometric techniques are no less important to consumer welfare than are others."); Jonathan B. Baker, "Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation," *Antitrust Law Journal* 74 (3) (2007): 575, 602.

50 Andrew I. Gavil and Steven C. Salop, "Probability, Presumptions and Evidentiary Evidence in Antitrust Analysis: Revitalizing the Rule of Reason For Exclusionary Conduct," *University of Pennsylvania Law Review* 168 (2020): 2107, 2133 (arguing that courts should not require quantification of harm for exclusionary conduct as "[n]o empirical methodology is perfect, and complete and accurate information is likely to be rare"); John E. Lopatka, "Exclusion Now and in the Future: Examining Chicago School Orthodoxy," *Mississippi College Law Review* 17 (1997): 27, 33 ("Simple tests—for instance, whether output declined because of a challenged restriction—are unlikely to be useful for lack of data. At least, the costs of obtaining, processing, and interpreting the data necessary for conclusive determination of a practice's effects are apt to be high.")

51 Irwin M. Stelzer, "Some Practical Thoughts About Entry." In Robert Pitofsky, ed., *How the Chicago School Overshot the Mark* (Oxford: Oxford University Press, 2008).

52 Wright, "Moving Beyond Naïve Foreclosure Analysis,"40 at 1166.

53 Ibid.

54 Lao, "Reclaiming a Role for Intent Evidence in Monopolization Analysis," at 181-82.

55 Marina Lao, "Erring on the Side of Antitrust Enforcement When in Doubt in Data-Driven Mergers." In N. Charbit and others, eds., *Douglas H. Ginsburg Liber Amicorum: An Antitrust Professor on the Bench* (New York: Institute of Competition Law, 2018) (describing briefly the business model of advertisement-supported multisided digital platforms where users on the consumer-facing side of the platform do not pay a monetary price but with data).

56 Jonathan B. Baker, *The Antitrust Paradigm* (Cambridge, MA: Harvard University Press, 2019) (providing a primer on platform economics).

57 Ibid., at 167-75 (emphasizing innovation harms from exclusionary conduct by dominant firms).

58 John E. Lopatka and William H. Page, "Monopolization, Innovation, and Consumer Welfare," *George Washington Law Review* 69 (2001).

59 John M. Newman, "Antitrust in Zero-Price Markets: Foundations," *University of Pennsylvania Law Review* 164 (1) (2015): 149 (explaining the foundations of zero-price markets).

60 Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (Oxford: Oxford University Press, 2016) (criticizing, in a merger context, the price-centric approach to antitrust, pointing out other harms that such an approach misses).

61 Magali Eben, "Market Definition and Free Online Services: The Prospect of Personal Data as Price," *I/S: A Journal of Law and Policy for the Information Society* 14 (2018): 227; David S. Evans, "The Antitrust Economics of Free," *Competition Policy International* 7 (2011): 71; Michal S. Gal and Daniel L. Rubinfeld, "The Hidden Costs of Free Goods: Implications for Antitrust Enforcement," *Antitrust Law Journal* 80 (401) (2016): 521; John M. Newman, "The Myth of Free," *George Washington Law Review* 86 (2) (2018): 513.

62 Allen P. Grunes and Maurice E. Stucke, "No Mistake About It: The Important Role of Antitrust in the Era of Big Data," *Antitrust Source*, April 20158.

63 Baker, *The Antitrust Paradigm*, at 122-24.

64 Shelanski, "Information, Innovation, and Competition Policy for the Internet," at 1682.

65 Ibid.

66 Stucke and Grunes, *Big Data and Competition Policy*, at 162-64 (analyzing network effects in data-driven markets).

67 Daniel L. Rubinfeld and Michal S. Gal, "Access Barriers to Big Data," *Arizona Law Review* 59 (2) (2017): 339, 345 ("Big data is a generic name for data that shares several characteristics with regard to their aggregation, rather than content. Big data's main characteristic, as the name signifies, is volume. A simple definition relates to amounts of data that cannot be analyzed by traditional methods. Rather, the data can only be analyzed through the establishment of a unique platform that can manage substantial volumes of information in a reasonable timeframe"). There is, however, no single definition of big data.

68 Shelanski, "Information, Innovation, and Competition Policy for the Internet," at 1686.

69 Mark A. Lemley and David McGowan, "Legal Implications of Network Economic Effects," *California Law Review* 86 (1998): 479, 502-503.

70 Baker, *The Antitrust Paradigm*, at 129-30 (discussing how a dominant platform's denial of access to customer data to a rival can prevent the rival from gaining scale economies).

71 First Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Facebook Inc*., case 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021).

72 Ibid., ¶¶142 & 143.

73 *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918).

74 *Eastman Kodak Co. v. Image Technical Servs. Inc*., 504 U.S. 451, 483 (1992) (looking to defendant's intent to determine if the proffered business justifications were pretextual); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 608 (1985) (same).

75 Lao, "Reimagining Merger Analysis to Include Intent."

76 While this example is inspired by some of the known facts regarding Facebook's acquisitions of Instagram in 2012 and WhatsApp in 2014, I am not presenting the hypothetical as a precise, factual recounting of the allegations in the Federal Trade Commission's Section 2 case against Facebook. For the details of the allegations in that case, see First Amended Complaint for Injunctive and Other Equitable Relief, *FTC v. Facebook Inc*.

77 Ibid. That is, in fact, the Federal Trade Commission's major theory of harm in its Section 2 case against Facebook.

78 This is intended only as a hypothetical; it is convenient to use because of popular understanding of how search algorithms work. I am not asserting that Google has, or has not, engaged in any of the hypothetical acts used as illustration.

79 Hovenkamp, "The Monopolization Offense," at 1046 ("The real question is what the innovator had in mind. If [the innovator's] intent was to develop a superior gun, but this required a unique needle, then [the innovator] should not be penalized [under Sherman Act § 2] because its new gun/needle combination ended up working no better (or only a little better) than the old combination did"); Ibid. ("[I]f the redesigned product is not an improvement, then it becomes proper to probe the defendant's pre-innovation intentions: did it really set out to build a better product, or did it redesign only in order to exclude a rival?").

80 Posner, *Antitrust Law*, at 214 ("Any doctrine that relies upon proof of intent is going to be applied erratically at best."); Brodley and Ma, "Contract Penalties, Monopolizing Strategies, and Antitrust Policy," at 1201; *A.A. Poultry Farms Inc. v. Rose Acre Farms Inc*., 881 F.2d 1396, 1402 (7th Cir. 1989) (assuming that intent evidence is "misleading evidence," and claiming that "the evidence offered to prove intent will be even more ambiguous than the economic data it seeks to illuminate.").

81 Frank H. Easterbrook, "Monopolization: Past, Present, and Future," *Antitrust Law Journal* 61 (1992): 99, 102-103 (stating that the intent to exclude rivals anticompetitively and the intent to become dominant competitively are indistinguishable); Brodley and Ma, "Contract Penalties, Monopolizing Strategies, and Antitrust Policy," at 1201 (asserting that "competitive and anticompetitive motivations are often indistinguishable"); Hovenkamp, "The Monopolization Offense," at 1039 ("Indeed, in most circumstances involving monopoly, the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively.").

82 David McGowan, "Networks and Intention in Antitrust and Intellectual Property," *Journal of Corporate Law* 24 (1999): 485, 514-516 (stressing the difficulty of determining the intention of a firm).

83 Posner, *Antitrust Law*, at 214.

84 Ibid., at 214; Ronald A. Cass and Keith N. Hylton, "Antitrust Intent," *Southern California Law Review* 74 (2001): 657, 676, 732.

85 Hovenkamp, "The Monopolization Offense," at 1039; Brodley and Ma, "Contract Penalties, Monopolizing Strategies, and Antitrust Policy," at 1201 ("[C]ompetitive and anticompetitive motivations are often indistinguishable"); Frank H. Easterbrook, "When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?," *Columbia Business Law Review* 2003 (2) (2003): 345 ("[C]ompetitive and exclusionary conduct look alike").

86 Easterbrook, "Monopolization: Past, Present, and Future," at 102-03 ("Firms want (intend) to grow; they love to crush their rivals; indeed, these desires are the wellsprings of rivalry and the source of enormous benefit for consumers ... the same elements of greed appear whether the entrepreneur wants to please customers or stifle rivals.").

87 *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 754 (Stevens, J., dissenting).

88 McGowan, "Networks and Intention in Antitrust and Intellectual Property84."

89 Marina Lao, "Aspen Skiing and Trinko: Antitrust Intent and 'Sacrifice'," *Antitrust Law Journal* 73 (1) (2005): 171, 203-204 (arguing that mistaken-attribution concerns can be easily addressed by limiting attribution to statements made by a firm's senior executives, or by mid-level managers where the statement relates to matters within the middle manager's areas of responsibility and over which the manager has policy-making authority).

90 Ibid.

91 Fed. R. Evid. § 801(d)(2)(D).

92 Posner, *Antitrust Law*, at 214-215 ("Especially misleading is the inveterate tendency of sales executives to brag to their superiors about their competitive prowess, often using metaphors of coercion that are compelling evidence of predatory intent to the naïve."); Cass and Hylton, "Antitrust Intent," 86 at 676 (arguing that "the comments made by individuals within a firm can be misleading if taken at face value as evidence of corporate intent, given the common practice of speaking in the language of war or of sports contests."); Manne and Williamson, "Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication" ("[B]usiness actors are subject to numerous forces that influence the rhetoric they use and the conclusions they draw. These factors include salesmanship, self-promotion, the need to take credit for successes and deny responsibility for failure, the need to develop consensus, and the desire to win support for an initiative or to neutralize its opponents.").

93 Posner, *Antitrust Law*, at 214.

94 Fed. R. Evid. 403 ("[R]elevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury").

95 Posner, *Antitrust Law*, at 214; Cass and Hylton, "Antitrust Intent," at 676 & 732 (reiterating Posner's argument that legally sophisticated firms will not leave any evidence of subjective intent while unsophisticated firms would).

96 Posner, Antitrust Law, at 214.

97 Courts and antitrust enforcers, however, should be alert to the possibility that dominant firms may then have an incentive to create substantial contradictory evidence to neutralize a "hot" document. See Christopher R. Leslie, "How to Hide a Price-Fixing Conspiracy," *University of Illinois Law Review* 2021 (4) (2021) (discussing how price fixing conspirators falsify exculpatory documents and how price-fixing conspirators hide and/or destroy incriminating documents).

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Laura Alexander is the director of markets and competition policy at the Washington Center for Equitable Growth. Her primary areas of research include healthcare markets, private equity, residential real estate sales, privacy policy, and labor market monopsony. Previously, she was the vice president of policy at the American Antitrust Institute. Alexander also is an experienced litigator, having represented plaintiffs and defendants in antitrust and other cases through trial and appeals as an associate at Kirkland & Ellis LLP and as an associate and partner at Cohen Milstein Sellers & Toll PLLC. She received her J.D. from Georgetown University and her B.A. in mathematics from Reed College. Alexander is also an adjunct professor of law at Georgetown.

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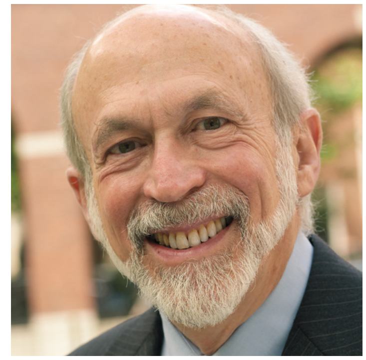
Disclosures: *During the past 3 years, I have not received compensation from private parties with interests in the subject matter addressed in this essay. During that time, I have acted as a consultant for a foreign governmental entity on subject matter related to this chapter.*



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Harry First is the Charles L. Denison professor of law at the New York University School of Law and has been co-director of the law school's Competition, Innovation, and Information Law Program. He has taught at NYU since 1976. His teaching interests include antitrust, regulated industries, international and comparative antitrust, business crime, and innovation policy. From 1999–2001, he served as chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. And from 1970–1972, he was an attorney in the Antitrust Division of the U.S. Department of Justice. He was twice a Fulbright research fellow in Japan and taught antitrust as an adjunct professor at the University of Tokyo in 1992–1993.

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