TECH FREEDOM

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II. Submissions

Antitrust Submissions for House Hearing July 29, 2020[1]

Author	**Support Statutory Changes to Antitrust Laws?**
Tad Lipsky Tad Lipsky is Assistant Professor and Director of the Competition Advocacy Program at the Global Antitrust Institute. As Deputy Assistant Attorney General (1981-83), he supervised preparation of the 1982 Merger Guidelines and organized and supervised the Antitrust Division's review of *United States v. IBM Corp*. Co-chaired the 2016 Transition Team for the FTC and served as Acting Director of FTC's Bureau of Competition until July, 2017.	**N**
Daniel Sokol Professor Daniel Sokol is one of the 10 most cited antitrust law professors of the past five years. He has presented his work before a number of authorities worldwide, including the DOJ's Antitrust Division and the FTC, and serves as academic advisor to the US Chamber of Commerce's Antitrust Council. He has won numerous awards, including the Global Competition Review Academic of the Year award.	**N**
Deborah Garza (plus Antitrust Modernization Commission)	**N**

[1] Material in brackets are summaries; all other material are quotes from the submitted papers. Quotes that may make for good Tweets are bolded or italicized. Note that there may be some imprecision in the precise quotes as presented here, as the copying and pasting process introduced some errors, which I have attempted to clean up.

Deborah Garza is currently a Partner at Covington & Burling. She has previously served in three presidential administrations and was appointed by President Bush to Chair the Antitrust Modernization Commission from 2004 to 2007.	
Maureen Ohlhausen Maureen Ohlhausen currently chairs Baker Botts' Global Antitrust and Competition practice. She previously served as Acting Chairman and Commissioner of the FTC, where she directed the FTC's antitrust work, particularly emphasizing privacy and technology issues.	**N**
Timothy Muris Timothy Muris is a George Mason University Foundation Professor of Law, and served as Chairman of the FTC from 2000-2004. Before his Chairmanship of the FTC, Professor Muris was the Director of the Bureau of Consumer Protection, as well as the Director of the Bureau of Competition.	**N**
Thom Lambert Thom Lambert is the Wall Chair in Corporate Law and Governance and Professor of Law at the University of Missouri. He co-authored one of the leading antitrust casebooks, and has published numerous articles on antitrust. His most recent book is *How to Regulate: A Guide for Policymakers.*	**N**
Gregory Werden Gregory Werden is Senior Economic Counsel at the DOJ's Antitrust Division, where he has been since 1977. He has worked on over fifty amicus briefs with the Supreme Court,	**N**

and since 1985 has worked on all appeals in DOJ's civil antitrust cases. He has published more than a hundred scholarly works on antitrust policy and related topics.	
Sharis Pozen Sharis Pozen is Co-Head of the Global Antitrust Practice at Clifford Chance. She has 30 years of experience practicing antitrust law, including in leadership roles at the FTC and the DOJ's Antitrust Division, where she served as Acting Attorney General for almost a year. Of particular relevance is her experience representing Netscape starting in 1997 when it was a third party and lead witness in the DOJ's case against Microsoft.	**N**
Daniel Crane Daniel Crane is the Frederick Paul Furth, Sr. Professor of Law at the University of Michigan. Professor Crane has authored several articles and books on antitrust law. Some of the areas on which his antitrust scholarship has been focused include the institutional structure of antitrust enforcement, predatory pricing, and bundling.	**N**
Joint Statement of scholars, economists, practitioners (23) **Jonathan Barnett**, Professor at the University of Southern California Gould **Abbott Lipsky**, Professor at the Scalia Law School and Former Deputy Assistant Attorney General of the DOJ Antitrust Division and Former Acting Director of the FTC Bureau of Competition	**N**

Michael Baye, Professor of Business at the Kelley School of Business and Former Director of the FTC Bureau of Economics **Geoffrey Manne**, President and Founder of the International Center for Law & Economics and Distinguished Fellow at the Northwestern University Center on Law, Business, & Economics **James Cooper**, Associate Professor of Law at the Scalia Law School and Former Acting and Deputy Director of the FTC Office of Policy Planning **Scott Masten**, Profess of Business Economics and Public Policy at the University of Michigan Stephen M. Ross School of Business **Daniel Crane**, Frederick Paul Furth Sr. Professor of Law at the University of Michigan Law School **Maureen Ohlhausen**, Chair, Global Antitrust and Competition Practice at Baker Botts and Former Acting Chairman & Commissioner at the FTC **Kenneth G. Elzinga**, Robert C. Taylor Professor of Economics at the University of Virginia **James Rill**, Partner at Baker Botts and Former Assistant Attorney General at the DOJ Antitrust Division **Richard Epstein**, Laurence A. Tisch Professor of Law at the NYU School of Law **Jan Rybnicek**, Counsel at Freshfields Bruckhaus Deringer and Former Attorney Adviser to Commissioner Joshua Wright of the FTC **Deborah Garza**, Partner at Covington & Burling, Chair of the AMC, and Former	

Acting and Deputy Assistant Attorney General at the DOJ Antitrust Division **Vernon Smith**, George L. Argyros Endowed Chair in Finance & Economics at Chapman University School of Business and Nobel Laureate in Economics **Thomas Hazlett**, H.H. Macaulay Endowed Chair in Economics at Clemson University and Former Chief Economist at the FCC **David J. Teece**, Thomas W. Tusher Professor in Global Business at the University of California, Berkeley Haas School of Business **Justin (Gus) Hurwitz**, Professor of Law at University of Nebraska College of Law and Former Trial Attorney at the DOJ Antitrust Division **Robert Willig**, Profess of Economics and Public Affairs Emeritus at Princeton University and Former Deputy Assistant Attorney General for Economics at the DOJ Antitrust Division **Benjamin Klein**, Professor Emeritus of Economics at UCLA **Joshua Wright**, University Professor at Scalia Law School **Jonathan Klick**, Professor of Law at the University of Pennsylvania Carey School of Law **Josh Yun**, Associate Professor of Law at Scalia Law School; **Thomas Lambert**, Wall Chair in Corporate Law and Governance at the University of Missouri Law School	
Thomas Hazlett Thomas Hazlett is the H.H. Macaulay Endowed Professor of Economics at Clemson University. His scholarship focuses on law	**N**

and economics, with emphasis on the information economy. He has served as Chief Economist of the FCC, and has held various faculty positions.	
Randal Picker Randal Picker is the James Parker Hall Distinguished Service Professor of Law at the University of Chicago Law School, where he teaches courses in antitrust, network industries, and secured transactions. His scholarship primarily focuses on intellectual property, competition policy, and regulated industries.	**N**
Geoffrey Manne Geoffrey Manne is the President and Founder of the International Center for Law & Economics, and Distinguished Fellow at the Northwestern University Center on Law, Business, & Economics. He specializes in economic analysis of law, competition, telecommunications, consumer protection, IP, and technology policy.	**N**
James Cooper is an Associate Professor of Law at the Scalia Law School and Former Acting and Deputy Director of the FTC Office of Policy Planning. He has been published numerous times on matters of vertical restraints, price discrimination, economics and antitrust, and privacy policy. **Joshua Wright** is the Executive Director of the Global Antitrust Institute and University Professor at Scalia Law School. He served as commissioner of the FTC from 2013 to 2015.	**N**

Josh Yun is an Associate Professor of Law at Scalia Law School, and the Director of Economic Education at the Global Antitrust Institute. He was previously the Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division at the FTC, and has served as economic advisor to FTC commissioner Joshua Wright.	
Harry First is the Charles L. Denison Professor of Law and Co-Director of the Competition, Innovation, and Information Law Program at NYU Law. He specializes in antitrust and business crime, and has multiple publications in the field of antitrust, including *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century*. **Eleanor Fox** is the Walter J. Derenberg Professor of Trade Regulation at the NYU Law School. She was previously a member of the International Competition Policy Advisory Committee to the Attorney General of the DOJ from 1997 to 2000. She also served as a commissioner on President Carter's National Commission for the Review of Antitrust Laws and Procedures.	**Y**
Tim Wu Tim Wu is a professor at Columbia Law School. His recent scholarship of antitrust law has been especially focused on the big tech platforms, and his tech breakup proposals have garnered significant attention during the 2020 presidential debate. Previously, he was enforcement counsel in the New York Attorney General's Office, worked on competition policy for the National	**Y**

Economic Council for the Obama White House, and worked in antitrust enforcement at the FTC.	
John M. Newman John M. Newman is an Associate Professor of Law at the University of Miami School of Law. His scholarship is focused on economics and regulation of digital markets, with a particular focus on antitrust.	**Y**
Richard M. Steuer Richard Steuer is an Adjunct Professor of Law at Fordham University. He is the former Chair of the ABA Section of Antitrust Law, and current Senior Counsel at Mayer Brown LLP. His scholarly work in antitrust law has been published numerous times.	**Y, but only to confirm existing text of S 7**
Consumer Reports	**Y**
AAI	**Y**
Open Markets	**Y, but existing law would suffice if enforced properly**
Sanjukta Paul Sanjukta Paul is an Assistant Professor of law at Wayne State University, focusing on the intersection of antitrust and labor.	**Y**
ILSR (Institute for Local Self-Reliance)	**Y**
Herbert Hovenkamp Herbert Hovenkamp is a professor at the University of Pennsylvania Law School, and winner of the Justice Department's John	**Y, but very narrow**

Sherman Award for his lifetime contributions to antitrust law. His numerous publications include the 21-volume *Antitrust Law*.	
Hal J. Singer Hal Singer is a principal at Economists Incorporated, a senior scholar at the George Washington Institute of Public Policy, and an adjunct professor at Georgetown's McDonough School of Business. He has authored several publications, and has testified before Congress on matters of antitrust and sector-specific regulation.	**Y**
Marshall Steinbaum Marshall Steinbaum is a former research economist at the Center for Equitable Growth. Prior to joining Equitable Growth he earned a Ph.D. from the University of Chicago Department of Economics in 2014 and a B.A. in Philosophy, Politics, and Economics from Oxford University in 2005.	**Y**
Maurice Stucke Maurice E. Stucke is a co-founder of the law firm, the Konkurrenz Group, and a law professor at the University of Tennessee. He has worked in private practice and as a prosecutor at the U.S. Department of Justice. Professor Stucke serves as one of the United States' non-governmental advisors to the International Competition Network, as a Senior Fellow at the American Antitrust Institute, and on the board of the Institute for Consumer Antitrust Studies. Professor Stucke received a number of awards	**Y**

including a Fulbright fellowship to teach at the China University of Political Science and Law in Beijing.	
Joint Response (12 scholars, including Morton and Shapiro) **Jonathan B. Baker** Research Professor of Law American University Washington College of Law **Joseph Farrell** Professor of Economics, Emeritus University of California, Berkeley **Andrew I. Gavil** Professor of Law Howard University School of Law **Martin S. Gaynor** E.J. Barone University Professor of Economics and Public Policy Carnegie Mellon University **Michael Kades** Director, Markets and Competition Policy Washington Center for Equitable Growth **Michael L. Katz** Sarin Chair Emeritus in Strategy and Leadership, Haas School of Business Professor Emeritus, Dept of Economics University of California, Berkeley **Gene Kimmelman** Senior Advisor	**Y**

Public Knowledge **A. Douglas Melamed** Professor of the Practice of Law Stanford Law School **Nancy L. Rose** Charles P. Kindleberger Professor of Applied Economics Massachusetts Institute of Technology **Steven C. Salop** Professor of Economics and Law Georgetown University Law Center **Fiona M. Scott Morton** Theodore Nierenberg Professor of Economics Yale School of Management **Carl Shapiro** Professor of the Graduate School Transamerica Chair in Business Strategy Emeritus University of California, Berkeley	
Spencer Waller Spencer Weber Waller is the John Paul Stevens Chair in Competition Law, Director of the Institute for Consumer Antitrust Studies, and Professor at Loyola University Chicago School of Law. He is a member of the Advisory Board of the American Antitrust Institute and the editorial boards of the Antitrust Law Journal and the World Competition Law and Economics Review. Professor Waller is the author, co-author, or editor of 8 books and over one hundred articles on	**Y**

United States and international antitrust, including Antitrust and American Business Abroad, the leading treatise in the field. He is the co-editor and contributor to Brands, Competition Law and IP (Cambridge University Press 2015).	

III. Quotes by Topic

A. There is a 40-Year Bipartisan Consensus on the Consumer Welfare Standard

1. The Antitrust Modernization Commission Opposes Changes to the Antitrust Laws

- **Garza**: there was broad consensus that "the economic principles on which antitrust is based do not require revision for application to those industries." As one respected economist noted, basic economic principles do not become "outdated" *simply because industries have become more dynamic.*

- **Garza**: [Mentions several recommendations made by the AMC which are relevant to the Subcommittee's current investigation.]

    - *No statutory change is recommended with respect to Section 7 of the Clayton Act. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.S. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*

    - *No substantial changes to merger enforcement policy are necessary to account for industries in which innovation, intellectual property, and technological change are central features. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.*

    - The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.

- The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.

- The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means.

- *Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized that vigorous competition, the aggressive pursuit of business objectives, and the realization of efficiencies not available to competitors are generally not improper, even for a "dominant" firm and even where competitors might be disadvantaged.*

- Additional clarity and improvement are best achieved through the continued evolution of the law in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

- Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

- ln general, firms have no duty to deal with a rival in the same market.

- There is no need to give the antitrust agencies expanded authority to seek civil fines. Commissioner Kemp dissented from this recommendation out of concern that requiring such reporting would "create an irresistible temptation for agencies to bring ill-considered enforcement actions in order to 'improve' their statistical score-card." Commissioners Jacobson and Shenefield join this recommendation "with qualification."

- The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

- **First and Fox**: we urge the legislative adoption of a National Competition Policy.

2. The Consensus Today

- **Lipsky:** *The federal antitrust laws are fully adequate to address any anticompetitive conduct - both in general and more specifically with regard to the conduct of participants in markets employing digital technology . . . the present institutional structure of antitrust in the United States is more than adequate to assure robust enforcement of U.S. antitrust law*.

- **Lipsky:** *Emphasis on economic analysis of competition as the basis for antitrust enforcement was clearly foreshadowed - indeed one could say it was introduced to the enforcement community - during the tenure of Donald F. Turner, who served as President Lyndon Johnson's first Assistant Attorney General for Antitrust from 1965 to 1968.*

- **Sokol**: Consumer welfare works as the method of analysis for antitrust law. Despite critiques that caricature consumer welfare as trapped in a simplistic early-1970s framework of "Chicago School" economics, consumer welfare is flexible to changes in economic thinking.

- **Sokol**: *Republican and Democratic administrations haw agreed for decades on the basic analysis of cases based on economic evidence and guided by economic analysis.*

- **Sokol**: First, "tech" should not be subject to special rules (though for protectionist reasons, a number of European jurisdictions are taking this approach). To do so would be an extreme departure from the current antitrust system. Antitrust is a flexible system that has and can continue to respond to changes in economic thinking.

- **Sokol**: *The current institutional design of antitrust and the development of antitrust case law promotes such an approach. This institutional design has been long-standing across both Republican and Democratic administrations. Antitrust can and will adjust to particular facts and business realities when there is anti-competitive harm.*

- **Garza**: Over the ensuing decades, consumer welfare was recognized as the unifying goal of antitrust law, with few disputing that the core mission of antitrust law is to protect consumers' right to the low prices, innovation, and diverse production that competition promises.

- **Garza**: *There is no need to revise the antitrust laws to apply different rules to industries in which innovation, intellectual property, and technological change are central features.* Economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate. It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles re levant to antitrust analysis.

- **Garza**: With respect to mergers and acquisitions, in particular, the Subcommittee has asked whether the law is sufficient to deal with potentially anticompetitive vertical and conglomerate mergers, "serial acquisitions," acquisitions involving data and acquisitions of potential competitors. As in 2007, I believe the answer to those questions remains "yes, " for the reasons explained by the AMC Report.

- **Garza**: As explained in the AMC Report, the ongoing incorporation of economic learning into antitrust case law is far preferable to trying to legislate different antitrust analyses for digital markets. Those markets will continue to change over time, as will our understanding of them. "It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis" in these and other markets. While antitrust analysis of technology-based markets may involve consideration of issues like network effects, high switching costs and entry barriers, these issues are not unique to digital markets.

- **Garza**: Such thumb-on-the-scale legislation to stack the decks for the government are neither necessary nor wise. This approach curiously ignores decades of economic learning designed precisely to enable us to find the right balance to maximize consumer welfare and economic growth with little regard for the damage that such an approach would cause to investment, innovation and efficiency.

- **Ohlhausen**: Current antitrust law can prevent and remediate anticompetitive transactions of all varieties, including vertical mergers, acquisitions of competitively significant assets, or acquisitions of potential competitors.

- **Muris**: For decades, antitrust enjoyed bipartisan cooperation and wide support in the academy, the courts, and the legal profession. Although disagreements arose in close cases, widespread agreement existed that antitrust should protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, were the mainstays of enforcement.

- **Muris**: For decades, a wide, bipartisan consensus held that antitrust law should focus on the welfare of consumers, guided by economic analysis. For example, Carl Shapiro-the top antitrust economist in the Obama and Clinton Justice Departments-warns: "[L]et us avoid a 'big is bad' mentality and let us truly have the interests of consumers in mind. We learned long ago that proper antitrust enforcement is about protecting consumers, and protecting the competitive process, not about protecting competitors. We must not forget that guiding principle."

- **Muris**: *Rather than condemn productivity and innovation, whether in the 1930s, 1970s, or today, we should applaud it. Companies like these superstar firms, many of whom are so-called "tech giants," have been built from the ground up in the United States rather than in Europe or China, largely because the U.S. legal environment is stable, predictable, and uniquely hospitable to vigorous, paradigm-shattering competition by all businesses, large and small. That legal environment is a hallmark of American exceptionalism.*

- **Lambert**: *I believe the existing antitrust statutes are optimal for addressing monopolistic conduct and potentially anticompetitive transactions. While some aspects of prevailing antitrust doctrine could be improved, the better approach is to rely on the federal courts to bring about such improvements as they adjust doctrines, in light of economic learning and market developments, through the incremental, common law process.*

- **Lambert**: *Statutory reform is likely either to change antitrust's focus on consumer welfare to other ends, to impose inflexible rules rather than standards, or to delegate the implementation of standards to some government agency rather than to politically insulated courts.* For reasons I explain below, each of those changes would diminish antitrust's social value. Accordingly, legislative reform of existing antitrust doctrines is unwarranted.

- **Lambert**: Most commentators view the antitrust statutes as an implicit delegation of authority to the federal courts to craft a common law of competition, one that evolves according to our ever-expanding learning about the effects of different business practices.

- **Lambert**: *From the late 1970s until recently, this "consumer welfare standard" enjoyed near-universal support among antitrust commentators across the ideological spectrum.*

- **Lambert**: *Antitrust enforcers have recently affirmed that market power-induced harms to consumer privacy, a matter of service quality, are cognizable under the consumer welfare standard*

- **Lambert**: *Not only is it unnecessary to abandon the consumer welfare standard in favor of a multi-goaled public interest standard, doing so would have adverse consequences for consumers and the rule of law. We know this from experience.* During the mid-Twentieth Century, courts did embrace multiple goals for antitrust. They would often interpret the law to be aimed at promoting consumer welfare by encouraging competition so as to lower prices, enhance quality, etc. But they would sometimes impose liability in the absence of consumer harm -- in the face of obvious consumer benefit, even -- only to protect smaller competitors from larger, more efficient rivals.

- **Werden**: *Existing antitrust statutes governing monopolistic conduct and mergers are adequate in my view. The statutes are framed in general terms that allow jurisprudence to evolve as the economy changes and as our understanding of the competitive process grows*.

- **Werden**: The law remains somewhat undeveloped, but the most important thing is clear: U.S. antitrust law protects the competitive process rather than competitors, and even rather than consumers. I note that *Senator Klobuchar's bill preempts limiting principles and undermines the notion that antitrust law protects competition rather than competitors*.

- **Werden**: Congress did not make the Sherman Act a tool for redistributing wealth. Congress instead chose to protect the competitive process from the sabotage of private anticompetitive conduct. In my view, Congress should stick to that plan.

- **Werden**: Antitrust law in the United States has never been seen as an invitation to micro-manage the economy and thereby secure a greater share of the benefits for consumers, and I oppose any antitrust legislation extending the invitation to either judges or bureaucrats.

- **Werden**: Whether any practice of a tech giant should be condemned under U.S. antitrust law can be determined only through a deeply fact-intensive analysis. Investigations are underway, and if anticompetitive conduct is found, no defect in substantive antitrust law will prevent a remedy from being secured.

- **Werden**: *The anti-merger statute, Section 7 of the Clayton Act, is adequate for the digital marketplace*, and the two federal antitrust enforcement agencies have experience with merger enforcement in the digital marketplace.

- **Pozen**: The consumer welfare standard is the proper measure and basis of our antitrust laws as long as it is properly viewed as encompassing more than price competition. Under the consumer welfare principle, "antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low." As the 2010 Horizontal Merger Guidelines and case law has made clear, the consumer welfare standard should include product quality and variety, service, and innovation.

- **Pozen**: *I do not believe the existing US antitrust laws need revision. They are broad mandates into which many industries readily fit and can be adjudged.* The existing antitrust laws that address monopolization and monopolistic conduct are sufficiently broad.

- **Pozen**: *I am confident in the breadth of the antitrust laws to properly investigate and enforce the law as applied to digital markets*.

- **Pozen**: *Recent challenges to the acquisition of nascent competitors demonstrate that the agencies are actively pursuing these cases.*

- **Crane**: *If the historical pattern holds, substantive legislative reforms are unlikely to achieve durable changes in the way the courts apply the antitrust laws.* This is not to say that new legislation would achieve nothing--in some cases, particularly with respect to the Robinson-Patman and Celler-Kefauver Acts, the courts initially followed the statute faithfully before retreating into "common law" interpretation that nullified much of what Congress enacted. However, the eventual trend has been, seemingly inevitably, away from distinctive legislative text and purpose and toward a homogenous common law of competition across all of the antitrust statutes.

- **Crane**: *Our judicial system has the capacity to work out iterative answers informed by experience and evolving understanding of competitive practices. I would not counsel any legislative amendment to Section 2 of the Sherman Act.*

- **Crane**: The antitrust agencies have long scrutinized acquisitions of intangible assets, such as patents, on the same terms as purchases of corporations or corporate shares. There is therefore no legal obstacle to antitrust enforcement against anticompetitive acquisitions- should such cases arise.

- **Crane**: I will conclude by repeating the observation that current legal doctrine is capacious enough on potential competition to permit the agencies and courts to work incrementally toward enhanced understanding of this problem. I do not believe that legislative reforms would be desirable.

- **Joint Statement**: The consumer welfare standard is not a narrowly circumscribed objective, but rather a prescription for the general social wellbeing generated by the competitive process. By contrast, *many of the current proposals would* (1) undermine the rule of law; (2) undo the healthy evolution of antitrust law in the courts over time; (3) require antitrust agencies to micromanage the economy by picking winners and losers; (4) abandon a focus on consumer welfare in favor of vague and politically oriented goals; and (5) *undermine successful American businesses and their competitiveness in the global economy at the worst-imaginable time*.

- **Joint Statement**: *Existing antitrust law is adequate for protecting competition in the modern economy. Antitrust law has developed incrementally through the common law approach. A strength of antitrust law is that it can incorporate learning about new business practices and economics to protect competition in an evolving economy*. The existing antitrust laws and enforcement framework, when correctly applied, are more than adequate to deter anticompetitive conduct, including in new and growing digital markets.

- **Joint Statement**: The consumer welfare standard contemplates the evaluation of alleged anticompetitive behaviors based on tradeoffs tied to the health of the competitive process. It thus dispenses with the need to make distributional choices inherent in selecting among divergent goals in favor of designing and implementing competition policy to prioritize the competitive process, which benefits all Americans.

- **Joint Statement**: *By grounding antitrust analysis in a disciplined and tractable framework, the consumer welfare standard fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions.*

- **Joint Statement**: *The consumer welfare standard also has the benefit of tethering antitrust outcomes to modern economics*. Implementation of the consumer welfare standard by courts and enforcers took the vague concept of "protecting competition" embodied in the antitrust laws and for the first time breathed meaning into it through the common language of economics. This allows for robust scrutiny of a variety of market factors including price, quality, and innovation.

- **Joint Statement**: *There is broad bipartisan support that protecting consumer welfare (properly defined) through the protection of competition is, and should be, the lodestar of modern antitrust enforcement.*

- **Joint Statement**: Research indicates that merger enforcement has increased relative to merger volume in *the past several decades and there is no evidence that anticompetitive mergers are more likely to pass muster today than in decades past. The claim that antitrust enforcement has been lax, or that anticompetitive mergers have been on the increase, is just not borne out by the evidence.*

- **Joint Statement**: In sum, *radical proposals to overturn broad swaths of modern antitrust doctrine are misguided, unnecessary, and threaten to abandon the rule of law with little to offer in return.*

- **Hazlett**: The evidence supports the view that, *relative to practical alternatives that include E.U.-style regulation, digital markets in the U.S. appear robust, generating considerable innovation that produces pro-consumer outcomes. The global Internet is dominated by U.S.-developed technologies and business models, discovered and deployed in a process of competitive rivalry.*

- **Hazlett**: Perhaps Richard Langlois states this more eloquently: "*Proponents of anti-tech antitrust must explain why consumers [are] being harmed by an incomprehensibly magical information source with swift access to virtually all the products of humanity at the touch of a finger ....*"

- **Picker**: *The companies that are at the heart of your investigation - Google, Apple, Facebook, Amazon and Microsoft- built their market positions off of incredibly successful products that faced a competitive marketplace. U.S. antitrust law does not condemn firms for doing that and more broadly as a society we should applaud the innovation and hard work that that represents. And the fact that all of those companies were founded in the United States is something that we should take pride in and should not take for granted*. I hope all of that is a point of common ground, but I fear that it might not be.

- **Cooper/Wright/Yun**: First, the current body of doctrine regarding monopolization is more than sufficient to address the digital marketplace. As such, *it is unnecessary to import the European concept of "abuse of dominance" into American antitrust doctrine. Doing so would penalize successful firms and directly harm the competitive process and thereby consumers*. Additionally, present-day antitrust doctrine also adequately addresses concerns with platform self-preferencing, which can generate both procompetitive and anticompetitive effects. Finally, conflation of antitrust and privacy policy should be avoided because the extent to which privacy serves as a dimension of competition is unclear and data collection can support higher quality products benefitting consumers.

- **Cooper/Wright/Yun**: *The consumer welfare standard has been widely lauded for bringing coherence and credibility to antitrust law, providing a framework for consistent, economically-sound decision-making, and giving consumers the benefit of lower prices, increased output, higher product quality, and more innovation. By focusing on a single objective measure, the consumer welfare standard disciplines modem antitrust law. Antitrust enforcers and courts under a consumer welfare standard are forced to support their actions with sound economic evidence. This helps to deter arbitrary or politically motivated enforcement actions.*

- **Cooper/Wright/Yun**: Based on the current evidence and scholarship, we believe the U.S. federal antitrust laws and the enforcement of those laws are sufficient and effective in preventing anticompetitive acquisitions of potential and nascent competitors.

- **Baer**: The executive and legislative branches, whether led by Republicans or Democrats, were mostly on the same page. As a result, for the last 30 years or so, antitrust enforcement has been largely nonpartisan, driven by the widely shared view that harm to consumers and competition should be the predicate for challenging conduct. And that is a good thing.

- **Baer**: *Analytically sound and fact-based antitrust enforcement … provides the public, the business community, the courts and the legislative branch with some assurance that it is the merits that count - not political ideology, whim or the desire to pick winners and losers in the economy*. And it helps explain why there have been only modest pendulum swings in competition enforcement over the last few decades. *Consistency and predictability enhance the credibility of antitrust enforcement.*

- **Steuer**: "Incipiency" describes the test under which mergers, acquisitions, and certain anticompetitive practices are prohibited by the Clayton Antitrust Act, 15 U.S.C. §§ 14, 18, when the effect may be substantially to lessen competition or tend to create a monopoly. *Applied intelligently, the incipiency test can satisfy most of the calls that are coming from across the political spectrum to strengthen antitrust enforcement. What's more, this can be accomplished without changing the statute. And, if there is consensus that the Clayton Act needs to be sharpened, there are means to accomplish that too*.

- **Hovenkamp:** *Antitrust is not a cure-all for political problems, patent problems, breach of contract, fraud, invasion of privacy or other violations of tort law, unless the practice in question also harms competition. Nor is it well designed to pursue business firm bigness for its own sake.* Large firm size becomes an antitrust problem only when it impairs competition.

- **Hovenkamp:** *An important benefit of this consumer-oriented approach to antitrust is that maximum output is also conducive to economic growth. which benefits everyone, including business and labor*.

- **Hovenkamp:** *Based on public information, it seems unlikely that the existing platforms have sufficient market power to be considered "monopolists" in most of the product markets where they operate.*

B. Dynamism: The Market Is Working Now

- **Lambert**: Moreover, *to the extent economies of scale and network effects influence competitive dynamics by rendering certain conduct anti- or procompetitive, the current antitrust regime can account for that. Economists understand quite a bit about economies of scale, network effects, and two-sided markets*. Under the prevailing antitrust regime, their views are sure to influence both the application and continued calibration of legal standards, and when economic understanding grows or circumstances change, courts may reach different conclusions.

- **Lambert:** *Put simply, there is no evidence of a market power crisis resulting from increased industrial concentration. When it comes to market competition, trends in national sector-level concentration are inapposite.*

- **Lambert**: *The evidence, however, does not support the view that lax U.S. antitrust is reducing innovation. Eleven of the top sixteen global spenders on research and development are U.S. firms, and six of those-Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook-are "Big Tech" firms that have been accused of acting like monopolists.* Moreover, the U.S. is home to half (178 of 356) of the world's so-called "unicorn" companies-i.e., private companies valued at greater than $ 1 billion. China ranks second with 90, and all of Europe contains a fraction of that number.

- **Joint Statement**: The American economy--including the digital sector--is competitive, innovative, and serves consumers well. Debate about whether the antitrust laws should be fundamentally rewritten originated from a concern that markets have recently become more concentrated and that competition had decreased as a result. The popular narrative, that increases in concentration have caused harm to competition throughout the economy, does not withstand close scrutiny.

- **Joint Statement**: In reality, most markets in the American economy--including digital markets--are competitive, and thriving, and create huge benefits for consumers. Structural changes in the economy have resulted from increased competition. The economic data show that intense competition, winner-take-all rivalry, and the adoption of new successful technologies in relevant antitrust markets were major economic forces that led to structural changes (i.e., increased national-level concentration) in the economy. The existence of these structural changes does not itself support changes in the law.

- **Joint Statement**: Lax antitrust enforcement has not allowed systematic increases in market power. *There is little evidence to support the view that anemic antitrust enforcement has led to a systematic rise in market power in the American economy. The evidence is especially weak as it relates to digital markets.*

- **Joint Statement**: The weight of the literature today--much of which is no more than a couple of years old and some of which is still in working paper form--does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework.

- **Joint Statement**: The most recent studies suggest that the observed changes in national-level concentration are brought about by the expansion of more productive large firms into local markets leading to, in these economists' own words, "more, rather than less, competitive markets."

- **Joint Statement**: *There is no evidence of systematic harm in digital markets arising from lax antitrust enforcement. To the contrary, digital markets are intensely rivalrous and generate substantial long-run economic welfare*. Given the demonstrated and well-known salutary effects that digital markets produce for consumers, the burden lies with those proposing radical reforms to address the alleged inadequacies of antitrust performance in digital markets to substantiate those claims. The evidence does not support the provocative claims made by many reformers.

- **Hazlett**: Economists have effectively critiqued such reported trends as somewhere between meaningless and misleading. Where increases in concentration, reasonably measured, are observed, there is no apparent harm.

- **Picker**: Sellers would almost certainly prefer that potential customers go to their websites directly, but it is hard for sellers to get attention from customers. Amazon has succeeded in doing that. When businesses say that they have to be on Amazon, they mean that they want access to the huge volume of product searches that occur there. Customers go to Amazon ready to buy. Amazon is going to charge for bringing those customers to these third parties.

- **Picker**: *The behavior of third-party sellers suggests that Amazon is providing valuable services to those sellers in using its internal skill set in wholesale transactions on the Amazon platform. Requiring Amazon to exit one business or the other would reduce competition and would risk destroying these valuable arrangements*.

- **Manne**: *It is inappropriate to draw conclusions about the strength of competition from national concentration measures. This view is shared by many economists across the political spectrum*. Carl Shapiro (former Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice under President Clinton) for example, raises these concerns regarding the national concentration data: "[S]imply as a matter of measurement, the Economic Census data that are being used to measure trends in concentration do not allow one to measure concentration in relevant antitrust markets, i.e., for the products and locations over which competition actually occurs. As a result, it is far from clear that the reported changes in concentration over time are informative regarding changes in competition over time."

- **Manne**: *The reality is that the large platforms—as well as many other companies—are increasingly and significantly in direct competition with each other for users and advertisers.*

- **Manne**: *Killer acquisitions are uncommon in digital markets and difficult to identify ex ante. These fears are often rooted in hindsight bias. Most small acquisitions either fail outright or have a negligible impact on the acquirer's business. In the small minority of cases where the acquisition becomes hugely successful, it is almost impossible to know whether the acquired company could have achieved the same level of success* in the counterfactual scenario. For example, Instagram arguably lacked a meaningful revenue-building business model before its acquisition, so it is not obvious that the company would have succeeded without Facebook's advertising expertise. Asserting that enforcers may have missed one or two anticompetitive mergers in the tech market is entirely speculative, and insufficient evidence for severely altering the doctrinal balance of the current system.

- **Manne**: *There is little evidence for "killer acquisitions" in digital markets, and it would be nearly impossible to identify which acquisitions are "killer" before the fact. Acquisitions are often investors' and founders' "exit strategy," and the evidence suggests that deterring acquisitions in tech would chill investment in startups and harm innovation*.

- **Manne**: Properly considered, *access to large amounts of data does not, by itself, constitute an anticompetitive barrier to entry. Data is simply one input in a panoply of inputs necessary for a firm to compete effectively*. "[B]ig data does not represent a barrier to entry but rather a factor of production much like any other input. It should therefore be treated as such."

- **Manne**: Valuable user data is widely held, and new entrants can acquire it as they can acquire any other factor of production. There are numerous examples of businesses successfully entering new markets without access to the same data as incumbents because they are offering a superior product.

- **Manne**: *Increases in national-level firm concentration are being driven by more intensive competition at the local level as larger chains compete with each other. This increased competition and choice is good for consumers*.

- **Manne**: Large digital platforms compete directly for advertising spending, which is often their main source of revenue, and indirectly for the user attention that allows them to sell advertising. They are increasingly in direct competition for users as well, as they expand into new markets.

- **Manne**: *Platforms competing with edge providers is often good for the edge providers as well as consumers, and platforms have strong incentives not to strangle edge providers that use their services*.

- **Cooper/Wright/Yun**: There is evidence that the trends in rising national concentration and falling local concentration are best explained by increased competition and technological change, not a rise in market power.

- **Cooper/Wright/Yun**: The relevant question is not whether the FTC or DOJ got a particular merger right or wrong, but whether or not the agencies are systematically biased in approving anticompetitive mergers (i.e., a Type II error or a false negative) or blocking procompetitive mergers (i.e., a Type I error or a false positive). To our knowledge, there is no study that has shown that the agencies are systematically committing either of these errors. These recent enforcement actions suggest that the agencies are not only active in this area but are also willing to push the bounds of the current potential and nascent competition doctrines.

- **Cooper/Wright/Yun**: *At the time of the purchase, Instagram had zero revenues and a handful of employees. Since Facebook's acquisition, Instagram has grown from 30 million users to well over one billion.* During the same period, Facebook grew from approximately 900 million users to over two billion users. When properly formulated, the central forces driving anticompetitive conduct are reductions in output: quality, innovation and transfers away from consumers to producers. Facebook's acquisition of Instagram does not fit this profile. *An acquisition that results in tremendous growth for both the acquiring and acquired product strongly suggests a procompetitive outcome*.

- **Open Markets**: *The Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. We believe the main reason for the radical concentration of power in these corporations is not any shortcoming in law, but the lack of political will by antitrust enforcers*. We believe this lack of political will is exacerbated by the adherence of law enforcement agencies to dangerously flawed economic philosophies that largely brought us America's monopoly crisis in the first place.

- **Open Markets**: *America's present monopoly crisis is due not to any fundamental shortcomings in existing law, but rather to a combination of extremely weak enforcement made worse by the teachings of the deeply flawed, efficiency-fetishizing ideology used to interpret the law.*

- **Hovenkamp:** *While predatory or other forms of exclusionary pricing is possible, the case for predatory pricing claims against individual internet sellers seems weak*. First, digital platforms are "two sided" markets, which means that revenue must be measured by looking at all relevant sides. For example, while Google and Facebook are largely free to users they are almost certainly not engaged in predatory pricing. Most of their revenue comes from advertising. There have been allegations that Amazon once engaged in predatory pricing of eBooks, but those claims were found by both the Justice Department and the court to be unpersuasive, and I do not quarrel with that outcome.

- **Hovenkamp**: *I see little merit in various proposals to break up large digital platforms such as Amazon or Facebook. These proposals appear to see size itself as the wrong to be proscribed and offer little assurance that price or output will improve. The opposite's more likely. The United States does not have a good track record with enforced breakups* *for monopolistic practices. Aside from recent mergers, there is no obvious way to break up highly integrated digital platforms without doing serious harm to both consumers and investors.*

- **Hovenkamp**: *Breaking off individual features simply makes the platform less attractive to users but does little to alleviate monopoly. Any breakup that interferes with economies of scale will result in higher costs and very likely higher prices or decreased product quality*. In any event, a breakup proposal must be more than rhetorical flourish. It must be accompanied by specifics showing which assets are to be spun off, as well as well-informed predictions concerning the impact on output, price, or quality.

- **Hovenkamp**: *The impact of Amazon's house brand competition in close juxtaposition with third parties is to force down the prices of the large name brands, most of which enjoy significant trademark appeal and high margins*. Segregating Amazon's house brands from the name brands (or requiring Amazon to withdraw from the market of one or the other), will reduce price pressure on the name brands, enabling yet higher prices. *Consumers will be harmed, and small businesses are unlikely to be benefitted*. Wise antitrust enforcement requires figuring out who is being hurt, and how, before proceeding.

- **Hovenkamp:** *while some small businesses who compete with Amazon are undoubtedly harmed, many others are benefitted because Amazon has effectively become their internet broker*. They receive access to internet distribution tools including billing and collection that they could not match on their own. As a result, one should not act too categorically. There is no good substitute for factual determinations of harms from contract practices. Specific instances of anticompetitive practices such as MFNs or exclusive dealing should be identified and remedied by both injunctive relief and private treble damages actions in appropriate cases.

C. Many of the Proposed Changes Would Politicize Antitrust Law and Enforcement

- **Sokol**: *If antitrust eschews an economic basis for its decision-making, then it changes the framework of antitrust law and policy. A new non-economics approach for decision-making would include some sort of 'fairness' consideration that takes the place of economics. What is 'fair" is often indeterminate and highly subjective.*

- **Sokol**: Issues *of economic analysis and fairness are particularly important because antitrust regulation and intervention can be misused in ways that promote lack of fairness* *and lack of competition on the merits. Public interest (non-economic) standards are particularly prone to such abuse.*

- **Sokol**: *Private firms may seek to use government-brought antitrust action strategically to punish rivals that are more efficient*. This strategy allows a firm to use government investigation as a way to raise rivals' costs. Even worse, incumbents may target new successful competitive business models by lobbying for antitrust enforcement, rather than focusing on competition on the merits.

- **Sokol**: [About the fairness consideration] *It provides agencies with a high degree of discretion and can create significant lack of legal certainty for business as to when a certain practice will be considered fair or not as well as introduce the possibility for enforcers to use politics to drive outcomes*.

- **Sokol**: Changing the consumer welfare standard would make antitrust look like sector regulation which is often rife with capture by special interest groups, as the Robinson-Patman Act illustrates. In regulated industries with a public interest standard firms may try to curry favor with the government to raise barriers to prevent new entry or to raise rivals' costs.

- **Sokol**: *Returning to this approach of picking winners and losers that favor special interests in the current digital economy would be similarly disastrous*. Many digital platforms have introduced low (or no) cost products and services. driving down prices in how consumers shop, connect with loved ones, research health issues, apply for jobs, and much more. These platforms have also provided similar benefits to small businesses, publishers, and advertisers, who can now reach global audiences that they could not reach in the past. *Disrupting these business models to support inefficient incumbents (many of whom are still owned by billionaires) would result in higher cost services (e.g., pay walls) that impact the most vulnerable who rely on a free and open Internet.*

- **Lambert**: *With enforcers and courts free to pick and choose among antitrust's multiple goals in order to condemn or acquit virtually any business behavior, antitrust became less a body of law and more an exercise of raw political power*. Bork compared it to the sheriff of a frontier town: "He did not sift the evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people."

- **Lambert**: *When government always wins, winning the favor of government officials becomes paramount. For that reason, abandonment of the consumer welfare standard in* *favor of a multi-goaled public interest standard or "abuse of dominance" approach would promote politicization of the antitrust enforcement agencies.*

- **Joint Statement**: *Some of the radical initiatives being pursued to reform antitrust today seek to abandon the consensus that has developed around the benefits of the consumer welfare standard as the guiding principle of antitrust. One need only look to history to see that this would be a bad idea.* Doing so would compel regulators and courts to evaluate the multidimensional and diverse effects of business conduct on political power, economic inequality, the environment, rival businesses, profits, and an assortment of other vague factors without the anchor of the focus on the impact on input and output market competition. This would necessarily lead to an incoherent weighing of the diverse effects, and subjective management oversight of the economy by the government and by the courts. It would also encourage rent-seeking by industry participants seeking to curry favor with the antitrust agencies and allow for the antitrust laws to be used as a weapon between rivals.

- **Hazlett**: Transferring money from Google and Facebook to newspapers may be a perfectly sensible social policy-I'm not opining on that- but it is clearly a political fight far removed from U.S. antitrust policy

- **AAI**: Antitrust is a generalist form of law enforcement, and special antitrust rules for any sector (digital technology or otherwise) would eliminate this important feature, creating conflicts across sectors, confusion in the courts, and potentially weakening antitrust law even further. Antitrust reforms should thus address issues like those identified above, but in ways that apply across sectors and markets and that retain antitrust's generalist law enforcement approach.

D. Vertical Mergers Benefit Consumers

1. Vertical Mergers Are Generally Pro-Competitive

- **Sokol**: Finally, structural remedies like bans based on size or by industry are bad for consumers. *Over the last 50 or so years, the overwhelming weight of economic evidence has increasingly shown that vertical integration - whether by merger or otherwise - is typically procompetitive*. Most sectoral regulations banning vertical integration have been discarded over time because such restrictions hurt consumers.

- **Sokol**: Large firms use acquisitions to fuel their own innovation. Innovation is critical for firms because greater innovation leads to improved financial returns. The race to innovate is particularly important in technology related industries where there is rapid change in and for the market. When firms reach a certain size and level of complexity, they tend to be less nimble with product innovation.

- **Sokol**: *For many vertical acquisitions, there are also benefits associated with the continued development of the acquired firm's technologies. For instance. the acquired service may lack sufficient resources to survive in the long-term, such as an adequate strategy to generate revenue. Companies with established business models can provide such support, such as connecting the acquired service with its own popular advertising network.*

- **Ohlhausen**: Vertical mergers, a hot topic in the antitrust world of late, are also subject to antitrust oversight and enforcement. The vast majority of vertical arrangements, however, are pro-competitive -- FTC Commissioner Christine Wilson has convincingly laid out the reasons why: vertical deals eliminate no head-to-head competition in any market; they may create cost-saving benefits such as the elimination of double-marginalization and incentivize investment by aligning upstream and downstream incentives; and they are confirmed to be typically procompetitive by retrospective analyses, such as those collected by DOJ and FTC economists and expanded upon by the Global Antitrust Institute.

- **Hazlett**: *A 2005 study concluded that vertical integration was overwhelmingly associated with lower costs and better outcomes for consumers. An article in 2007 in the Journal of Economic Literature surveyed published academic research and reached the same conclusion.*

- **Manne**: *Professors Francine Lafontaine (former Director, FTC Bureau of Economics under President Obama) and Margaret Slade catalogued and analyzed this literature*, and they assess its meaning for antitrust policy: "As to what the data reveal in relation to public policy, . . . the weight of the evidence . . . says that, *under most circumstances, profit-maximizing vertical integration decisions are efficient, not just from the firms' but also from the consumers' points of view. . . . [E]ven in industries that are highly concentrated..., the net effect of vertical integration appears to be positive in many instances."*

- **Manne**: Vertical integration may help firms to internalize transaction costs, prevent holdup or moral hazard, reduce double marginalization, and create pro-consumer product innovations integrating products and features efficiently. All of these ultimately benefit consumers. And these findings hold true in the digital economy: *as the empirical evidence demonstrates, vertically integrated platforms tend to offer* *significant consumer benefits even when their conduct might lead to less consumer use of specific downstream competitors.*

- **Manne**: Vertical integration is generally good for consumers, because it helps firms to internalize transaction costs, prevent holdup or moral hazard, reduce double marginalization, and might allow the vertically integrated firm to efficiently price discriminate.

- **Hovenkamp:** *Merger policy should not be designed to go after large size for its own sake. It needs to rest on sound economic theory about when mergers lead to lower output and higher prices*. These tests should be objective and not depend on the testimony of affected firms. Efficiency claims, which are frequently asserted in litigation, should be disregarded except where proof is particularly strong and non-speculative, and then only as a tie-breaker for mergers that are barely above acceptable concentration thresholds. *Merger law should also reflect sound economic analysis about bargaining behavior among profit-maximizing firms that often serves to explain why both horizontal and vertical mergers lead to higher prices. The draft Vertical Merger Guidelines recently released by the Agencies are a good first step.*

- **Hovenkamp**: *One pressing merger threat is widespread digital platform acquisitions of much smaller firms. … In general, adding complementary products or services is competitively beneficial*. Such acquisitions can limit potential competition. however.

2. Acquisition of Small Companies by Large Companies Is Critical for Investment and Innovation

- **Sokol**: *To wholesale attack an entire business model that has been the primary form of exit for entrepreneurs not merely in platform-based tech but in biotech and other R&D intensive industries across the supply chain would create economy-wide problems. When certain avenues for firm exit, such as vertical acquisition by larger firms, are closed off via limits to acquisition because of an overly stringent antitrust regime, it hurts the entrepreneurial ecosystem. Entrepreneurs would be chilled from creating start-ups if they could not easily create a liquidity event to extract financial rewards from their investment*.

- **Sokol**: Even the best VCs and CVCs have trouble picking winners and losers. Just because a larger firm acquires a start-up does not mean that the best technologies, people, and ideas can be implemented to capture value from the acquisition. It is the very intangibility of the formula for success that ensures that we can identify success only with hindsight.

- **Lambert**: Finally, *the fact that large American technology firms are purchasing smaller producers of complementary products or technologies in no way implies that the incentive to innovate is thereby reduced. Many start-ups are organized with the goal of being bought out by a larger firm; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company's having to incur the significant cost of a public offering*.

- **Manne**: Without sufficient evidence, *proposals to ban large technology companies from acquiring nascent or potential competitors could do much more harm than good, resulting in significantly lower levels of innovation and consumer welfare, including deterring start-up activity*. In addition to halting welfare-enhancing integrations and potentially leaving many small companies to fail in the long run, regulatory intervention that reduces the likelihood of reaching a profitable exit could reduce the incentive for venture capitalists to invest in startups and may inhibit new business formation. *A research paper analyzing venture capital investments and M&A activity found that "the number of [VC] deals scaled by the number of public firms . . . declines by about 27% in . . . states that enact an antitakeover law."*

E. Procedural Changes

1. Problematic Procedural Changes

- **Lipsky**: *American experimentation with broad application of the per se rule and heavy presumptions against business conduct led to important adverse effects on the competitiveness and productivity of the US economy.*

- **Ohlhausen**: *Forcing large platforms to provide access to all third parties who are arguably rivals under threat of liability would hamstring their ability to police their own platforms and keep out harmful content and services*, which would not serve consumer or broader societal interests well.

- **Ohlhausen**: *Another proposed expansion of Section 2 liability includes prohibiting a platform from also serving as a competing merchant on its own platform*. This may force retailers with revenues over $40 billion who also sell their own products over their websites to choose between offering house brand products (often popular with lower-income consumers) and offering products made by third parties, such as national brand manufacturers. *Were this prohibition interpreted this way, it would* *greatly reduce consumer choice on a large number of well-known retailer websites and possibly lead to a reduction in low-cost house brands-an extremely common retailing practice that long predated online sales*.

- **Lambert**: *The alternatives to the prevailing antitrust regime are unappealing. Imposing ex ante conduct rules via statute threatens ossification and significant error costs (as inflexible rules routinely misfire, especially in dynamic, technology-driven markets)*. Creating an agency to oversee competition in digital markets, as some have suggested, risks agency capture and may ironically entrench incumbent firms, which are likely to have an advantage over new entrants in navigating the regulatory arena. The better approach, in my view, is to stay the course.

- **Lambert**: In light of these concerns, some have called for legislative clarification that the antitrust laws are not to be interpreted to pursue consumer welfare exclusively. For example, the Anti-Monopoly and Competition Restoration Act, reportedly being drafted by Senator Elizabeth Warren, declares that the "antitrust laws were not created exclusively to enhance the narrowly defined concept of 'consumer welfare' as articulated by academics such as Robert Bork, or as described by the Supreme Court of the United States. The draft legislation also clarifies that "courts have misinterpreted the antitrust laws by adopting the misguided consumer welfare standard," and it provides that the true purpose of the antitrust laws is to protect "market structures that ... restore and protect competition between rivals" for the benefit of "workers, consumers, entrepreneurs, and citizens." *Antitrust courts would thus be directed to focus on market structures-not effects-to further the interests of workers, small businesses ("entrepreneurs"), and the democratic process ("citizens"). Proposals to amend the antitrust laws to forbid "abuse of dominance" are similarly likely to redirect antitrust's focus from consumer welfare to the protection of small competitors and other non-consumer interests.*

- **Lambert**: Jettisoning the consumer welfare standard in favor of the sort of multi-goaled, structural approach embraced by the Anti-Monopoly and Competition Restoration Act is both unnecessary and undesirable. It is unnecessary because each of the "blind spots" identified by critics of the consumer welfare standard is either addressed by the standard, more appropriately addressed by a body of law other than antitrust, or best left unaddressed

- **Lambert**: [On Klobuchar's bill] *This proposed reform would likely increase antitrust's error costs by chilling procompetitive conduct*. Any firm selling a brand for which it is able to charge above-cost prices would think twice before embarking on any course of conduct that would enable it to win business from, and thus "materially disadvantage" or "foreclose," its rivals.

- **Lambert**: The current system also allows courts to reallocate proof burdens if economic learning concerning the frequency of pro- or anticompetitive effect suggests they should. *Congress should not disrupt this sensible system by imposing an inflexible mandate that the defendant bear the burden of proving reasonableness in a large swath of cases in which conduct is likely procompetitive.*

- **Lambert**: [On Warren's bill] *These are radical proposals. As any regular shopper can attest, private label sales by retail platforms are ubiquitous. Consumers love private labels, and the fact that private label sales are common in highly competitive markets suggests that "serving as both a platform and a merchant that competes with third-party merchants" is not some sort of exclusionary strategy*.

- **Lambert**: *Mandating the structural separation of platforms and commerce is not only unnecessary to protect competition, it would also be destructive of competition. Private label sales increase competition in product markets and thereby benefit consumers.* In response to private label sales, existing merchants often must lower their prices or enhance the quality of their offerings. It is well-understood that the sorts of vertical restraints Senator Warren's proposal would condemn may often enhance market output and leave consumers better off but may also, under certain circumstances, reduce output and harm consumers. The bulk of the empirical evidence on such restraints, however, shows that they usually enhance consumer welfare.

- **Lambert**: Imposing a general antitrust duty on firms to share their "materially important" and "difficult to duplicate" assets with their rivals is a bad idea for the reasons set forth in the Trinko opinion.

- **Werden**: *The bill recently proposed by Senator Klobuchar (5.3426) exemplifies what should not be done. If it became law, a judge would be empowered to condemn as unlawful exclusionary conduct the introduction of a new product, the improvement of an existing product, or an above-cost price cut*. … The bill essentially starts from scratch on the law of exclusionary conduct, and if history is a guide, the law will be less clear at the turn of the 22nd Century than it is today.

- **Pozen**: Antitrust laws and enforcement----or even competition-related industry-specific legislation--are not necessarily solutions to all of the issues that exist in digital markets. Concerns unrelated to competition about privacy and unauthorized use of personal data, fraud, or other perceived harms, such as exploitation in labor markets, should be addressed with the tools of the relevant legal regime. *Antitrust's regulatory tools are not designed to correct all of the challenges posed by digital platforms.*

- **Crane**: One could imagine inverting the burden of proof and requiring the merging parties to prove that they are not likely to become competitors because of technological change, but that is not a practicable solution. How could one go about identifying the set of mergers to which the inverted burden of proof should apply without first identifying which firms are likely to morph into horizontal competitors through technological change?

- **Joint Statement**: *History teaches that discarding the modern approach to antitrust would harm consumers. Many of the radical reforms being proposed today seek to return antitrust to what it was in the 1960s.* But antitrust during that time was based primarily on per se rules that prohibited economic analysis and fact-based defenses. This created a body of law fundamentally marred by internal contradiction, that frequently protected individual competitors over consumers and did not focus on the central goal of protecting competition. *Congress has considered and rejected radical proposals to overhaul antitrust in the past and should do so again*.

- **Joint Statement**: *One of the most troubling aspects of the radical reform agenda is the systematic effort to overturn established case law, and to return antitrust jurisprudence to its incoherent, pre-economic era*. Overturning these cases would be tantamount to overturning the Court's consistent and laudable focus in the modern antitrust era on protecting competition, even where competition may harm the fortunes of specific competitors.

- **Picker**: It is far from clear to me that breaking up Google would do. It is certainly possible that, given their market positions, Google and Facebook have pushed up advertising prices, but that of course would make it easier for print media to compete with them today. Breaking up Google – say, forcing a divestiture of YouTube – might split the data held by Alphabet, especially going forward, but the revamped Alphabet and the new YouTube would both have large amounts of data. It isn't at all obvious that that would meaningfully improve the posture of newspapers. A breakup could just push down advertising prices without benefiting newspapers.

- **Picker**: Barring Amazon from running these ads would presumably raise First Amendment issues. And the key advantage of having Amazon run a platform is that everything suggests that they are a strong competitor in providing back-end transaction and fulfillment services to third parties. *We would weaken competition in that* *market if we excluded Amazon from it. Each time we bar a firm from a market, we run the risk of reducing competition in that market*.

- **Picker**: *The behavior of third-party sellers suggests that Amazon is providing valuable services to those sellers in using its internal skill set in wholesale transactions on the Amazon platform. Requiring Amazon to exit one business or the other would reduce competition and would risk destroying these valuable arrangements*.

- **Manne**: Without sufficient evidence, *proposals to ban large technology companies from acquiring nascent or potential competitors could do much more harm than good, resulting in significantly lower levels of innovation and consumer welfare, including deterring start-up activity*. In addition to halting welfare-enhancing integrations and potentially leaving many small companies to fail in the long run, regulatory intervention that reduces the likelihood of reaching a profitable exit could reduce the incentive for venture capitalists to invest in startups and may inhibit new business formation. *A research paper analyzing venture capital investments and M&A activity found that "the number of [VC] deals scaled by the number of public firms . . . declines by about 27% in . . . states that enact an antitakeover law."*

- **First and Fox**: urge Congress to consider specific legislation that would simplify litigation in a way that would allow courts more easily to achieve the goals of the National Competition Policy. One important way to do that would be to specify evidentiary presumptions that would shift the burden of justification to defendants. Courts in antitrust cases have often used presumptions, but the courts today more often use them to defeat antitrust claims. Congress could, for example, require dominant firms to justify certain exclusionary conduct, or their giant mergers. Congress could also make rules special to certain types of acquisitions; for example, acquisitions of nascent competitors by industry leaders

- **First and Fox**: Congress should seriously consider a complementary regulatory approach to deal with some systemic problems that require ongoing supervision and expertise and are difficult to remedy with after-the-fact litigation. High on this list would be data and privacy concerns. There may also be interoperability concerns that are hard for enforcement agencies to discover and for courts to monitor on an on-going basis

- **Lande / U Baltimore:** At a minimum, new legislation should create a presumption that the antitrust laws should impose sanctions on all firms with more than 67% of a relevant market unless defendants can overcome this presumption by presenting clear and convincing evidence that the firm does not have monopoly power.

- **Lande / U Baltimore:** Congress in 1890 actually intended Section 2 of the Sherman Act to be a "no-fault" statute. Section 2 is supposed to impose sanctions on all monopolies and attempts to monopolize, not just those for which plaintiff can prove that defendant engaged in anticompetitive conduct.
- **Lande / U Baltimore:** This legislation would block every merger - horizontal, vertical. or conglomerate - that exceeds clearly specified asset thresholds. We are proposing a law that would block every merger in which both firms have assets exceeding $10 billion unless they spin-off assets so that their increase in size falls below the figure.
- **Lande / U Baltimore:** Legislation should force the enforcers and courts to return to the original formulation of this doctrine. It should create a presumption that mergers to a total of more than 30% of a market should be presumed illegal.
- **Lande / U Baltimore:** Allow indirect purchaser consumers to sue for damages under the federal antitrust laws.
- **Lande / U Baltimore:** Award automatic prejudgment interest to successful victims of antitrust violations.
- **Lande / U Baltimore:** Stiffer criminal penalties
- **Lande / U Baltimore:** Whistleblower provisions for cartels
- **Newman**: Congress could clear up a great deal of confusion by simply clarifying that the antitrust laws are not a "consumer welfare prescription." Their coverage extends to all of the trading partners, as well as the competitors, of a concentrated source of power in the marketplace.
- **Newman**: Orthodox antitrust law's focus on price effects has increasingly attracted criticism. Less well-recognized, though no less important, is its deep obsession with output.
- **Newman**: Congress could do a great deal of good by clarifying that no single particular type of effect is a requisite element of an antitrust violation. Insistence on proof of an output reduction is just as badly misguided as an over-fixation on price effects. If antitrust is to become robust enough to deal with digital markets, more flexibility is needed.
- **Newman**: [adopt abuse of dominance standard]

- **Newman**: The probabilistic nature of the current Clayton Act Section 7 text ("may...") is optimal for the complex reality in which antitrust analysis takes place. Nothing can ever be known with absolute certainty. But it would be quite valuable for Congress to state expressly that mergers and acquisitions are also illegal if the effect "may have been substantially to lessen competition or to tend to create a monopoly." This simple addition would send a clear signal that an anticompetitive deal does not somehow become benign when it is consummated.

- **Newman**: [Repeal the Federal Arbitration Act, at least as to antitrust cases]

- **Newman**: Eliminate the judge-made "Indirect Purchaser" Limitation.

- **Consumer Reports**: we support a number of proposals now pending in the Senate that warrant the Subcommittee's consideration, including:

    - S. 3426, the Anticompetitive Exclusionary Conduct Prevention Act, to strengthen the ability of the antitrust laws to reach anticompetitive exclusionary conduct before the violator achieves a full monopoly;

    - S.2237, the Monopolization Deterrence Act. to authorize the Justice Department and the FTC to impose civil penalties for unlawful monopolizing;

    - S. 307, the Consolidation Prevention and Competition Promotion Act. to strengthen merger enforcement by restoring the "incipiency standard" and shifting the burden of proof for acquisitions involving extremely large corporations;

    - And S. 1937, the Merger Filing Fee Modernization Act to strengthen antitrust enforcement resources by increasing pre-merger filing fees for extremely large acquisitions.

- **Consumer Reports**: Reinvigorating the antitrust laws, while a key part of that, is not the full answer. Congress should also consider ways to restructure the online marketplace to promote competition - as it did three decades ago for telecommunications. In particular, we recommend Congress pursue two reforms that were key parts of what became the Telecommunications Act of 1996. Portability would enable consumers to exercise control over the information they have put on a platform, and to switch among platforms without having to "start over" and lose important records, documents, photos, and other materials. And interoperability would enable consumers and others using one platform as their home base to connect with those using other platforms.

- **Sanjukta Paul:** I encourage the subcommittee to formulate legislation that would substantially reverse antitrust's preference for vertical control and its hostility to horizontal coordination. With respect to the latter, there is precedent for doing so in other jurisdictions through regulatory channels. Most notably, the Australian Competition and Consumer Commission (ACCC) last year promulgated its proposal to implement a broad class exemption that would allow small businesses to collectively negotiate with their suppliers. processors, and some other entities.

- **ILSR (Institute for Local Self-Reliance)**: Congress should prohibit dominant digital platforms from engaging in other lines of business when doing so creates inherent competitive harms. In the case of Amazon, adopting this policy would compel Amazon to spin off its Retail, Private Label, and Logistics divisions each as separate, stand-alone companies divorced from its online marketplace.

- **ILSR**: Impose standards of nondiscrimination and common carriage on dominant digital platforms. Congress should instruct an agency such as the FTC to establish rules for dominant platforms to ensure these infrastructure companies provide fair and reasonable terms and pricing for producers and do not use their gatekeeper power to favor some firms over others or to impose onerous costs on market participants.

- **ILSR**: To address the extreme levels of concentration across the economy, Congress should prohibit mergers involving corporations that already have significant scale and market power, including acquisitions that are currently too small to trigger notice and review under the Hart-Scott-Rodino Act. If Congress chooses not to impose an outright ban, at the very least mergers involving firms with significant market power should be subject to heightened scrutiny and a more stringent standard for approval by the FTC and DOJ.

- **ILSR**: Establish "bright line" rules that ban anti-competitive conduct by firms with significant scale and market power, including dominant digital platforms.

- **ILSR**: We'd like to highlight two types of conduct that should be barred for firms with significant market power, including dominant digital platforms. The first is tying.

- **ILSR**: The second is predatory pricing. The current "recoupment" standard wrongly assumes that the only route for recouping losses is through charging inflated consumer prices in the future. But a growing body of scholarship shows that a firm that uses predatory pricing to expand its market share can reap rewards in other ways, including through an increase in its stock price and greater monopsony power to squeeze workers and suppliers.

- **ILSR** believes that sustained below-cost selling, tying, and other forms of conduct should be considered per se violations of the law when undertaken by firms with significant market power and scale, including Amazon and other dominant digital platforms.

2. Procedural Reforms Worth Pursuing

- **Lipsky**: U.S. procedural reforms in order to strengthen the institutional credibility of FTC antitrust proceedings. Specifically, I recommend that the position of Director of the Bureau of Competition be filled through Executive-Branch appointment, and that the Director be granted authority similar to that of the senior leadership of the Antitrust Division.

- **Sokol:** Because economic analysis allows for more precision than fairness does, it is important to highlight examples that show how economic analysis has shifted over time in ways that both promote enforcement and limit enforcement.

- **Sokol**: The best way to address such mergers is on a case-by-case basis that is fact-specific, consistent with current law and policy. The institutional choice best suited to develop such an approach comes from courts and antitrust agencies through Vertical Merger Guidelines to signal the factors for those vertical mergers that are higher risk. *A new legislative approach is likely to be too overbroad and would overwhelm antitrust agencies' resources with investigations and eventually challenges that discourage innovation and reduce consumer welfare.*

- **Garza**: The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

- **Werden**: The greatest problem in merger litigation is that judges do not fully understand vital economic evidence. … Congress should mandate written expert testimony in all government cases under Section 7.

- **Werden**: The Subcommittee might consider the radical reform of entrusting adjudication to antitrust experts.

- **Pozen**: However, I do believe we need to clarify certain existing court decisions, particularly as they apply to digital marketplaces. I also believe the agencies must sharpen their analytic tools and focus their enforcement resources with respect to both mergers and potential anticompetitive conduct in the digital marketplaces. Finally, I believe the time has come to consider institutional changes to the DOJ and FTC.

- **Pozen**: Agencies can support the development of new precedent by bringing cases strategically and providing novel forms of evidence of competitive harms gleaned through new analytical tools. Yet such efforts alone might be insufficient if courts continue to apply troubling precedent and restrict liability under antitrust laws. It could fall upon Congress to override certain precedents if they persist as an obstacle to needed enforcement in the digital marketplace.

- **Pozen**: Specialized Legislation - As noted above, antitrust tools alone may be insufficient to address some of the issues particular to digital platforms. This industry may require specialized legislation to address some of its features that cannot be properly addressed using the antitrust laws. I support careful review of this option. As a start, policymakers should consider whether legislation should be adopted to address harms including privacy, fraud, and exploitation of the labor markets. Some of the measures instituted to promote competition in the telecommunications sector may be applicable to digital markets. Such measures include data portability, interoperability, and the implementation of new standards. However, some have noted that certain measures, such as data portability and interoperability may only be suitable remedies for commoditized products and could actually cement dominance of other products in digital markets.

- **Crane**: *The FTC and DOJ recently promulgated draft vertical merger guidelines … Until the new guidelines are finalized and we have some experience with their implementation, it would be premature to consider potential legislative reforms.*

- **Joint Statement**: Common sense reforms should be pursued to improve antitrust enforcement. A positive agenda for antitrust reform would pursue common-sense initiatives that build upon prior learning while incorporating advances in industrial organization economics, empirical research, and analytical techniques. These proposals should focus antitrust enforcement on areas that will have the biggest return for consumers and input suppliers, support balanced retrospectives of agency decisions to identify gaps in enforcement, and address any institutional impediments to effective enforcement.

- **Picker**: But the relationship between Amazon and its third-party sellers is contractual and presumably those contracts establish the respective rights and obligations of the parties regarding this data. I doubt that antitrust law is the best tool to regulate this issue or third-party sellers would have strong antitrust claims under U.S. antitrust law. Blocking all uses of third-party data, individual or aggregated, through direct regulation almost certainly would be the cleanest way to resolve this issue

- **Manne**: To the extent that Congress chooses to act, it should do so by encouraging the antitrust agencies to elicit and expose more and better information. For example, Congress might require (and fund) agencies to coordinate the collection and analysis of data and significant economic research. The combination of the agencies' expertise and enforcement-related knowledge with high-quality research could significantly improve the state of our knowledge and the agencies' ability to make more informed enforcement decisions.

- **Manne**: Congress could also require the agencies to better elucidate and justify the reasoning underlying their enforcement decisions—including their decisions not to bring an enforcement action. This would serve as a useful roadmap for firms to better understand which conduct and mergers are considered violations of competition laws, and which are not. Such an approach should also inspire greater public confidence in the system and help to alleviate concerns that lobbying or political maneuvering was leading to underenforcement.

- **Cooper/Wright/Yun**: Congress should (1) expand the size and role of Ph.D. economists at both agencies; (2) eliminate the FTC Act's common carrier and non-profit exemptions; (3) formalize clearance agreements between the agencies to provide parties more transparency on which agency is likely to handle a merger or conduct an investigation; and (4) potentially consider dividing enforcement responsibilities between the two agencies to avoid duplication and allow for gains from specialization.

- **Jones & Kovacic**: A second essential step is for Congress to eliminate statutory exemptions that deny the FTC jurisdiction over common carriers, not-for-profit institutions, the business of insurance, and banks.

- **First and Fox**: Third, we urge Congress to clarify the scope of the FTC'S authority to reprehend "unfair methods of competition" under Section 5 of the FTC Act. The Commission's most recent statement of its authority under Section 5 took too narrow a view of how it might go beyond the limits of current Sherman Act interpretations

Congress envisioned a broader role for the Commission when in enacted the FTC Act in 1914. Congress should now write a yet clearer delegation of authority that reaffirms the Commission's role in making certain that markets are working properly, without being tethered to the Sherman Act, on the one hand, and without an unbounded delegation of equitable authority on the other.

- **First and Fox**: we urge Congress, in the exercise of its oversight authority, to encourage the FTC to engage in antitrust rule-making. Commissioner Chopra has persuasively argued for the use of this approach to flesh out antitrust rules. With the addition of clearer Section 5 authority, the Commission might consider rules that prohibit some of the major abuses we detailed above with regard to Big Tech behavior-for example, self-preferencing, cutting off data life-lines to punish rivals for competing, and coercive bargaining tactics.

- **Baer**: So I think the Subcommittee is doing the right thing by taking a hard look at changes to current law that will encourage the courts and empower the antitrust enforcers to be more assertive in challenging conduct and consolidation that risks creating or enhancing market power. These changes need not be dramatic. By incorporating presumptions that certain behaviors are likely to reduce competition, by making it more clear that showing a risk of a reduction in competition is sufficient and by emphasizing that anticompetitive effects are not limited to price effects, but include quality and innovation competition, Congress can make a meaningful difference.

- **Baer**: The other thing Congress can and should do is provide adequate resources to the antitrust enforcement agencies. [need after action studies]

- **Steuer:** *This can be remedied, without radical surgery to the antitrust laws. The incipiency standard already provides the power to bolster the effectiveness of antitrust if Congress is prepared to reconfirm it, enforcers are prepared to employ it, and courts are prepared to apply it.*

- **Steuer**: *Antitrust is not the answer to every market imperfection in the economy*. Issues arising in the communications sector but beyond the limits of competition law have traditionally been subject to regulation. If the public interest requires constraints, and antitrust law is not the solution, regulation may be worthwhile to consider. And, *even if the incipiency standard is stiffened, there still would be proposals to create new presumptions, per se rules, and limits on size. But these would require a substantive shift in the law, affecting every industry, and realistically could not be accomplished without considerable reflection and debate*.

F. Behavioral Remedies

- **Crane**: Merger law is not a place in which new substantive legislation is likely to be helpful. The Supreme Court has not decided a substantive merger case since Congress enacted the Hart-Scott-Rodino Act in 1976, largely leaving in place a body of enforcement-friendly precedent from the 1950s, 60s, and early 70s. Since Hart-Scott, merger review has primarily taken place within the agencies as a matter of bureaucratic practice rather than through a formal legal process of litigation in the courts. The Federal Trade Commission and Antitrust Division's merger guidelines, more than judicial precedent, frame the substance of merger review. *Existing caselaw, including structural presumptions of anticompetitive effects, give the agencies wide latitude to challenge many more mergers than they do. If there is a need for more aggressive merger challenges, a change in agency attitude toward mergers would be more significant than new legislation.*

G. Specific Issues

1. Preferencing Your Own Content Isn't a Problem

- **Ohlhausen**: *Forcing large platforms to provide access to all third parties who are arguably rivals under threat of liability would hamstring their ability to police their own platforms and keep out harmful content and services*, which would not serve consumer or broader societal interests well.

- **Manne**: *Self-preferencing by platforms does not harm innovation. Platforms have an incentive to optimize openness and to assure complementors of sufficient returns on their platform-specific investments*. This doesn't mean that treating platforms as essential facilities is optimal, however; in fact, typically a well-managed platform will exert some control where doing so is most important, and openness where control is least meaningful.

- **Manne**: *What critics of so-called "self-preferencing" miss is that, while constraints on complementors' access and use may look restrictive compared to an imaginary world where such restrictions were not allowed, in such a world the platform would not be built in the first place because it would not ensure enough revenue*. Similarly, if platforms ever operated at the other extreme—full appropriation—the platform also would not be built because it would attract no complementors. Thus, platforms operate in a delicate middle ground in which some edge appropriation is, in fact, desirable. As with the Covidien/Newport merger, there is virtually no empirical basis to believe that killer acquisitions are a significant problem, or that, even if they are, they would be effectively thwarted by enhanced merger standards.

- **Singer:** My overarching thesis is that *antitrust is not a perfect solution for addressing certain categories of potentially anticompetitive conduct, particularly the problem of self-preferencing by the dominant "tech platforms*," such as Amazon, Apple, Google and Facebook. Although certain types of exclusionary conduct by tech platforms do lend themselves neatly to antitrust scrutiny-for example, Facebook's restricting independent access to Facebook's API (a discriminatory refusal to deal) or Amazon's conditioning unfettered access to its e-commerce platform on an independent merchant's purchase of Amazon's fulfillment services (a tie-in-self-preferencing does not fit into any well-received antitrust paradigm. And even if the antitrust laws could be stretched to accommodate this type of exclusion, the pace of antitrust litigation is too slow to address the potential harms that flow from self-preferencing-namely, an innovation loss at the "edges" of the platforms, as independents throw in the towel as a response to an unlevel playing field.

- **Singer:** In the case of self-preferencing, there generally are no such observable short-run harms, as the platform is merely displacing an independent offering with its own. In the case of Google's self-preferencing in search results, however, there could be a short-run quality degradation-Google's affiliated content has been shown to generate fewer click-throughs than independent content-but few if any antitrust cases have turned solely on a showing of quality harm.

- **Singer:** *Although Microsoft is often invoked by those pressing for antitrust scrutiny of self-preferencing by tech platforms, the case stands for the opposite. The Microsoft court held that structural remedies were not appropriate unless anticompetitive effects could be demonstrated with confidence*: Even if antitrust law could be stretched, via new push-the-boundary cases or via new legislation, to accommodate self-preferencing, antitrust is not designed to redress innovation harms in a timely manner.

2. Many of the Proposed Changes Would Undermine American Technology Companies to the Benefit of China

- **Picker**: First, *even though those companies have operations across the globe, they were all founded in the U.S. and continue to be based here. I do not think that we should take that point as a given or that we as a country would be indifferent to having all of those companies based in say Japan Europe or China.*

- **First and Fox**: *The EU and China are developing their own plans on how to control Big Tech as well as how to compete through big tech.*

IV. Conservative Submissions

Lipsky

- *the federal antitrust laws are fully adequate to address any anticompetitive conduct - both in general and more specifically with regard to the conduct of participants in markets employing digital technology . . . the present institutional structure of antitrust in the United States is more than adequate to assure robust enforcement of U.S. antitrust law*.

- create a new Executive-Branch capability to spearhead an effort to reduce and ultimately to eliminate current and future threats to US innovation and competitiveness attributable to certain harmful foreign antitrust-law enforcement rules and practices.

- U.S. procedural reforms in order to strengthen the institutional credibility of FTC antitrust proceedings. Specifically, I recommend that the position of Director of the Bureau of Competition be filled through Executive-Branch appointment, and that the Director be granted authority similar to that of the senior leadership of the Antitrust Division

- similarly, extremely heavy burdens were placed on firms accused of monopolization. To avoid liability, a firm with monopoly power was required to prove that its success was "thrust upon" it, even if its conduct was "honestly industrial," As a consequence of this approach, even routine and procompetitive business conduct by firms with substantial market power - such as increasing production capacity in order to meet demand - was condemned as illegal, United States v. Alcoa (2d Cir. 1945).

- A persistent and recurring theme of this reexamination was criticism of pervasive application of the per se rule and other heavy presumptions excluding or disfavoring fact-based defenses and the application of economic analysis to understand competitive behavior.

- *emphasis on economic analysis of competition as the basis for antitrust enforcement was clearly foreshadowed - indeed one could say it was introduced to the enforcement community - during the tenure of Donald F. Turner, who served as President Lyndon Johnson's first Assistant Attorney General for Antitrust from 1965 to 1968.*

- *As Assistant Attorney General he was forthright in stating that antitrust enforcement against mergers should be based on economic analysis of competition and should reject the temptation to oppose "bigness" for its own sake or to incorporate other public policies distinct from preservation of competition in the economic sense.*

- This is a major strength of the common-law system of antitrust decision making within the federal judiciary, as established by Congress in 1890. Rather than providing a straight-jacket and attempting to mandate a uniform rule-based approach for all future cases - a task that would unduly overburden the predictive powers of any court or agency, especially in sectors of the economy that are being disrupted by rapidly evolving and diverse technologies - the Court has wisely focused its analysis on the particular characteristics of the business sector
- *American experimentation with broad application of the per se rule and heavy presumptions against business conduct led to important adverse effects on the competitiveness and productivity of the US economy.*
- I have no doubt that our judiciary will be successful in separating wheat from chaff among the many allegations and legal theories that are sure to arise to challenge new forms of business conduct that may evolve within the digital economy.
- [supports antitrust enforcement from the feds + states + privates]

Sokol

- Consumer welfare works as the method of analysis for antitrust law. Despite critiques that caricature consumer welfare as trapped in a simplistic early-1970s framework of "Chicago School" economics, consumer welfare is flexible to changes in economic thinking.
- *If antitrust eschews an economic basis for its decision-making, then it changes the framework of antitrust law and policy. A new non-economics approach for decision-making would include some sort of 'fairness' consideration that takes the place of economics. What is 'fair" is often indeterminate and highly subjective.*
- *Issues of economic analysis and fairness are particularly important because antitrust regulation and intervention can be misused in ways that promote lack of fairness and lack of competition on the merits. Public interest (non-economic) standards are particularly prone to such abuse.*
- *Republican and Democratic administrations haw agreed for decades on the basic analysis of cases based on economic evidence and guided by economic analysis.*

- *The courts protect antitrust from political intervention and statutory overreach that would hurt consumers.* There is a natural experiment that tests what antitrust would look like with a different set of goals, which until recently diverged fundamentally from the Chicago School approach found in Sherman and Clayton Act jurisprudence. Enforcement of the Robinson-Patman Act can teach us about what a more populist antitrust would entail.

- Agencies, guided by economic analysis, do a good job given the overall uncertainty of addressing mergers.

- *To wholesale attack an entire business model that has been the primary form of exit for entrepreneurs not merely in platform-based tech but in biotech and other R&D intensive industries across the supply chain would create economy-wide problems.*

- *It provides agencies with a high degree of discretion and can create significant lack of legal certainty for business as to when a certain practice will be considered fair or not as well as introduce the possibility for enforcers to use politics to drive outcomes*. Because economic analysis allows for more precision than fairness does, it is important to highlight examples that show how economic analysis has shifted over time in ways that both promote enforcement and limit enforcement.

- *Issues of economic analysis and fairness are particularly important because antitrust regulation and intervention can be misused in ways that promote lack of fairness and lack of competition on the merits. Private firms may seek to use government-brought antitrust action strategically to punish rivals that are more efficient*. This strategy allows a firm to use government investigation as a way to raise rivals' costs. Even worse, incumbents may target new successful competitive business models by lobbying for antitrust enforcement, rather than focusing on competition on the merits.

- First, "tech" should not be subject to special rules (though for protectionist reasons, a number of European jurisdictions are taking this approach). To do so would be an extreme departure from the current antitrust system. Antitrust is a flexible system that has and can continue to respond to changes in economic thinking.

- *The current institutional design of antitrust and the development of antitrust case law promotes such an approach. This institutional design has been long-standing across both Republican and Democratic administrations. Antitrust can and will adjust to particular facts and business realities when there is anti-competitive harm.*

- Changing the consumer welfare standard would make antitrust look like sector regulation which is often rife with capture by special interest groups, as the Robinson-Patman Act illustrates. In regulated industries with a public interest standard firms may try to curry favor with the government to raise barriers to prevent new entry or to raise rivals' costs.

- *Retuning to this approach of picking winners and losers that favor special interests in the current digital economy would be similarly disastrous*. Many digital platforms have introduced low (or no) cost products and services. driving down prices in how consumers shop, connect with loved ones, research health issues, apply for jobs, and much more. These platforms have also provided similar benefits to small businesses, publishers, and advertisers, who can now reach global audiences that they could not reach in the past. *Disrupting these business models to support inefficient incumbents (many of whom are still owned by billionaires) would result in higher cost services (e.g., pay walls) that impact the most vulnerable who rely on a free and open Internet.*

- Predicting future champions among tech companies is not easy. If it were, law and entrepreneurship would not be defined as a distinct field because of the inherent uncertainty of such investments.

- Even the best VCs and CVCs have trouble picking winners and losers. Just because a larger firm acquires a start-up does not mean that the best technologies, people, and ideas can be implemented to capture value from the acquisition. It is the very intangibility of the formula for success that ensures that we can identify success only with hindsight.

- Though it is possible that a particular transaction might create competition problems, the solution is to address specific deals with a sufficient factual record. *To wholesale attack an entire business model that has been the primary form of exit for entrepreneurs not merely in platform-based tech but in biotech and other R&D intensive industries across the supply chain would create economy-wide problems. When certain avenues for firm exit, such as vertical acquisition by larger firms, are closed off via limits to acquisition because of an overly stringent antitrust regime, it hurts the entrepreneurial ecosystem. Entrepreneurs would be chilled from creating start-ups if they could not easily create a liquidity event to extract financial rewards from their investment.*

- The best way to address such mergers is on a case-by-case basis that is fact-specific, consistent with current law and policy. The institutional choice best suited to develop such an approach comes from courts and antitrust agencies through Vertical Merger

Guidelines to signal the factors for those vertical mergers that are higher risk. *A new legislative approach is likely to be too overbroad and would overwhelm antitrust agencies' resources with investigations and eventually challenges that discourage innovation and reduce consumer welfare.*

- Finally, structural remedies like bans based on size or by industry are bad for consumers. *Over the last 50 or so years, the overwhelming weight of economic evidence has increasingly shown that vertical integration - whether by merger or otherwise - is typically procompetitive*. Most sectoral regulations banning vertical integration have been discarded over time because such restrictions hurt consumers.
- Large firms use acquisitions to fuel their own innovation. Innovation is critical for firms because greater innovation leads to improved financial returns. The race to innovate is particularly important in technology related industries where there is rapid change in and for the market. When firms reach a certain size and level of complexity, they tend to be less nimble with product innovation.
- *For many vertical acquisitions, there are also benefits associated with the continued development of the acquired firm's technologies. For instance. the acquired service may lack sufficient resources to survive in the long-term. such as an adequate strategy to generate revenue. Companies with established business models can provide such support, such as connecting the acquired service with its own popular advertising network.*
- [More money invested in competition advocacy; more research]

Garza

- [summarizing the Antitrust Modernization Commission and noting that its bipartisan recommendations did not include sweeping changes to the antitrust laws]
- *[On the AMC] there was broad consensus that "the economic principles on which antitrust is based do not require revision for application to those industries." As one respected economist noted, basic economic principles do not become "outdated" simply because industries have become more dynamic.*
- *Over the ensuing decades, consumer welfare was recognized as the unifying goal of antitrust law, with few disputing that the core mission of antitrust law is to protect consumers' right to the low prices, innovation, and diverse production that competition promises.*

- *There is no need to revise the antitrust lows to apply different rules to industries in which innovation, intellectual property, and technological change are central features.* Economic learning continues to evolve, and antitrust law needs to be able to incorporate this new learning as appropriate. It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles re levant to antitrust analysis.

- *[AMC Recommendations follow]*

- *No statutory change is recommended with respect to Section 7 of the Clayton Act. There is a general consensus that, while there may be disagreement over specific merger decisions, and U.5. merger policy would benefit from continued empirical research and examination, the basic framework for analyzing mergers followed by the U.S. enforcement agencies and courts is sound.*

- *Recommendation 4. No substantial changes to merger enforcement policy ore necessary to account for industries in which innovation, intellectual property, and technological change are central features. Current law, including the Merger Guidelines, as well as merger policy developed by the agencies and courts, is sufficiently flexible to address features in such industries.*

- Recommendation 6: The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance efficiency.

- Recommendation 8. The Federal Trade Commission and the Antitrust Division of the Department of Justice should give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation.

- The Federal Trade Commission and the Antitrust Division of the Department of Justice should work toward increasing transparency through a variety of means

- *Recommendation 13: Congress should not amend Section 2 of the Sherman Act. Standards currently employed by U.S. courts for determining whether single-firm conduct is unlawfully exclusionary are generally appropriate. Although it is possible to disagree with the decisions in particular cases, in general the courts have appropriately recognized thot vigorous competition, the aggressive pursuit of business objectives, and the* *realization of efficiencies not available to competitors ore generally not improper, even for a "dominant" firm and even where competitors might be disadvantaged.*

- Recommendation 14. Additional clarity and improvement are best achieved through the continued evolution of the low in the courts. Public discourse and continued research will also aid in the development of consensus in the courts regarding the proper legal standards to evaluate the likely competitive effects of bundling and unilateral refusals to deal with a rival in the same market.

- Recommendation 15: Additional clarity and improvement in Sherman Act Section 2 legal standards are desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether and in what circumstances (if any) a monopolist has a duty to deal with rivals.

- Recommendation 18. ln general, firms have no duty to deal with a rival in the same market.

- There is no need to give the antitrust agencies expanded authority to seek civil fines. Commissioner Kemp dissented from this recommendation out of concern that requiring such reporting would "create an irresistible temptation for agencies to bring ill-considered enforcement actions in order to 'improve' their statistical score-card." Commissioners Jacobson and Shenefield join this recommendation "with qualification."

- Recommendation 72: The Federal Trade Commission and the Antitrust Division of the Department of Justice should develop and implement a new merger clearance agreement based on the principles in the 2002 Clearance Agreement between the agencies, with the goal of clearing all proposed transactions to one agency or the other within a short period of time. To this end, the appropriate congressional committees should encourage both antitrust agencies to reach a new agreement, and the agencies should consult with these committees in developing the new agreement.

- *With respect to mergers and acquisitions, in particular, the Subcommittee has asked whether the law is sufficient to deal with potentially anticompetitive vertical and conglomerate mergers, "serial acquisitions," acquisitions involving data and acquisitions of potential competitors. As in 2007, I believe the answer to those questions remains "yes, " for the reasons explained by the AMC Report.*

- *As explained in the AMC Report, the ongoing incorporation of economic learning into antitrust case law is far preferable to trying to legislate different antitrust analyses for* *digital markets. Those markets will continue to change over time, as will our understanding of them*. "It is important that antitrust develops through mechanisms, such as case law development in the courts and agency guidelines, that allow ongoing reassessments of existing law and economic principles relevant to antitrust analysis" in these and other markets. While antitrust analysis of technology-based markets may involve consideration of issues like network effects, high switching costs and entry barriers, these issues are not unique to digital markets.

- *Such thumb-on-the-scale legislation to stack the decks for the government are neither necessary nor wise. This approach curiously ignores decades of economic learning designed precisely to enable us to find the right balance to maximize consumer welfare and economic growth with little regard for the damage that such an approach would cause to investment, innovation and efficiency.*

Ohlhausen

- *Forcing large platforms to provide access to all third parties who are arguably rivals under threat of liability would hamstring their ability to police their own platforms and keep out harmful content and services*, which would not serve consumer or broader societal interests well.
- *Another proposed expansion of Section 2 liability includes prohibiting a platform from also serving as a competing merchant on its own platform*. This may force retailers with revenues over $40 billion who also sell their own products over their websites to choose between offering house brand products (often popular with lower-income consumers) and offering products made by third parties, such as national brand manufacturers. *Were this prohibition interpreted this way, it would greatly reduce consumer choice on a large number of well-known retailer websites and possibly lead to a reduction in low-cost house brands-an extremely common retailing practice that long predated online sales*.
- Current antitrust law can prevent and remediate anticompetitive transactions of all varieties, including vertical mergers, acquisitions of competitively significant assets, or acquisitions of potential competitors.
- Vertical mergers, a hot topic in the antitrust world of late, are also subject to antitrust oversight and enforcement. The vast majority of vertical arrangements, however, are pro-competitive -- FTC Commissioner Christine Wilson has convincingly laid out the

reasons why: vertical deals eliminate no head-to-head competition in any market; they may create cost-saving benefits such as the elimination of double-marginalization and incentivize investment by aligning upstream and downstream incentives; and they are confirmed to be typically procompetitive by retrospective analyses, such as those collected by DOJ and FTC economists and expanded upon by the Global Antitrust Institute.

Muris

- *For decades, antitrust enjoyed bipartisan cooperation and wide support in the academy, the courts, and the legal profession. Although disagreements arose in close cases, widespread agreement existed that antitrust should protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, were the mainstays of enforcement.*

- Any distinction between physical and digital or tech companies is increasingly meaningless. New technologies such as cloud computing, machine learning. and robotics are diffusing throughout the economy in both "new-' and "old" industries.

- *for decades, a wide, bipartisan consensus held that antitrust law should focus on the welfare of consumers, guided by economic analysis. For example, Carl Shapiro-the top antitrust economist in the Obama and Clinton Justice Departments-warns: "[L]et us avoid a 'big is bad' mentality and let us truly have the interests of consumers in mind. We learned long ago that proper antitrust enforcement is about protecting consumers, and protecting the competitive process, not about protecting competitors. We must not forget that guiding principle."*

- *[Justice] Breyer's crucial role is instructive for multiple reasons. First, he is yet another major figure whom no one would associate with the Chicago School yet is just as committed as Chicagoans to the centrality of consumer welfare and rigorous economics in antitrust analysis. Second, current condemnation of antitrust doctrine ignores him, presumably because it is easier to demonize a conservative like Bork than a liberal like Breyer. Third, Breyer's jurisprudence reminds us that antitrust defies easy, partisan labels. Rigorous analysis can lead the liberal Breyer to oppose antitrust intervention in close cases. So too it can lead conservatives to support antitrust intervention*

- *Rather than condemn productivity and innovation, whether in the 1930s, 1970s, or today, we should applaud it. Companies like these superstar firms, many of whom are so-*

called "tech giants," have been built from the ground up in the United States rather than in Europe or China, largely because the U.S. legal environment is stable, predictable. and uniquely hospitable to vigorous, paradigm-shattering competition by all businesses, large and small. That legal environment is a hallmark of American exceptionalism.

Lambert

- *I believe the existing antitrust statutes are optimal for addressing monopolistic conduct and potentially anticompetitive transactions. While some aspects of prevailing antitrust doctrine could be improved, the better approach is to rely on the federal courts to bring about such improvements as they adjust doctrines, in light of economic learning and market developments, through the incremental, common law process.*

- *Statutory reform is likely either to change antitrust's focus on consumer welfare to other ends, to impose inflexible rules rather than standards, or to delegate the implementation of standards to some government agency rather than to politically insulated courts.* For reasons I explain below, each of those changes would diminish antitrust's social value. Accordingly, legislative reform of existing antitrust doctrines is unwarranted.

- Experience has taught us that market competition is the best way to secure low prices, high-quality goods and services, and product variety. Not only do competitive markets benefit consumers, they also ensure that society's productive resources are put to their highest and best ends. The goal of antitrust, then, is to promote consumer and societal welfare by ensuring that markets remain competitive. To secure that goal, antitrust polices the situations in which competition breaks down, chiefly monopoly (or monopsony), where there is a single seller (or buyer), and collusion, where nominal competitors agree not to compete.

- most commentators view the antitrust statutes as an implicit delegation of authority to the federal courts to craft a common law of competition, one that evolves according to our ever-expanding learning about the effects of different business practices.

- Digital markets do not warrant a different approach.

- Moreover, *to the extent economies of scale and network effects influence competitive dynamics by rendering certain conduct anti- or procompetitive, the current antitrust regime can account for that. Economists understand quite a bit about economies of scale, network effects, and two-sided markets*. Under the prevailing antitrust regime, their views are sure to influence both the application and continued calibration of legal standards, and when economic understanding grows or circumstances change, courts may reach different conclusions.

- *The alternatives to the prevailing antitrust regime are unappealing. Imposing ex ante conduct rules via statute threatens ossification and significant error costs (as inflexible rules routinely misfire, especially in dynamic, technology-driven markets)*. Creating an agency to oversee competition in digital markets, as some have suggested, risks agency capture and may ironically entrench incumbent firms, which are likely to have an advantage over new entrants in navigating the regulatory arena. The better approach, in my view, is to stay the course.

- A recent study by economists from Princeton University and the Federal Reserve Bank documents diverging trends between national and local market concentration. It concludes that while national concentration is increasing, local concentration is not. Indeed, the authors find that "local concentration has been declining rapidly for the last 25 years when we measure concentration at the city, county, or ZIP level."

- *Put simply, there is no evidence of a market power crisis resulting from increased industrial concentration. When it comes to market competition, trends in national sector-level concentration are inapposite.*

- *The evidence, however, does not support the view that lax U.S. antitrust is reducing innovation. Eleven of the top sixteen global spenders on research and development are U.S. firms, and six of those-Amazon, Alphabet, Intel, Microsoft, Apple, and Facebook-are "Big Tech" firms that have been accused of acting like monopolists.* Moreover, the U.S. is home to half (178 of 356) of the world's so-called "unicorn" companies-i.e., private companies valued at greater than $ 1 billion. China ranks second with 90, and all of Europe contains a fraction of that number.

- The U.S. also far outpaces Europe in terms of venture capital spending, with 10,777 investments in 2019 worth $136.5 billion compared to Europe's 5,017 deals worth $36.3 billion.

- Finally, *the fact that large American technology firms are purchasing smaller producers of complementary products or technologies in no way implies that the incentive to innovate is thereby reduced. Many start-ups are organized with the goal of being bought out by a larger firm; a buy-out option allows the initial investors in a company to enjoy a return on their investment without the company's having to incur the significant cost of a public offering*.

- *From the late 1970s until recently, this "consumer welfare standard" enjoyed near-universal support among antitrust commentators across the ideological spectrum.*

- In light of these concerns, some have called for legislative clarification that the antitrust laws are not to be interpreted to pursue consumer welfare exclusively. For example, the Anti-Monopoly and Competition Restoration Act, reportedly being drafted by Senator Elizabeth Warren, declares that the "antitrust laws were not created exclusively to enhance the narrowly defined concept of 'consumer welfare' as articulated by academics such as Robert Bork, or as described by the Supreme Court of the United States . . . The draft legislation also clarifies that "courts have misinterpreted the antitrust laws by adopting the misguided consumer welfare standard and it provides that the true purpose of the antitrust laws is to protect "market structures that restore and protect competition between rivals" for the benefit of "workers, consumers, entrepreneurs, and citizens. *Antitrust courts would thus be directed to focus on market structures-not effects-to further the interests of workers, small businesses ("entrepreneurs"), and the democratic process ("citizens"). Proposals to amend the antitrust laws to forbid "abuse of dominance" are similarly likely to redirect antitrust's focus from consumer welfare to the protection of small competitors and other non-consumer interests.*

- jettisoning the consumer welfare standard in favor of the sort of multi-goaled, structural approach embraced by the Anti-Monopoly and Competition Restoration Act is both unnecessary and undesirable. It is unnecessary because each of the 'blind spots" identified by critics of the consumer welfare standard, i.e. either addressed by the standard, more appropriately addressed by a body of law other than antitrust, or best left unaddressed

- *antitrust enforcers have recently affirmed that market power-induced harms to consumer privacy, a matter of service quality, are cognizable under the consumer welfare standard*

- *Not only is it unnecessary to abandon the consumer welfare standard in favor of a multigoaled public interest standard, doing so would have adverse consequences for consumers and the rule of law. We know this from experience.* During the mid- Twentieth Century, courts did embrace multiple goals for antitrust. They would often interpret the law to be aimed at promoting consumer welfare by encouraging competition so as to lower prices, enhance quality, etc. But they would sometimes impose liability in the absence of consumer harm-in the face of obvious consumer benefit, even only to protect smaller competitors from larger, more efficient rivals.

- *With enforcers and courts free to pick and choose among antitrust's multiple goals in order to condemn or acquit virtually any business behavior, antitrust became less a body of law and more an exercise of raw political power*. Bork compared it to the sheriff of a frontier town: "He did not sift the evidence, distinguish between suspects, and solve crimes, but merely walked the main street and every so often pistol-whipped a few people."

- *When government always wins, winning the favor of government officials becomes paramount. For that reason, abandonment of the consumer welfare standard in favor of a multi-goaled public interest standard or "abuse of dominance" approach would promote politicization of the antitrust enforcement agencies.*

- [On Klobuchar bill] *This proposed reform would likely increase antitrust's error costs by chilling procompetitive conduct*. Any firm selling a brand for which it is able to charge above-cost prices would think twice before embarking on any course of conduct that would enable it to win business from, and thus "materially disadvantage" or "foreclose," its rivals.

- The current system also allows courts to reallocate proof burdens if economic learning concerning the frequency of pro- or anticompetitive effect suggests they should. Congress should not disrupt this sensible system by imposing an inflexible mandate that the defendant bear the burden of proving reasonableness in a large swath of cases in which conduct is likely procompetitive.

- [On Warren bill] *These are radical proposals. As any regular shopper can attest, private label sales by retail platforms are ubiquitous. Consumers love private labels, and the fact that private label sales are common in highly competitive markets suggests that "serving as both a platform and a merchant that competes with third-party merchants" is not some sort of exclusionary strategy*.

- *Mandating the structural separation of platforms and commerce is not only unnecessary to protect competition, it would also be destructive of competition. Private label sales increase competition in product markets and thereby benefit consumers.* In response to private label sales, existing merchants often must lower their prices or enhance the quality of their offerings. It is well-understood that the sorts of vertical restraints Senator Warren's proposal would condemn may often enhance market output and leave consumers better off but may also, under certain circumstances, reduce output and harm consumers. The bulk of the empirical evidence on such restraints, however, shows that they usually enhance consumer welfare.

- Imposing a general antitrust duty on firms to share their "materially important" and "difficult to duplicate" assets with their rivals is a bad idea for the reasons set forth in the Trinko opinion.

[defending Sylvania, Twombly, Brooke Group, Credit Suisse]

Werden

- *Existing antitrust statutes governing monopolistic conduct and mergers are adequate in my view. The statutes are framed in general terms that allow jurisprudence to evolve as the economy changes and as our understanding of the competitive process grows*.
- Altering substantive antitrust law inevitably creates long-lasting uncertainty and is likely to have unforeseeable consequences.
- *The bill recently proposed by Senator Klobuchar (5.3426) exemplifies what should not be done. If it became law, a judge would be empowered to condemn as unlawful exclusionary conduct the introduction of a new product, the improvement of an existing product, or an above-cost price cut*. … The bill essentially starts from scratch on the law of exclusionary conduct, and if history is a guide, the law will be less clear at the turn of the 22nd Century than it is today.
- [burdens on plaintiffs can be excessive; criticizing AMEX decision]
- Too often, courts now reject sound theories supported by substantial evidence. A plaintiff's proof always has weaknesses because uncertainties are unresolvable, and courts sometimes demand what plaintiffs cannot possibly provide. A solution to this problem is elusive. Reversing the burden of proof goes much too far.
- The law remains somewhat undeveloped, but the most important thing is clear: U.S. antitrust law protects the competitive process rather than competitors, and even rather than consumers. I note that *Senator Klobuchar's bill preempts limiting principles and undermines the notion that antitrust law protects competition rather than competitors*.
- *Congress did not make the Sherman Act a tool for redistributing wealth. Congress instead chose to protect the competitive process from the sabotage of private anticompetitive conduct. In my view, Congress should stick to that plan*.

- *Antitrust law in the United States has never been seen as an invitation to micro-manage the economy and thereby secure a greater share of the benefits for consumers, and I oppose any antitrust legislation extending the invitation to either judges or bureaucrats*.
- *Microsoft* shows that the existing antitrust statutes can be applied successfully to monopolistic conduct in the digital marketplace.
- *Whether any practice of a tech giant should be condemned under U.S. antitrust law can be determined only through a deeply fact-intensive analysis. Investigations are underway, and if anticompetitive conduct is found, no defect in substantive antitrust law will prevent a remedy from being secured.*
- *The anti-merger statute, Section 7 of the Clayton Act, is adequate for the digital marketplace*, and the two federal antitrust enforcement agencies have experience with merger enforcement in the digital marketplace.
- The mere potential for future competition does not satisfy the reasonable probability standard articulated by the Supreme Court. In my view, that demonstration also could be made on the basis of a pattern of small mergers with a substantial cumulative effect.
- At a time when the Supreme Court was finding every merger than came before it unlawful, the Nixon Administration launched a campaign against conglomerate mergers. The spectacular failure of that campaign should not be forgotten.
- The greatest problem in merger litigation is that judges do not fully understand vital economic evidence. … Congress should mandate written expert testimony in all government cases under Section 7.
- The Subcommittee might consider the radical reform of entrusting adjudication to antitrust experts.
- [supports more funding]

Pozen

- antitrust laws and enforcement----or even competition-related industry-specific legislation--are not necessarily solutions to all of the issues that exist in digital markets. Concerns unrelated to competition about privacy and unauthorized use of personal data. fraud, or other perceived harms. such as exploitation in labor markets, should be addressed with the tools of the relevant legal regime. *Antitrust's regulatory tools are not designed to correct all of the challenges posed by digital platforms*.

- the consumer welfare standard is the proper measure and basis of our antitrust laws as long as it is properly viewed as encompassing more than price competition. Under the consumer welfare principle, "antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low." As the 2010 Horizontal Merger Guidelines and case law has made clear, the consumer welfare standard should include product quality and variety. service. and innovation.

- *when I was an antitrust enforcer* at DOJ and we had to make decisions related to emerging markets and technology marketplaces. We were conscious that antitrust enforcement can have unintended consequences, such as inhibiting innovation or destroying nascent market sectors. So *we were careful in our approach, acting surgically rather than with a bludgeon*.

- While the eBooks case has been criticized by some as advancing Amazon's market power, in my view, this case stands for the proposition that collusion and coordination among competitors-in this case eBook publishers, facilitated by Apple, a competing platform, is not a legitimate means to combat perceived dominance.

- *I do not believe the existing US antitrust laws need revision. They are broad mandates into which many industries readily fit and can be adjudged.* However. I do believe we need to clarify certain existing court decisions, particularly as they apply to digital marketplaces. I also believe the agencies must sharpen their analytic tools and focus their enforcement resources with respect to both mergers and potential anticompetitive conduct in the digital marketplaces. Finally, I believe the time has come to consider institutional changes to the DOJ and FTC.

- The existing antitrust laws that address monopolization and monopolistic conduct are sufficiently broad.

- [criticizing Trinko, Amex, and Novell; judges too willing to excuse predatory intent]

- *I am confident in the breadth of the antitrust laws to properly investigate and enforce the law as applied to digital markets*.

- Agencies can support the development of new precedent by bringing cases strategically and providing novel forms of evidence of competitive harms gleaned through new analytical tools. Yet such efforts alone might be insufficient if courts continue to apply troubling precedent and restrict liability under antitrust laws. It could fall upon Congress to override certain precedents if they persist as an obstacle to needed enforcement in the digital marketplace.

- Specialized Legislation - As noted above, antitrust tools alone may be insufficient to address some of the issues particular to digital platforms. This industry may require specialized legislation to address some of its features that cannot be properly addressed using the antitrust laws. I support careful review of this option. As a start, policymakers should consider whether legislation should be adopted to address harms including privacy, fraud, and exploitation of the labor markets. Some of the measures instituted to promote competition in the telecommunications sector may be applicable to digital markets. Such measures include data portability, interoperability, and the implementation of new standards. However, some have noted that certain measures, such as data portability and interoperability may only be suitable remedies for commoditized products and could actually cement dominance of other products in digital markets.

- agencies must have the resources and the mandate to consider acquisitions within the context of the broader acquisition patterns of dominant platforms.

- *Recent challenges to the acquisition of nascent competitors demonstrate that the agencies are actively pursuing these cases.* [listing examples]

- The FTC 6(b) study should shed additional light on past serial acquisitions and acquisitions of nascent competitors in the digital markets and guide enforcement efforts regarding digital platforms going forward. Additionally. the FTC 6(b) study should also provide insights into how digital platforms have acquired data from small companies and how they viewed the importance and uses of such data. Any action by Congress should take into account the lessons learned from this important study.

- [reform clearance agreement; have one agency review all digital]

Crane

- *If the historical pattern holds, substantive legislative reforms are unlikely to achieve durable changes in the way the courts apply the antitrust laws.* This is not to say that new legislation would achieve nothing-in some cases. Particularly with respect to the Robinson-Patman and Celler-Kefauver Acts, the courts initially followed the statute faithfully before retreating into "common law" interpretation that nullified much of what

Congress enacted. However. the eventual trend has been, seemingly inevitably, away from distinctive legislative text and purpose and toward a homogenous common law of competition across all of the antitrust statutes.

- *Our judicial system has the capacity to work out iterative answers informed by experience and evolving understanding of competitive practices. I would not counsel any legislative amendment to Section 2 of the Sherman Act.*

- merger law is not a place in which new substantive legislation is likely to be helpful. The Supreme Court has not decided a substantive merger case since Congress enacted the Hart-Scott-Rodino Act in 1976, largely leaving in place a body of enforcement-friendly precedent from the 1950s, 60s, and early 70s. Since Hart-Scott, merger review has primarily taken place within the agencies as a matter of bureaucratic practice rather than through a formal legal process of litigation in the courts. The Federal Trade Commission and Antitrust Division's merger guidelines, more than judicial precedent, frame the substance of merger review. *Existing caselaw, including structural presumptions of anticompetitive effects, give the agencies wide latitude to challenge many more mergers than they do. If there is a need for more aggressive merger challenges, a change in agency attitude toward mergers would be more significant than new legislation.*

- *the FTC and DOJ recently promulgated draft vertical merger guidelines ... Until the new guidelines are finalized and we have some experience with their implementation. it would be premature to consider potential legislative reforms.*

- *Under current U.S. antitrust law, there is no obstacle to agency challenges to serial acquisitions that harm competition.* If a firm buys up five small companies and none of the acquisitions itself would have harmed competition but the five acquisitions harm competition in combination, the mergers are actionable under Section 7 of the Clayton Act.

- The antitrust agencies have long scrutinized acquisitions of intangible assets. such as patents. on the same terms as purchases of corporations or corporate shares. There is therefore no legal obstacle to antitrust enforcement against anticompetitive acquisitions- should such cases arise.

- One could imagine inverting the burden of proof and requiring the merging parties to prove that they are not likely to become competitors because of technological change, but that is not a practicable solution. How could one go about identifying the set of mergers to which the inverted burden of proof should apply without first identifying which firms are likely to morph into horizontal competitors through technological change?

- Since I do not have a comprehensive solution to propose, I will conclude by repeating the observation that current legal doctrine is capacious enough on potential competition to permit the agencies and courts to work incrementally toward enhanced understanding of this problem. I do not believe that legislative reforms would be desirable.

- [consolidate DOJ and FTC; align injunction standards for blocking mergers]

Joint Statement [23 antitrust economists, legal scholars, and practitioners]

- the consumer welfare standard is not a narrowly circumscribed objective, but rather a prescription for the general social wellbeing generated by the competitive process. By contrast, *many of the current proposals would* (1) undermine the rule of law; (2) undo the healthy evolution of antitrust law in the courts over time; (3) require antitrust agencies to micromanage the economy by picking winners and losers; (4) abandon a focus on consumer welfare in favor of vague and politically oriented goals; and (5) *undermine successful American businesses and their competitiveness in the global economy at the worst-imaginable time*.

- The American economy-including the digital sector-is competitive, innovative, and serves consumers well. Debate about whether the antitrust laws should be fundamentally rewritten originated from a concern that markets have recently become more concentrated and that competition had decreased as a result. The popular narrative, that increases in concentration have caused harm to competition throughout the economy, does not withstand close scrutiny.

- In reality, most markets in the American economy-including digital markets-are competitive, and thriving, and create huge benefits for consumers. Structural changes in the economy have resulted from increased competition. The economic data show that intense competition, winner-take-all rivalry, and the adoption of new successful technologies in relevant antitrust markets were major economic forces that led to structural changes (i.e., increased national-level concentration) in the economy. The existence of these structural changes does not itself support changes in the law.

- Lax antitrust enforcement has not allowed systematic increases in market power. *There is little evidence to support the view that anemic antitrust enforcement has led to* *a systematic rise in market power in the American economy. The evidence is especially weak as it relates to digital markets.*

- *Existing antitrust law is adequate for protecting competition in the modern economy. Antitrust law has developed incrementally through the common law approach. A strength of antitrust law is that it can incorporate learning about new business practices and economics to protect competition in an evolving economy*. The existing antitrust laws and enforcement framework, when correctly applied, are more than adequate to deter anticompetitive conduct, including in new and growing digital markets.

- *History teaches that discarding the modern approach to antitrust would harm consumers. Many of the radical reforms being proposed today seek to return antitrust to what it was in the 1960s.* But antitrust during that time was based primarily on per se rules that prohibited economic analysis and fact-based defenses. This created a body of law fundamentally marred by internal contradiction, that frequently protected individual competitors over consumers and did not focus on the central goal of protecting competition. *Congress has considered and rejected radical proposals to overhaul antitrust in the past and should do so again*.

- Common sense reforms should be pursued to improve antitrust enforcement. A positive agenda for antitrust reform would pursue common-sense initiatives that build upon prior learning while incorporating advances in industrial organization economics, empirical research, and analytical techniques. These proposals should focus antitrust enforcement on areas that will have the biggest return for consumers and input suppliers, support balanced retrospectives of agency decisions to identify gaps in enforcement, and address any institutional impediments to effective enforcement.

- The weight of the literature today -much of which is no more than a couple of years old and some of which is still in working paper form-does not support the conclusion that the economy has been trending inexorably toward increased market power and greater consumer harm, especially for the purpose of justifying dramatic legislative changes to the antitrust framework.

- The most recent studies suggest that the observed changes in national-level concentration are brought about by the expansion of more productive large firms into local markets leading to, in these economists' own words, "more, rather than less, competitive markets.

- The consumer welfare standard contemplates the evaluation of alleged anticompetitive behaviors based on tradeoffs tied to the health of the competitive process. It thus dispenses with the need to make distributional choices inherent in selecting among divergent goals in favor of designing and implementing competition policy to prioritize the competitive process, which benefits all Americans.

- *By grounding antitrust analysis in a disciplined and tractable framework, the consumer welfare standard fosters the rule of law and helps prevent arbitrary or politically motivated enforcement decisions.*

- *The consumer welfare standard also has the benefit of tethering antitrust outcomes to modern economics*. Implementation of the consumer welfare standard by courts and enforcers took the vague concept of "protecting competition" embodied in the antitrust laws and for the first time breathed meaning into it through the common language of economics. This allows for robust scrutiny of a variety of market factors including price, quality, and innovation.

- *there is broad bipartisan support that protecting consumer welfare (properly defined) through the protection of competition is, and should be, the lodestar of modern antitrust enforcement.*

- *Some of the radical initiatives being pursued to reform antitrust today seek to abandon the consensus that has developed around the benefits of the consumer welfare standard as the guiding principle of antitrust. One need only look to history to see that this would be a bad idea.* Doing so would compel regulators and courts to evaluate the multidimensional and diverse effects of business conduct on political power, economic inequality, the environment, rival businesses, profits, and an assortment of other vague factors without the anchor of the focus on the impact on input and output market competition. This would necessarily lead to an incoherent weighing of the diverse effects, and subjective management oversight of the economy by the government and by the courts. It would also encourage rent-seeking by industry participants seeking to curry favor with the antitrust agencies and allow for the antitrust laws to be used as a weapon between rivals.

- Research indicates that merger enforcement has increased relative to merger volume in *the past several decades and there is no evidence that anticompetitive mergers are more likely to pass muster today than in decades past. The claim that antitrust enforcement has been lax, or that anticompetitive mergers have been on the increase, is just not borne out by the evidence.*

- *There is no evidence of systematic harm in digital markets arising from lax antitrust enforcement. To the contrary, digital markets are intensely rivalrous and generate* *substantial long-run economic welfare*. Given the demonstrated and well-known salutary effects that digital markets produce for consumers, the burden lies with those proposing radical reforms to address the alleged inadequacies of antitrust performance in digital markets to substantiate those claims. The evidence does not support the provocative claims made by many reformers.

- Contrary to assertions proffered to this Committee, antitrust agencies can and routinely do bring monopolization cases, including in high-tech markets.
- *One of the most troubling aspects of the radical reform agenda is the systematic effort to overturn established case law, and to return antitrust jurisprudence to its incoherent, pre-economic era*.
- overturning these cases would be tantamount to overturning the Court's consistent and laudable focus in the modern antitrust era on protecting competition, even where competition may harm the fortunes of specific competitors.
- The economic evidence does not support the claim that the Supreme Court has been "too willing to presume" that monopolies promote innovation. In reality, innovation arises from both small and large firms, and in concentrated and unconcentrated markets, depending on the business environment.
- In sum, *radical proposals to overturn broad swaths of modern antitrust doctrine are misguided, unnecessary, and threaten to abandon the rule of law with little to offer in return.*
- [other ideas: more transparency in agency decisions; merger retrospectives; strengthen challenges to state-sponsored monopolies; raise penalties for criminal cartels; protect workers in labor markets; repeal *Illinois Brick*; eliminate inefficiencies of dual-agency enforcement; more economists; more funding]

Hazlett

- The evidence supports the view that, *relative to practical alternatives that include E.U.-style regulation, digital markets in the U.S. appear robust, generating considerable innovation that produces pro-consumer outcomes. The global Internet is dominated by U.S.-developed technologies and business models, discovered and deployed in a process of competitive rivalry.*

- U.S. policies have managed to incentivize great progress in high tech markets.
- economists have effectively, critiqued such reported trends as somewhere between meaningless and misleading. Where increases in concentration, reasonably measured, are observed, there is no apparent harm.
- General Motors once purchased car bodies from an independent supplier, Fisher Body: it then acquired Fisher Body and made these components internally. This integration has been explained by economists as an efficient coordination of risky, long-term. complementary investments.
- *A 2005 study concluded that vertical integration was overwhelmingly associated with lower costs and better outcomes for consumers. An article in 2007 in the Journal of Economic Literature surveyed published academic research and reached the same conclusion.*
- [examples of positive vertical integration: iTunes /Kazaa; AOL / Time Warner]
- [Broadband discussion]
- Perhaps Richard Langlois states this more eloquently: "*Proponents of anti-tech antitrust must explain why consumers [are] being harmed by an incomprehensibly magical information source with swift access to virtually all the products of humanity at the touch of a finger ….*"

Picker

- [skeptical of need to change merger law]
- Facebook stayed independent and went public in May 2012, but in the middle of that process, on Apr 9, 2012, Facebook announced that it was buying Instagram for $1 billion. The FTC investigated that deal and voted 5-0 to not to take any action to block the deal. And in February 2014, Facebook bought WhatsApp for $16 billion. Antitrust regulators in the U.S. and Europe evaluated the deal but eventually took no steps to block the purchase.
- First, *even though those companies have operations across the globe, they were all founded in the U.S. and continue to be based here. I do not think that we should take that point as a given or that we as a country would be indifferent to having all of those companies based in say Japan Europe or China.*

- We want U.S. companies to succeed and the scale of that success will be driven first and foremost by the quality of their products and by key features of the economics of digital marketplaces.

- everything suggests that Google constructed a superior product and achieved its original position in search through legitimate competition.

- The issue is priority more than carriage. A nondiscrimination obligation might address that and these are common in public utilities, going back at least as far as the 1887 Commerce Act.

- It is far from clear to me that breaking up Google would do. It is certainly possible that, given their market positions, Google and Facebook have pushed up advertising prices, but that of course would make it easier for print media to compete with them today. Breaking up Google – say, forcing a divestiture of YouTube – might split the data held by Alphabet, especially going forward, but the revamped Alphabet and the new YouTube would both have large amounts of data. It isn't at all obvious that that would meaningfully improve the posture of newspapers. A breakup could just push down advertising prices without benefiting newspapers.

- If vou wanted to breakup either Google or Facebook, I am skeptical that you can do that within antitrust proper. I have trouble identifying a nonconsensual breakup of a large firm in the Hart-Scott-Rodino era, meaning a retroactive breakup of a large merger that had gone through the pre-notification process.

- Transferring money from Google and Facebook to newspapers may be a perfectly sensible social policy-I'm not opining on that- but it is clearly a political fight far removed from U.S. antitrust policy

- Barring Amazon from running these ads would presumably raise First Amendment issues. And the key advantage of having Amazon run a platform is that everything suggests that they are a strong competitor in providing back-end transaction and fulfillment services to third parties. *We would weaken competition in that market if we excluded Amazon from it. Each time we bar a firm from a market, we run the risk of reducing competition in that market*.

- Sellers would almost certainly prefer that potential customers go to their websites directly but it is hard for sellers to get attention from customers. Amazon has succeeded in doing that. When businesses say that they have to be on Amazon, they mean that they want access to the huge volume of product searches that occur there.

Customers go to Amazon ready to buy. Amazon is going to charge for bringing those customers to these third parties.

- But the relationship between Amazon and its third-party sellers is contractual and presumably those contracts establish the respective rights and obligations of the parties regarding this data. I doubt that antitrust law is the best tool to regulate this issue or third-party sellers would have strong antitrust claims under U.S. antitrust law.
- Blocking all uses of third-party data, individual or aggregated, through direct regulation almost certainly would be the cleanest wav to resolve this issue.
- [on the Buy Box] If Amazon is doing that just to boost its profits-because it makes more money when it sells its own products or products it is fulfilling directly - I do not think that there is a straightforward winnable claim under current U.S. antitrust law. The essential facilities doctrine in antitrust and the corresponding mandatory access regime seen in Aspen Skiing and Trinko are quite narrow and of uncertain application.
- *the behavior of third-party sellers suggests that Amazon is providing valuable services to those sellers in using its internal skill set in wholesale transactions on the Amazon platform. Requiring Amazon to exit one business or the other would reduce competition and would risk destroying these valuable arrangements*.
- U.S. antitrust law doesn't create some sort of general nondiscrimination and access regime for third-party sellers. For concreteness, continue with smartphone platforms and consider four possible regulatory approaches: (1) treat the platforms like common carriers; (2) implement a nondiscrimination regime; (3) implement price regulation; or (4) bar actions that block platform devices from accessing competing app stores.
- *The companies that are at the heart of your investigation - Google, Apple, Facebook, Amazon and Microsoft- built their market positions off of incredibly successful products that faced a competitive marketplace. U.S. antitrust law does not condemn firms for doing that and more broadly as a society we should applaud the innovation and hard work that that represents. And the fact that all of those companies were founded in the United States is something that we should take pride in and should not take for granted*. I hope all of that is a point of common ground, but I fear that it might not be.

Manne

- To the extent that Congress chooses to act, it should do so by encouraging the antitrust agencies to elicit and expose more and better information. For example, Congress might require (and fund) agencies to coordinate the collection and analysis of data and significant economic research. The combination of the agencies' expertise and enforcement-related knowledge with high-quality research could significantly improve the state of our knowledge and the agencies' ability to make more informed enforcement decisions.

- Congress could also require the agencies to better elucidate and justify the reasoning underlying their enforcement decisions—including their decisions not to bring an enforcement action. This would serve as a useful roadmap for firms to better understand which conduct and mergers are considered violations of competition laws, and which are not. Such an approach should also inspire greater public confidence in the system and help to alleviate concerns that lobbying or political maneuvering was leading to underenforcement.

- *it is inappropriate to draw conclusions about the strength of competition from national concentration measures. This view is shared by many economists across the political spectrum*. Carl Shapiro (former Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice under President Clinton) for example, raises these concerns regarding the national concentration data: "[S]imply as a matter of measurement, the Economic Census data that are being used to measure trends in concentration do not allow one to measure concentration in relevant antitrust markets, i.e., for the products and locations over which competition actually occurs. As a result, it is far from clear that the reported changes in concentration over time are informative regarding changes in competition over time."

- *the reality is that the large platforms—as well as many other companies—are increasingly and significantly in direct competition with each other for users and advertisers.*

- *Professors Francine Lafontaine (former Director, FTC Bureau of Economics under President Obama) and Margaret Slade catalogued and analyzed this literature*, and they assess its meaning for antitrust policy: "As to what the data reveal in relation to public policy, . . . the weight of the evidence . . . says that, *under most circumstances, profit-maximizing vertical integration decisions are efficient, not just from the firms' but also from the consumers' points of view. . . . [E]ven in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances."*

- Vertical integration may help firms to internalize transaction costs, prevent holdup or moral hazard, reduce double marginalization, and create pro-consumer product innovations integrating products and features efficiently. All of these ultimately benefit consumers. And these findings hold true in the digital economy: *as the empirical evidence demonstrates, vertically integrated platforms tend to offer significant consumer benefits even when their conduct might lead to less consumer use of specific downstream competitors.*

- *Self-preferencing by platforms does not harm innovation. Platforms have an incentive to optimize openness and to assure complementors of sufficient returns on their platform-specific investments*. This doesn't mean that treating platforms as essential facilities is optimal, however; in fact, typically a well-managed platform will exert some control where doing so is most important, and openness where control is least meaningful.

- *Killer acquisitions are uncommon in digital markets and difficult to identify ex ante. These fears are often rooted in hindsight bias. Most small acquisitions either fail outright or have a negligible impact on the acquirer's business. In the small minority of cases where the acquisition becomes hugely successful, it is almost impossible to know whether the acquired company could have achieved the same level of success* in the counterfactual scenario. For example, Instagram arguably lacked a meaningful revenue-building business model before its acquisition, so it is not obvious that the company would have succeeded without Facebook's advertising expertise. Asserting that enforcers may have missed one or two anticompetitive mergers in the tech market is entirely speculative, and insufficient evidence for severely altering the doctrinal balance of the current system.

- Without sufficient evidence, *proposals to ban large technology companies from acquiring nascent or potential competitors could do much more harm than good, resulting in significantly lower levels of innovation and consumer welfare, including deterring start-up activity*. In addition to halting welfare-enhancing integrations and potentially leaving many small companies to fail in the long run, regulatory intervention that reduces the likelihood of reaching a profitable exit could reduce the incentive for venture capitalists to invest in startups and may inhibit new business formation. *A research paper analyzing venture capital investments and M&A activity found that "the number of [VC] deals scaled by the number of public firms . . . declines by about 27% in . . . states that enact an antitakeover law."*

- *What critics of so-called "self-preferencing" miss is that, while constraints on complementors' access and use may look restrictive compared to an imaginary world where such restrictions were not allowed, in such a world the platform would not be built in the first place because it would not ensure enough revenue*. Similarly, if platforms ever operated at the other extreme—full appropriation—the platform also would not be built because it would attract no complementors. Thus, platforms operate in a delicate middle ground in which some edge appropriation is, in fact, desirable. As with the Covidien/Newport merger, there is virtually no empirical basis to believe that killer acquisitions are a significant problem, or that, even if they are, they would be effectively thwarted by enhanced merger standards.

- The real test for regulators is whether they could identify, for example, the two potentially anticompetitive mergers out of Google's 270 acquisitions and, under an error cost analysis, do less harm to consumers with false positives than false negatives. If the anticompetitive mergers are such a tiny percentage of the total mergers—and identifying them a priori is difficult—then a precautionary principle strategy that results in many false positives for enforcement would likely not merit the benefits from blocking one or two anticompetitive mergers. Furthermore, but for Google and Facebook's investments in YouTube and Instagram, it is far from clear that a mere "video-hosting service" or "photo-sharing app" would have grown into the competitor that advocates assume.

- Properly considered, *access to large amounts of data does not, by itself, constitute an anticompetitive barrier to entry. Data is simply one input in a panoply of inputs necessary for a firm to compete effectively*.

- "[B]ig data does not represent a barrier to entry but rather a factor of production much like any other input. It should therefore be treated as such."

- *Increases in national-level firm concentration are being driven by more intensive competition at the local level as larger chains compete with each other. This increased competition and choice is good for consumers*.

- Large digital platforms compete directly for advertising spending, which is often their main source of revenue, and indirectly for the user attention that allows them to sell advertising. They are increasingly in direct competition for users as well, as they expand into new markets.

- Vertical integration is generally good for consumers, because it helps firms to internalize transaction costs, prevent holdup or moral hazard, reduce double marginalization, and might allow the vertically integrated firm to efficiently price discriminate.
- *Platforms competing with edge providers is often good for the edge providers as well as consumers, and platforms have strong incentives not to strangle edge providers that use their services*.
- *There is little evidence for "killer acquisitions" in digital markets, and it would be nearly impossible to identify which acquisitions are "killer" before the fact. Acquisitions are often investors' and founders' "exit strategy," and the evidence suggests that deterring acquisitions in tech would chill investment in startups and harm innovation*.
- Access to data is not a barrier to entry. Valuable user data is widely held and new entrants can acquire it as they can acquire any other factor of production. There are numerous examples of businesses successfully entering new markets without access to the same data as incumbents because they are offering a superior product.

Cooper / Wright / Yun

- First, the current body of doctrine regarding monopolization is more than sufficient to address the digital marketplace. As such, *it is unnecessary to import the European concept of "abuse of dominance" into American antitrust doctrine. Doing so would penalize successful firms and directly harm the competitive process and thereby consumers*. Additionally, present-day antitrust doctrine also adequately addresses concerns with platform self-preferencing, which can generate both procompetitive and anticompetitive effects. Finally, conflation of antitrust and privacy policy should be avoided because the extent to which privacy serves as a dimension of competition is unclear and data collection can support higher quality products benefitting consumers.
- Congress should (1) expand the size and role of Ph.D. economists at both agencies; (2) eliminate the FTC Act's common carrier and non-profit exemptions; (3) formalize clearance agreements between the agencies to provide parties more transparency on which agency is likely to handle a merger or conduct an investigation; and (4) potentially consider dividing enforcement responsibilities between the two agencies to avoid duplication and allow for gains from specialization.

- *The consumer welfare standard has been widely lauded for bringing coherence and credibility to antitrust law, providing a framework for consistent, economically-sound decision-making, and giving consumers the benefit of lower prices, increased output, higher product quality, and more innovation. By focusing on a single objective measure, the consumer welfare standard disciplines modem antitrust law. Antitrust enforcers and courts under a consumer welfare standard are forced to support their actions with sound economic evidence. This helps to deter arbitrary or politically motivated enforcement actions.*

- current monopolization law, as a general matter, provides a good balance of reducing both false positives (Type I errors) and false negatives (Type II errors).

- there is evidence that the trends in rising national concentration and falling local concentration are best explained by increased competition and technological change, not a rise in market power.

- the relevant question is not whether the FTC or DOJ got a particular merger right or wrong, but whether or not the agencies are systematically biased in approving anticompetitive mergers (i.e., a Type II error or a false negative) or blocking procompetitive mergers (i.e., a Type I error or a false positive). To our knowledge, there is no study that has shown that the agencies are systematically committing either of these errors.

- *At the time of the purchase, Instagram had zero revenues and a handful of employees.T3 Since Facebook's acquisition, Instagram has grown from 30 million users to well over one billion.* During the same period, Facebook grew from approximately 900 million users to over two billion users. When properly formulated, the central forces driving anticompetitive conduct are reductions in output! quality, innovation and transfers away from consumers to producers. Facebook's acquisition of Instagram does not fit this profile. *An acquisition that results in tremendous growth for both the acquiring and acquired product strongly suggests a procompetitive outcome*.

- Based on the current evidence and scholarship, we believe the U.S. federal antitrust laws and the enforcement of those laws are sufficient and effective in preventing anticompetitive acquisitions of potential and nascent competitors.

- These recent enforcement actions suggest that the agencies are not only active in this area but are also willing to push the bounds of the current potential and nascent competition doctrines. [listing examples]

Jones and Kovacic

- [raise antitrust civil service salaries, maybe to align with financial regulators; triple FTC budget]
- [improve coordination between agencies]
- [process changes, like relaxing Sunshine Act re: FTC; market studies; hire competition specialists as ALJs; formalize clearance agreement]
- A second essential step is for Congress to eliminate statutory exemptions that

deny the FTC jurisdiction over common carriers, not-for-profit institutions, the

business of insurance, and banks.

V. Liberal Submissions

First and Fox

- The above list pinpoints harms that do or might come within traditional antitrust, although some of the conduct lies at the outer boundaries of current antitrust doctrine and require creative arguments not likely to survive Supreme Court review.
- we urge the legislative adoption of a National Competition Policy.
- urge Congress to consider specific legislation that would simplify litigation in a way that would allow courts more easily to achieve the goals of the National Competition Policy. One important way to do that would be to specify evidentiary presumptions that would shift the burden of justification to defendants. Courts in antitrust cases have often used presumptions, but the courts today more often use them to defeat antitrust claims. Congress could, for example, require dominant firms to justify certain exclusionary conduct, or their giant mergers. Congress could also make rules special to certain types of acquisitions; for example, acquisitions of nascent competitors by industry leaders.
- Third, we urge Congress to clarify the scope of the FTC'S authority to reprehend "unfair methods of competition" under Section 5 of the FTC Act. The Commission's most recent statement of its authority under Section 5 took too narrow a view of how it might go beyond the limits of current Sherman Act interpretations Congress

envisioned a broader role for the Commission when in enacted the FTC Act in 1914. Congress should now write a yet clearer delegation of authority that reaffirms the Commission's role in making certain that markets are working properly, *without being tethered to the Sherman Act*, on the one hand, and without an unbounded delegation of equitable authority on the other.

- we urge Congress, in the exercise of its oversight authority, to encourage the FTC to engage in antitrust rule-making. Commissioner Chopra has persuasively argued for the use of this approach to flesh out antitrust rules. With the addition of clearer Section 5 authority, the Commission might consider rules that prohibit some of the major abuses we detailed above with regard to Big Tech behavior-for example, self-preferencing, cutting off data life-lines to punish rivals for competing, and coercive bargaining tactics.

- Congress should seriously consider a complementary regulatory approach to deal with some systemic problems that require ongoing supervision and expertise and are difficult to remedy with after-the-fact litigation. High on this list would be data and privacy concerns. There may also be interoperability concerns that are hard for enforcement agencies to discover and for courts to monitor on an on-going basis.

- *The EU and China are developing their own plans on how to control Big Tech as well as how to compete through big tech.*

Lande / U Baltimore

- [Wants Congress to change laws to punish conduct that is not anticompetitive]

- At a minimum, new legislation should create a presumption that the antitrust laws should impose sanctions on all firms with more than *** of a relevant market unless defendants can overcome this presumption by presenting clear and convincing evidence that the firm does not have monopoly power.

- Congress in 1890 actually intended Section 2 of the Sherman Act to be a "no-fault" statute. Section 2 is supposed to impose sanctions on all monopolies and attempts to monopolize, not just those for which plaintiff can prove that defendant engaged in anticompetitive conduct.

- *This legislation would block every merger - horizontal, vertical. or conglomerate - that exceeds clearly specified asset thresholds. We are proposing a law that would block* *every merger in which both firms have assets exceeding $10 billion unless they spin-off assets so that their increase in size falls below the figure*.

- Legislation should force the enforcers and courts to return to the original formulation of this doctrine. It should create a presumption that mergers to a total of more than 30% of a market should be presumed illegal.
- Allow indirect purchaser consumers to sue for damages under the federal antitrust laws.
- Award automatic prejudgment interest to successful victims of antitrust violations.
- Stiffer criminal penalties
- Whistleblower provisions for cartels

Baer

- My submission makes four basic points: (1) to be effective and embraced by the courts, antitrust enforcement needs to be based on an analytically sound, fact-based framework; (2) but we cannot let the perfect be the enemy of the good, and many courts hold enforcement to an effective standard of proof that is unrealistic and inconsistent with the plain language of our antitrust statutes; (3) the antitrust agencies should be advocates for a more robust approach to enforcement, but if the courts are unwilling to step back from bias against the risk of over-enforcement, legislation may be the only way of resetting the balance; and (4) more resources are needed if antitrust enforcement is to fulfill its role as the economic cop on beat.
- *The executive and legislative branches, whether led by Republicans or Democrats, were mostly on the same page. As a result, for the last 30 years or so, antitrust enforcement has been largely nonpartisan, driven by the widely shared view that harm to consumers and competition should be the predicate for challenging conduct. And that is a good thing.*
- *Analytically sound and fact-based antitrust enforcement … provides the public, the business community, the courts and the legislative branch with some assurance that it is the merits that count - not political ideology, whim or the desire to pick winners and losers in the economy*. And it helps explain why there have been only modest pendulum swings in competition enforcement over the last few decades. *Consistency and predictability enhance the credibility of antitrust enforcement.*

- [agencies are too cautious in bringing cases, too concerned about Type I errors; burden of proof under Section 7 is too high]
- So I think the Subcommittee is doing the right thing by taking a hard look at changes to current law that will encourage the courts and empower the antitrust enforcers to be more assertive in challenging conduct and consolidation that risks creating or enhancing market power. These changes need not be dramatic. By incorporating presumptions that certain behaviors are likely to reduce competition, by making it more clear that showing a risk of a reduction in competition is sufficient and by emphasizing that anticompetitive effects are not limited to price effects, but include quality and innovation competition, Congress can make a meaningful difference.
- The other thing Congress can and should do is provide adequate resources to the antitrust enforcement agencies. [need after action studies]

Wu

- [need to update antitrust laws; burdens of proof too high, inadequate for tech; need to analyze "free" markets; scrutinize nascent acquisitions – "reasonably capable of posing a serious future threat to the incumbent, given evidence of intent to eliminate the threat"; bias to action; competitive process standard; overturn Brooke Group; invigorate essential facilities doctrine; non-competes presumptively unlawful; replace Noerr with 1st Am defense]
- [conceding that harms aren't measurable under a new standard]: "the consumer welfare standard's emphasis on measurable harms to consumers tends to bias the law toward a focus on static harms and, especially, on prices. It thus ignores dynamic harms …"

Newman

- [entry isn't that easy; switching costs are not that low (portability etc)]
- [Antitrust protects more than consumers, including upstream suppliers and competitors]
- Congress could clear up a great deal of confusion by simply clarifying that the antitrust laws are not a "consumer welfare prescription." Their coverage extends to all of

the trading partners, *as well as the competitors*, of a concentrated source of power in the marketplace.

- [shouldn’t have to define market]
- Orthodox antitrust law's focus on price effects has increasingly attracted criticism. Less well-recognized, though no less important, is its deep obsession with output.
- Congress could do a great deal of good by clarifying that no single particular type of effect is a requisite element of an antitrust violation. Insistence on proof of an output reduction is just as badly misguided as an over-fixation on price effects. If antitrust is to become robust enough to deal with digital markets, more flexibility is needed.
- [adopt abuse of dominance standard]
- The probabilistic nature of the current Clayton Act Section 7 text ("may . ..") is optimal for the complex reality in which antitrust analysis takes place. Nothing can ever be known with absolute certainty. But it would be quite valuable for Congress to state expressly that mergers and acquisitions are also illegal if the effect "may have been substantially to lessen competition or to tend to create a monopoly." This simple addition would send a clear signal that an anticompetitive deal does not somehow become benign when it is consummated.
- [Repeal the Federal Arbitration Act, at least as to antitrust cases]
- Eliminate the judge-made "Indirect Purchaser" Limitation.

Steuer

- “Incipiency” describes the test under which mergers, acquisitions, and certain anticompetitive practices are prohibited by the Clayton Antitrust Act, 15 U.S.C. §§ 14, 18, when the effect may be substantially to lessen competition or tend to create a monopoly. *Applied intelligently, the incipiency test can satisfy most of the calls that are coming from across the political spectrum to strengthen antitrust enforcement. What’s more, this can be accomplished without changing the statute. And, if there is consensus that the Clayton Act needs to be sharpened, there are means to accomplish that too*.
- The immediate problem today is how tentatively the incipiency test is being applied. Courts have hesitated to find illegality without evidence of more than a threat to competition—a discouraging development for enforcers weighing their prospects for

winning lawsuits in those courts. As a result, the incipiency standard has been diluted and marginalized.

- *This can be remedied, without radical surgery to the antitrust laws. The incipiency standard already provides the power to bolster the effectiveness of antitrust if Congress is prepared to reconfirm it, enforcers are prepared to employ it, and courts are prepared to apply it.*

- If Congress believes that the courts have grown too reluctant to apply the incipiency standard, Congress has the power to reinvigorate the standard by Congressional resolution or clarifying legislation.

- Another alternative would be to amend the Clayton Act itself to make it more explicit.

- If Congress wants to strengthen the interpretation of incipiency, it could amend Section 7 to reflect this distinction by not only inserting the word "threaten" but by explicitly including the element of foreseeability. The Section would then provide that Section 7 forbids acquisitions where "the reasonably foreseeable effect of such acquisition is substantially to threaten competition, or to tend to create a monopoly" in any relevant market. This would make clear that the threat to competition must be more than a mere possibility and must be reasonably foreseeable, but without requiring a plaintiff to demonstrate that competitive harm is more likely than not.

- *Antitrust is not the answer to every market imperfection in the economy*. Issues arising in the communications sector but beyond the limits of competition law have traditionally been subject to regulation. If the public interest requires constraints, and antitrust law is not the solution, regulation may be worthwhile to consider. And, *even if the incipiency standard is stiffened, there still would be proposals to create new presumptions, per se rules, and limits on size. But these would require a substantive shift in the law, affecting every industry, and realistically could not be accomplished without considerable reflection and debate*.

- One day, it may make sense to overhaul America's antitrust statutes from top to bottom. Until then, a more energized application of the incipiency standard, with or without some adjustment by Congress, offers the most practical approach.

Consumer Reports

- The market power of these large platforms is enabling them to exercise inordinate influence over market access, restricting and diminishing the quantity and quality of our choices, and the pathways for all who seek to reach us - including manufacturers, service providers, content creators, and other voices.

- A key step in ensuring that our antitrust laws are up to the task is increasing enforcement resources to levels commensurate with that task.
- [criticizing court decisions, which have abandoned the incipiency standard]
- [in the past decade] Google/Alphabet has executed about 150 of these acquisitions; Amazon has made about 60; Microsoft, about 85: Apple, about 70: and Facebook. about 60. Each of these acquisitions was subject to review under Section 7 of the Clayton Act. But as far as we know, very few were actually subjected to serious review.
- Under a properly applied "incipiency standard," enforcers would be encouraged to use the full powers of their insight and foresight to focus on discernible market trends, and what is needed to protect and promote, over the long haul, an open and innovative marketplace where competition prevails, and consumers are in charge.
- we support a number of proposals now pending in the Senate that warrant the Subcommittee's consideration, including:
  - S. 3426, the Anticompetitive Exclusionary Conduct Prevention Act, to strengthen the ability of the antitrust laws to reach anticompetitive exclusionary conduct before the violator achieves a full monopoly;
  - S.2237, the Monopolization Deterrence Act. to authorize the Justice Department and the FTC to impose civil penalties for unlawful monopolizing;
  - S. 307, the Consolidation Prevention and Competition Promotion Act. to strengthen merger enforcement by restoring the "incipiency standard" and shifting the burden of proof for acquisitions involving extremely large corporations;
  - And S. 1937, the Merger Filing Fee Modernization Act to strengthen antitrust enforcement resources by increasing pre-merger filing fees for extremely large acquisitions.
- Reinvigorating the antitrust laws, while a key part of that, is not the full answer. Congress should also consider ways to restructure the online marketplace to promote competition - as it did three decades ago for telecommunications. In particular, we recommend Congress pursue two reforms that were key parts of what became the Telecommunications Act of 1996. Portability would enable consumers to exercise

control over the information they have put on a platform, and to switch among platforms without having to "start over" and lose important records, documents, photos, and other materials. And interoperability would enable consumers and others using one platform as their home base to connect with those using other platforms.

- [need to protect privacy]

AAI

- [need aggressive statutory changes]
- Based on its briefing in Qualcomm, as well as an amicus brief it filed in an important private Section 2 case decided recently, there is especially good reason to doubt that the DOJ, in particular, has any interest in Section 2 enforcement of any kind, whether in the technology sector or otherwise.
- The disconnect is attributable to a culture of excessive caution in agencies and courts. In our experience, enforcers confronted with potentially harmful dominant-firm behavior tend to be too deferential to theoretical efficiencies claims, too averse to the risk of "false positives," and too dismissive of the risk of "false negatives." Many of the most substantial roadblocks to a more effective anti-monopoly program would be overcome if agency enforcers adopted a more vigorous approach to monopolization enforcement, supported by significantly increased appropriations and the political support of Congress and the Executive Branch.
- Congress, should pursue the following changes to monopolization law and policy:
    - Recognize that information deficiencies and other "consumer protection" market imperfections may give a firm market power; eliminate formalistic reliance on market-share benchmarks for purposes of establishing monopoly power, particularly in attempt cases and cases where there is direct evidence of harm.
    - Overturn, or sharply limit, Ohio v. American Express Co., and confirm that normal rules for defining relevant markets apply in Section 2 cases involving two-sided platforms, without requiring plaintiffs to establish harm to both sides of a two-sided platform to make out a prima facie case, and clarify that two-sided platforms can face competition from firms that are not two-sided platforms.

- Reject efforts to promote a single proxy for exclusionary conduct under Section 2, such as the profit-sacrifice test, the no-economic sense test, or the equally efficient competitor test. The default framework for assessing allegations of exclusionary conduct should be the consumer-welfare balancing test articulated by the D.C. Circuit in Microsoft

- Treat a monopolist's exclusive dealing that reasonably appears capable of making a significant contribution to maintaining its monopoly power as presumptively anticompetitive, subject to rebuttal that actual or potential anticompetitive effects are unlikely or are prevented by procompetitive benefits to consumers.

- Reject cost-based safe harbors for conditional pricing practices Quality and bundled "discounts"), and treat such practices as presumptively anticompetitive when they help preserve, extend, or exploit a monopolist's market power, subject to rebuttal that anticompetitive effects ate unlikely or are prevented by procompetitive benefits to consumers.

- Support liability for a monopolist's refusal to deal with a rival when: (1) such refusal helps preserve or extend its monopoly power; (2) the monopolist discriminates between the competitor and other customers, has previously dealt voluntarily with the competitor, or otherwise demonstrates a predatory intent; and (3) the anticompetitive effects are not prevented by procompetitive benefits to consumers.

- Treat a "price squeeze" by a monopolist as a constructive refusal to deal when the monopolist could not have made a profit selling at its retail rates if it purchased inputs at its own wholesale rates.

- Revitalize the essential facilities doctrine as an independent theory of liability for purposes of injunctive relief.

- Treat a vertically integrated monopolist's refusal to sell or license its intellectual property to a downstream competitor the same as a refusal to sell or provide access to physical property.

- Treat a drug manufacturer's large cash or in-kind payment to delay generic entry as presumptively unlawful, subject to rebuttal that it is justified by avoided litigation costs or valuable collateral products and services and treat a "product hop" as presumptively unlawful if it makes "no economic sense" on its face.

- Overturn the Brooke Group standard for predatory-pricing and apply instead a structured rule of reason that is more consistent with modem economic thinking about predatory pricing strategies, including above-cost strategies, than is current law.

- Use the Federal Trade Commission's 'unfair methods of competition" authority to address anticompetitive conduct by dominant firms that may not be reachable under the Sherman Act or Clayton Act.

- Seek to employ structural remedies in appropriate cases, continue the increased use of equitable monetary remedies, and support legislation to allow both agencies to obtain civil penalties in Section 2 cases.

- Oppose efforts to overturn Jefferson Parrish, and support a rule of presumptive illegality for tying by firms with market power.

- *Despite the intent and design of Section 7 of the Clayton Act, merger law in the U.S. has been under-enforced for at least the past 40 years.*

- *Antitrust is a generalist form of law enforcement, and special antitrust rules for any sector (digital technology or otherwise) would eliminate this important feature, creating conflicts across sectors, confusion in the courts, and potentially weakening antitrust law even further. Antitrust reforms should thus address issues like those identified above, but in ways that apply across sectors and markets and that retain antitrust's generalist law enforcement approach*.

- Institute stronger presumptions of illegality for all types of mergers - horizontal, vertical, ecosystem, and potential competition. Shift the burden of proof to defendants to show offsetting pro-competitive effects in mergers that are likely to have anticompetitive effects. Reduce the burden of production for plaintiffs, particularly for acquisitions of potential rivals. Require that merger review consider both price and non-price effects, including quality and innovation.

- Require that merger review ensure "symmetry” between competitive effects analysis and efficiencies analysis and prevent attempts to limit competitive effects analysis to short-term price effects while considering both short-term cost savings and longer-term (i.e., dynamic) consumer benefits in efficiencies analysis.

- Require that merger remedies seek optimal deterrence, including the remedy of blocking a merger outright.
- Consider the success or failure of past remedies in crafting prospective remedies, including in past mergers involving the same or similar markets and competitive concerns, and whether prospective buyers of assets have committed past antitrust violations.
- Require that defendants collect and report (to an appropriately determined authority) post-merger data to facilitate merger retrospectives for both competitive effects and claimed efficiencies.
- Appropriately lower filing thresholds under the HSR reporting requirements to ensure that small acquisitions, particularly those that expand the scale and scope of market ecosystems, do not fly under the antitrust "radar."

Open Markets

- [On platforms]: They exploit their positions as providers of multiple essential services to bankrupt supplant, or sideline rivals in every market in which they operate. They also exploit their position as gatekeepers to the marketplace to manipulate and extort businesses and individuals who simply want to sell their goods, services, and ideas to their fellow citizens. This problem is getting worse fast. The number of businesses that are not at the mercy of the platform monopolists is declining every day,
- In recent written testimony submitted to the Senate Judiciary Committee regarding digital

platform self-dealing, which is when these corporations exploit their gatekeeper power to favor their own products and services over those provided by the sellers who depend on them to get to market, I detailed some of the ways that I believe these digital platforms are violating (current interpretations of) Section 2.

- *The Open Markets Institute believes that current statutes are capable of addressing the full spectrum of anti-competitive conduct by digital platforms. We believe the main reason for the radical concentration of power in these corporations is not any shortcoming in law, but the lack of political will by antitrust enforcers*. We believe this lack of political will is exacerbated by the adherence of law enforcement agencies to dangerously flawed economic philosophies that largely brought us America's monopoly crisis in the first place.

- In short, we believe law enforcement agencies can and should aggressively enforce the antitrust laws against platform monopolists now, without waiting for Congress to strengthen or reform these laws. Indeed. the Open Markets Institute believes that enforcers could push the law in the right direction simply by bringing more aggressive cases under existing legal standards. A good example of how this could work is United States v. Microsoft Corp., because today's digital platforms are following Microsoft 's monopolistic playbook.

- One of the simplest ways for Congress to address the dangers posed by the platform monopolists is to demand that enforcers at the DOJ, FTC, FCC, and other agencies charged with keeping markets open and competitive, do their jobs aggressively. That said, the Open Markets Institute also believes that antitrust jurisprudence has in certain

respects become so deeply flawed that contemporary interpretations of the law bear little or no resemblance to the original intent of Congress.

- The Open Markets Institute therefore would welcome efforts by Congress to strengthen antitrust standards by correcting wrongly decided court decisions. Further, the Open Markets Institute would also welcome efforts by Congress to remove complexity in antitrust doctrine and make antitrust cases easier, faster, and cheaper.

- it is necessary to completely separate ownership of the platforms from ownership of the goods, services, information, and entertainment sold across the platforms.

- The Open Markets Institute supports a solution that has been advanced by Sen. Elizabeth Warren: to structurally eliminate the platforms' conflicts of interest and remove both their incentives and their abilities to exclude competition. Here again, the Open Markets Institute believes that existing law provides enforcers with tools that empower them to break up the platform monopolists along vertical lines in ways that would entirely eliminate all conflicts of interest. That said, action by Congress once again could yield a quicker, cleaner, and more comprehensive solution to the problem.

- The Open Markets Institute has also encouraged enforcers to consider separating one platform monopoly from another, in instances where multiple such platforms have been tied together through acquisition. Google is particularly ripe for such restructuring, and the Open Markets Institute has publicly advocated that enforcers force Google's holding company to spin off YouTube, Maps, Android, and the corporation's suite of online advertising technologies, among other monopoly platforms.

- enforce interoperability requirements that make it easier for customers of one platform to shift their businesses to another platform. Over the years, regulators and antitrust enforcers have imposed interoperability requirements against AT&T and Microsoft, among others, opening up competition in long-distance calling, telephones, and internet browsers.

- interoperability would allow new social media platforms to integrate with Facebook's platform, using APIs offered on reasonable and nondiscriminatory terms, with consumers empowered to control which data is shared and with whom. Users' control over their data is critical to prevent privacy violations.

- *America's present monopoly crisis is due not to any fundamental shortcomings in existing law, but rather to a combination of extremely weak enforcement made worse by the teachings of the deeply flawed, efficiency-fetishizing ideology used to interpret the law.*

- the easiest way to remove complexity from the law and to streamline cases is to adopt Bright Line rules for structuring markets and limiting corporate behaviors. Such Bright Line rules were standard in U.S. anti-monopoly law and enforcement from the founding until the early 1980s.

- Specific to the online platform monopolists, Bright Line rules should be used to clarify outright the per se illegality of the following practices:

    - Refusing to deal with customers and rivals.

    - Prohibiting distributors, suppliers. or customers from doing business with rival firms.

    - Penalizing purchasers who do not place a large share of their business with the firm.

    - Tying the purchase of one good or service to the purchase of a separate good or service, whether done through contractual or technological means.

    - Pricing below average variable cost on a significant volume of commerce.

    - Most favored nation clauses.

    - Using monopoly power in one market to create competitive advantage in a secondary market.

    - Buying default installation or prime placement through slotting-fee agreements (such as Google's payment to Apple to set the default search engine for iOS devices to Google's product). Choice screens that present users with a range of competitive options, without those competitors having to pay to play, should replace such agreements.

- even before the pandemic, the Open Markets Institute had already called for the FTC to impose a temporary ban on all acquisitions by Google, Apple, Facebook, and Amazon. The Open Markets Institute recommends that such a ban be lifted only when the FTC certifies to Congress that it has fully investigated platform monopolists' exclusionary and predatory conduct and has brought the weight of the antitrust laws to bear in suing to stop such conduct in court.

- In addition. should Congress choose to make such a ban temporary, it should also require that the platform monopolists notify the FTC and DOJ of all acquisitions regardless of size. The legislation should require the FTC and DOJ to subject all such acquisitions to second requests and to provide the public with an opportunity to comment. The legislation should require enforcers to evaluate every acquisition by Google, Apple, Facebook, and Amazon based on the data that the acquisition would allow the platforms to collect, even if the acquisition target does not collect data. The Legislation should ban any mergers that would allow a platform monopolist to acquire data or algorithmic machine learning that would either fortify the monopolist's market power or create entry barriers for competition.

- In any such legislation, Congress should also require that, if the FTC or DOJ approve any acquisition by a platform monopolist, each agency must issue an in-depth statement to the public …

- The Open Markets Institute also calls on Congress to make it easier for citizens to bring class action lawsuits.

- As a first step, federal antitrust enforcers must abandon all efforts to interfere with the right of independent actors to freely associate, including efforts to bargain collectively and organize boycotts.

Sanjukta Paul

- This submission will focus upon one often-overlooked issue that also contributes to concentrated power in the digital economy: over-enforcement as to horizontal cooperation beyond firm boundaries, particularly among smaller players. I recommend that the Subcommittee reconsider antitrust law's unnecessary prohibition of such cooperation, particularly when it could serve as a countervailing check upon the power of dominant players, in the digital economy and beyond.

- I encourage the subcommittee to formulate legislation that would substantially reverse antitrust's preference for vertical control and its hostility to horizontal coordination. With respect to the latter, there is precedent for doing so in other jurisdictions through regulatory channels. Most notably, the Australian Competition and Consumer Commission (ACCC) last year promulgated its proposal to implement a broad class exemption that would allow small businesses to collectively negotiate with their suppliers. processors, and some other entities.

ILSR (Institute for Local Self-Reliance)

- U.S. antitrust laws, as written, are strong and, in theory, provide the tools needed to protect competition. However, decades of misguided enforcement and jurisprudence have allowed antitrust policy to stray far from Congress's intent. It's not simply that enforcement has been weak. Rather it's that enforcement has been guided by a flawed ideological framework that chases scale efficiencies at the expense of maintaining competitive markets, thus directly contradicting the intent of the statutes.
- ILSR believes that the FTC and DOJ can and should more aggressively enforce the antitrust laws and that the FTC should use its rule-making authority to address unfair methods of competition, particularly in digital markets. That said, we also believe that Congressional action is urgently needed to reaffirm the goals of the antitrust laws, correct the course of the enforcement agencies and the courts on crucial questions of policy, and enact new law to address the outsized power of dominant digital platforms and the threat they pose to competition, entrepreneurship, and democracy.
- Bar dominant digital platforms from engaging in lines of business that compete with companies that depend on their platforms.
- Amazon's cut of the sales made by third-parry sellers on its site is now 32 percent up from 19 percent five years ago. Suppliers have likewise reported increasing demands for discounts and payments. As these companies cede more revenue to Amazon, they lose the capacity to develop new products and invest in growing their businesses.

America's workers and consumers ultimately pay the price for this lost innovation and growth.

- Congress should prohibit dominant digital platforms from engaging in other lines of business when doing so creates inherent competitive harms. In the case of Amazon, adopting this policy would compel Amazon to spin off its Retail, Private Label, and Logistics divisions each as separate, stand-alone companies divorced from its online marketplace.

- Impose standards of nondiscrimination and common carriage on dominant digital platforms. Congress should instruct an agency such as the FTC to establish rules for dominant platforms to ensure these infrastructure companies provide fair and reasonable terms and pricing for producers and do not use their gatekeeper power to favor some firms over others or to impose onerous costs on market participants.

- Reaffirm that the intent of the antitrust laws is to safeguard the competitive process and disperse economic power.

- This "consumer welfare" framework has failed in at least two key ways. First, it ignores the fact that the exercise of market power can harm people not only as consumers, but also as producers of value as entrepreneurs and workers.

- John Kwoka, an economics professor at Northeastern University, studied the outcomes of major mergers and found that, in most cases, they led to price increases.

- To address the extreme levels of concentration across the economy, Congress should prohibit mergers involving corporations that already have significant scale and market power, including acquisitions that are currently too small to trigger notice and review under the Hart-Scott-Rodino Act. If Congress chooses not to impose an outright ban, at the very least mergers involving firms with significant market power should be subject to heightened scrutiny and a more stringent standard for approval by the FTC and DOJ.

- Establish "bright line" rules that ban anti-competitive conduct by firms with significant scale and market power, including dominant digital platforms.

- We'd like to highlight two types of conduct that should be barred for firms with significant market power, including dominant digital platforms. The first is tying.

- The second is predatory pricing. The current "recoupment" standard wrongly assumes that the only route for recouping losses is through charging inflated consumer prices in the future. But a growing body of scholarship shows that a firm that uses predatory pricing to expand its market share can reap rewards in other ways, including through an increase in its stock price and greater monopsony power to squeeze workers and suppliers.

- ILSR believes that sustained below-cost selling, tying, and other forms of conduct should be considered per se violations of the law when undertaken by firms with significant market power and scale, including Amazon and other dominant digital platforms.

- Mandate that the FTC and DOJ operate with greater public engagement, transparency, and accountability.

Hovenkamp

- *Antitrust is not a cure-all for political problems, patent problems, breach of contract, fraud, invasion of privacy or other violations of tort law, unless the practice in question also harms competition. Nor is it well designed to pursue business firm bigness for its own sake.* Large firm size becomes an antitrust problem only when it impairs competition.

- *An important benefit of this consumer-oriented approach to antitrust is that maximum output is also conducive to economic growth. which benefits everyone, including business and labor*.

- *Based on public information, it seems unlikely that the existing platforms have sufficient market power to be considered "monopolists" in most of the product markets where they operate.*

- *While predatory or other forms of exclusionary pricing is possible, the case for predatory pricing claims against individual internet sellers seems weak*. First, digital platforms are "two sided" markets, which means that revenue must be measured by looking at all relevant sides. For example, while Google and Facebook are largely free to users they are almost certainly not engaged in predatory pricing. Most of their revenue comes from advertising. There have been allegations that Amazon once engaged in predatory pricing of eBooks, but those claims were found by both the Justice Department and the court to be unpersuasive, and I do not quarrel with that outcome.

- An overly broad duty-to-deal rule can make firms slow to invest … given that they have an entitlement to free ride on the established assets of other firms. However, an overly conservative approach can weaken both price competition and innovation if it permits dominant firms to renege on commitments to involve significant collaborative development.

- *I see little merit in various proposals to break up large digital platforms such as Amazon or Facebook. These proposals appear to see size itself as the wrong to be proscribed and offer little assurance that price or output will improve. The opposite's more likely. The United States does not have a good track record with enforced breakups for monopolistic practices. Aside from recent mergers, there is no obvious way to break up highly integrated digital platforms without doing serious harm to both consumers and investors.*

- *Breaking off individual features simply makes the platform less attractive to users but does little to alleviate monopoly. Any breakup that interferes with economies of scale will result in higher costs and very likely higher prices or decreased product quality*. In any event, a breakup proposal must be more than rhetorical flourish. It must be accompanied by specifics showing which assets are to be spun off, as well as well-informed predictions concerning the impact on output, price, or quality.

- Also highly problematic is one popular "quasi" breakup proposal, which is that Amazon be required to establish separate platforms for sales of its own products and the numerous sales it makes as a broker for other merchants. The principal victims will be consumers, and the principal beneficiaries will be other large businesses whose products Amazon currently sells.

- *The impact of Amazon's house brand competition in close juxtaposition with third parties is to force down the prices of the large name brands, most of which enjoy significant trademark appeal and high margins*. Segregating Amazon's house brands from the name brands (or requiring Amazon to withdraw from the market of one or the other), will reduce price pressure on the name brands, enabling yet higher prices. *Consumers will be harmed and small businesses are unlikely to be benefitted*. Wise antitrust enforcement requires figuring out who is being hurt, and how, before proceeding.

- antitrust policy should be brought to bear on such contract practices as most-favored-nation clauses (MFNs), anti-steering clauses, exclusive dealing and related practices, including tying.

- Antitrust condemnation of these contract practices should not ordinarily lead to divestiture or other structural remedies. In most cases a prohibitory injunction plus disgorgement of unlawfully obtained gains is sufficient. I do believe that disgorgement should be broadly preserved as a remedy under an Agency's general equitable power.

- *while some small businesses who compete with Amazon are undoubtedly harmed, many others are benefitted because Amazon has effectively become their internet broker*. They receive access to internet distribution tools including billing and collection that they could not match on their own. As a result, one should not act too categorically. There is no good substitute for factual determinations of harms from contract practices. Specific instances of anticompetitive practices such as MFNs or exclusive dealing should be identified and remedied by both injunctive relief and private treble damages actions in appropriate cases.

- FRAND commitments are contractual, and breach of contract neither entails nor precludes an antitrust violation. When market power and anticompetitive effects are present, however, practices such as selective refusals to license, tying, loyalty requirements, or exclusive dealing that involve FRAND patents undermine this competitive system and can violate the antitrust laws. … One thing Congress should consider is legislation to protect the FRAND process.

- *Merger policy should not be designed to go after large size for its own sake. It needs to rest on sound economic theory about when mergers lead to lower output and higher prices*. These tests should be objective and not depend on the testimony of affected firms. Efficiency claims, which are frequently asserted in litigation, should be disregarded except where proof is particularly strong and non-speculative, and then only as a tie-breaker for mergers that are barely above acceptable concentration thresholds. *Merger law should also reflect sound economic analysis about bargaining behavior among profit-maximizing firms that often serves to explain why both horizontal and vertical mergers lead to higher prices. The draft Vertical Merger Guidelines recently released by the Agencies are a good first step.*

- *One pressing merger threat is widespread digital platform acquisitions of much smaller firms. … In general, adding complementary products or services is competitively beneficial*. Such acquisitions can limit potential competition. however.

- One promising solution would be to prohibit such acquisitions broadly, but permit dominant firms to obtain nonexclusive rights in acquired technology.

- [more funding for agencies]

Singer

- My overarching thesis is that *antitrust is not a perfect solution for addressing certain categories of potentially anticompetitive conduct, particularly the problem of self-preferencing by the dominant "tech platforms*," such as Amazon, Apple, Google and Facebook. Although certain types of exclusionary conduct by tech platforms do lend themselves neatly to antitrust scrutiny-for example, Facebook's restricting independent access to Facebook's API (a discriminatory refusal to deal) or Amazon's conditioning unfettered access to its e-commerce platform on an independent merchant's purchase of Amazon's fulfillment services (a tie-in-self-preferencing does not fit into any well-received antitrust paradigm. And even if the antitrust laws could be stretched to accommodate this type of exclusion, the pace of antitrust litigation is too slow to address the potential harms that flow from self-preferencing-namely, an innovation loss at the "edges" of the platforms, as independents throw in the towel as a response to an unlevel playing field.

- In the case of self-preferencing, there generally are no such observable short-run harms, as the platform is merely displacing an independent offering with its own. In the case of Google's self-preferencing in search results, however, there could be a short-run quality degradation-Google's affiliated content has been shown to generate fewer click-throughs than independent content-but few if any antitrust cases have turned solely on a showing of quality harm.

- *Although Microsoft is often invoked by those pressing for antitrust scrutiny of self-preferencing by tech platforms, the case stands for the opposite. The Microsoft court held that structural remedies were not appropriate unless anticompetitive effects could be demonstrated with confidence*: Even if antitrust law could be stretched, via new push-the-boundary cases or via new legislation, to accommodate self-preferencing, antitrust is not designed to redress innovation harms in a timely manner.

- To fill this gap in antitrust protection, I have advocated for a particular form of non-antitrust intervention-a nondiscrimination regime, patterned off of the nondiscrimination regime created by Congress as part of the 1992 Cable Act.

- A similar venue, or what I call the "Net Tribunal," could be used to adjudicate disputes between edge providers and dominant tech platforms.

- Existing antitrust laws are inadequate at assessing and anticipating the cumulative harm of a series of seemingly inconsequential mergers. Existing antitrust laws also appear to be struggling with how to effectively police vertical and conglomerate mergers.

- The legal landscape for challenging vertical mergers is hostile. Given the tendency of the current administration to preserve the status quo, as reflected in the DOJ and FTC Draft Vertical Guidelines, it is necessary for Congress to alter the landscape itself.

- To fill this gap in merger enforcement, Congress should create a presumption against mergers involving dominant platforms, as proxied with very high shares and entry barriers in a relevant market.

- the FTC or some new agency should be authorized to enforce a new nondiscrimination standard, which is distinct from an antitrust standard or unfair or deceptive acts standard.

- Merger statutes could be refined to make vertical acquisitions under certain fact patterns (such as by dominant platforms presumptively illegal, thereby shifting the burden of proof onto the merger proponents. Congress should overturn the Supreme Court's decision in Ohio v. American Express …

Steinbaum

- [focus on labor issues]

- The gig economy labor platforms. including ridesharing companies Uber and Lyft- domestic service platforms Handy and Care.com. and the home delivery service Instacart, as well as many others, constitute a distinct set of tech platforms whose central function is the coordination of labor performed by ostensibly independent service providers who agree to perform "gigs" as contracted via the app-based interfaces those companies control. As primarily labor-coordinating operations, this segment of the tech ecosystem raises its own unique set of antitrust concerns related to the erosion of vertical restraints jurisprudence under both the Sherman and Clayton Acts. I urge the subcommittee to consider legislation that would reverse the jurisprudence that enabled these platforms to operate a business model that is uniquely threatening to a vulnerable work force.

- all of the vertical restraints imposed by dominant gig economy platforms are enabled by the pervasiveness of employer monopsony power.

- The recent innovation in the empirical economics literature is that labor markets are surprisingly monopsonized relative a perfectly competitive baseline, but given actual estimates of firm-specific labor supply elasticities the real anomaly is that employers do not use more of the considerable monopsony power that they do possess. In other words. wages are surprisingly high, not surprisingly low.

- I encourage the subcommittee to formulate legislation that would substantially reverse antitrust's preference for vertical control. and thereby mandate a substantial re-engineering of the labor platform business model in favor of workers and other less powerful stakeholders. The policy experiment of almost wholly eliminating liability for vertical restraints of any kind, culminating in Ohio v. American Express, has failed.

- Vertical restraints should be a violation of antitrust law for any firm that possesses market power, either in the relevant market in which the restraint is imposed or more generally.

- The vertical restraints that should be illegal for any firm with market power, as shown by one of the above criteria, include the following:

- Exclusive dealing.
- Requirements contracts.
- Resale Price Maintenance--the fixing of prices for any transaction in which the dominant firm is not a party.
- Loyalty rebates in their many forms, including non-linear bonus-based pay policies in prevalent use on the labor platforms.
- Noncompete agreements.
- No-poaching clauses in contracts between vertically-affiliated parties.
- Anti-steering provisions.
- Most-Favored Nations clauses.
- Tying.

- The crucial point to emphasize about this is that there is no empirical evidence in favor of any of the purported pro-competitive effects of any of these vertical restraints, and substantial evidence of harm in the form of the precarity of the workers who depend on the platforms. There's no need for a process of balancing, as antitrust jurisprudence in an earlier era found.

Stucke

- Congress should do away with the Court's ill-defined consumer welfare

standard.

- *The infirmities of a "consumer welfare" standard would be less alarming if the welfare of consumers actually increased over the past forty years*.

- One egregious example is when employers agree not to poach each other employees. Another example is powerful buyers who depress wages or the prices paid to farmers.

- The consumer welfare standard has not fostered convergence - either in the U.S. Rather than an objective standard, the consumer welfare standard invites considerable subjectivity-and, more to the point, tolerance of anticompetitive practices.

- Congress should clearly state that the purpose of the antitrust laws is not exclusively

- the promotion of consumer welfare, but is to protect and promote an effective competitive process:
- Agencies and courts shall use the preservation of competitive market
- structures that protect individuals, purchasers, consumers, and producers;
- preserve opportunities for competitors; promote individual autonomy and
- well-being: and disperse private power as the principal objective of the
- federal antitrust laws.

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

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

- Congress should clarify that market power, especially in the digital platform economy, can take different forms. Powerful digital platforms, instead of raising price, can depress privacy protection below competitive levels. Companies, antitrust authorities increasingly recognize, can compete on privacy and protecting data. But without competition, Google and Facebook face less pressure. They can depress privacy protection below competitive levels and collect personal data above competitive levels. The collection of too much personal data can be the equivalent of charging an excessive price.

- Basically, if the enforcers and private plaintiffs present evidence of coercion - this

- Is, the firm is forcing or coercing buyers, sellers, or individuals to do something that they
- would not ordinarily do in a competitive market - then that should suffice to prove market power.

- Congress should reject the Supreme Court's praise of monopoly pricing andhierarchy of antitrust harms.

- [Criticizing Trinko]

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

- [Ban]:

    - no-poach agreements, including those by franchise agreements;

    - non-compete agreements by firms that individually or collectively have significant market power;

    - otherwise illegal or tortious anticompetitive behavior, including deceptive behavior, by a monopolist, when that conduct appears reasonably capable of helping the monopoly attain, maintain, or extend its power

    - and predatory pricing by a monopoly, which would mean pricing below average

    - variable cost (even if there is not a dangerous probability of recouping the investment in below-cost prices) or below total cost if there is evidence of anticompetitive intent.

- Address the Political, Social, and Economic Risks Posed by Today's Powerful Digital Platforms [more antitrust scrutiny, privacy protections, reduce switching costs]

Joint Response (12 scholars, including Morton and Shapiro)

- In short, economic research establishes that market power is now a serious problem, and that current antitrust doctrines are too limited to protect competition adequately, making it needlessly difficult to stop anticompetitive conduct in digital markets.

- The antitrust laws, as interpreted and enforced today, are inadequate to confront and deter
- growing market power in the U.S. economy and unnecessarily limit the ability of antitrust
- enforcers to address anticompetitive conduct in the digital markets that the Committee is investigating.
- Congress should update the antitrust laws to:
    - Correct flawed judicial rules that reflect unsound economic theories or unsupported empirical claims
    - Clarify that the antitrust laws protect against competitive harms from the loss of potential and nascent competition, especially harms to innovation
    - incorporate presumptions that better reflect the likelihood that certain practices harm competition
    - Recognize that under some circumstances conduct that creates a risk of substantial harm should be unlawful even if the harm cannot be shown to be more likely than not
    - Alter substantive legal standards and the allocation of pleading, production, and proof burdens to reduce barriers to demonstrating meritorious cases
- Congress also should improve the effectiveness of antitrust enforcement by increasing the
- resources available to the federal antitrust enforcement agencies and increasing penalties.
- [enforcement too lax; market power slows innovation and growth; standard interventionist critique]
- To address growing market power, remedy existing competitive problems, and deter new competitive harms, action is required. For the past 40 years, the courts have imposed a policy judgment that is too accommodating to anticompetitive conduct and too dismissive of the harm that conduct can cause.

Waller

- [US should import EU / abuse of dominance concepts]
- [investigate claims like margin squeezes, tying, essential facilities]
- [market studies]
- Add statutory language that well-reasoned decisions outside the United States interpreting the existence of a dominant position or its abuse be given persuasive, but not binding, effect by courts and agencies interpreting this new statutory language [re: abuse of dominance]
- Revise the language of the Robinson-Patman Act to explicitly include the provision of services as well as commodities given the dual nature of many of the lines of business of digital platforms and other dominant firms in the global economy.