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Selling Antitrust

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SELLING ANTITRUST

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Antitrust's promoters have never done a particularly good job selling their field to the public. That is not entirely their fault. Antitrust is inherently technical, and a less engaging discipline to most people than, say, civil rights or criminal law. The more serious problem is that when the general press does talk about antitrust policy it naturally gravitates toward the fringes, both the far right and today increasingly the far left. Extreme rhetoric makes for better press than the day-to-day operations of a technical enterprise. The extremes are often stated in overdramatized black-and-white terms that avoid the worldly subtleties that make science more complex and fact-dependent, but also more useful. Richard Hofstadter captured the issue well in his iconic 1960s essay on What Happened to the Antitrust Movement?[1] For decades, he observed, antitrust was filled with rhetorical fervor aimed mainly at a poorly defined group of firms called the "trusts." During that period, however, it accomplished very little. When it finally peeled the rhetoric away and settled down to applying a coherent set of rules the public lost interest, but in the process antitrust was actually able to get something done.

A good illustration of this is the use of "winner-take-all" rhetoric to describe the big platforms. The Press loves the suggestion that these markets naturally gravitate toward permanent monopoly status. In fact, nothing could be further from the truth, as suggested by

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[1] Richard Hofstadter, *What Happened to the Antitrust Movement?*, in THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 188 (1st ed. 1965). The essay is reprinted in THE MAKING OF COMPETITION POLICY: LEGAL AND ECONOMIC SOURCES (Daniel A. Crane & Herbert Hovenkamp eds., 2013). Hofstadter's essay originally appeared in THE BUSINESS ESTABLISHMENT 113 (Earl F. Cheit ed., 1964).

Facebook's recent stock market crash.[2] It was induced in substantial part by the entry and rapid growth of TikTok, which has been peeling users away from Facebook at a rapid rate. However, explaining "differentiated" entry to the press is difficult, although it need not be. The theory of natural monopoly, from which the term "winner take all" was derived, was limited to undifferentiated firms such as utilities who faced identical demand but had declining costs. Neither Facebook nor any similarly situated platform is likely to face new entry from a clone. Rather it will (and did) come from a rival who produces a different but overlapping product.

Centrist antitrust is flanked by two outspoken extremes. Both groups live primarily in the past, although in different parts of it. Antitrust's neoliberal right grew out of a reaction to the New Deal that developed in the 1940s through the 1970s, prior to the rise of robust and testable models of imperfect competition.[3] The principal target was theories of oligopoly and monopolistic competition that at the time were considered novel but untestable.[4] Today that is no longer the case. Not only are they robust and testable, but they have largely displaced older perfect competition models that the Chicago School defended so aggressively from the 1940s through the 1970s.[5]

Antitrust's extreme left depends on ideas developed decades earlier, with exaggerated but simple views about the harms caused by

[2] E.g., Christiaan Hetzner, "As Rivals Close in on Facebook, Zuckerberg Pins Hopes on Meta's New TikTok Rival," FORTUNE (Feb. 3, 2022), available at https://fortune.com/2022/02/03/facebook-earnings-market-cap-stock-market-zuckerberg-tiktok-metaverse/.

[3] E.g., George J. Stigler, *Monopolistic Competition in Retrospect*, in FIVE LECTURES ON ECONOMIC PROBLEMS 12 (1949); Milton R. Friedman, *The Methodology of Positive Economics*, in MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 1, 39 (1953).

[4] *See* Herbert Hovenkamp, *Antitrust Error Costs*, __ PENN. J. BUS. L. __ (forthcoming, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3853282.

[5] *Ibid*.

big firms, but largely disregarding the welfare of consumers and labor – two enormous beneficiaries of competitive markets.[6] This position, sometimes referred to as "Progressive" or "Neo-Brandeisian," attempts to get back to an imagined view of Progressive antitrust policy. It does not accurately represent the views of the actual Progressives.[7] Even if it did, there is no obvious need to return to it, any more than a need to return to, say, the gold standard or mandatory balanced budgets.

The use of the term "Progressive" to describe the policies of the new antitrust left is historically unfortunate. In fact, no era has contributed more to modern antitrust doctrine than the original Progressives, and the vast majority of it was pro-enforcement. Among their contributions were partial equilibrium analysis, which breaks the economy up into small segments, or "markets, for purposes of study. This microeconomic doctrine led to the development of the "relevant market" in antitrust law for estimating power. Another Progressive development was the use of tools for measuring industrial concentration as a device for assessing industry competitiveness. Yet another was the concept of entry barriers, in contrast to the classical presumption that new entry is easy and certain to discipline monopoly pricing. In addition was the development of a more technical theory of costs, including the idea that industries with high fixed costs are more problematic, more conducive to unstable competition and cartels, and thus warrant closer scrutiny.[8] The new Progressives have

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[6] On the Neo-Brandeis movement, *see* David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION, April 4, 2017, available at https://www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies/. For incisive commentary, *see* Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULLETIN 531 (2019).

[7] *See* Herbert Hovenkamp, *Progressivism's Antitrust Toolbox* (SSRN Dec. 29, 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3995502.

[8] Hovenkamp, *Toolbox*, *supra* note __.

purloined the name while ignoring most of the valuable antitrust enforcement tools that the actual Progressives developed.

How should antitrust be marketed to a press and readership whose principal common characteristic is a short attention span? The remainder of this essay highlights four positions that are harmful as a matter of antitrust law. They are attractive to the public, however, because each of them can be declared on a post-it note. The corrections unfortunately require both facts and explanation.

The first is the misuse of antitrust's "consumer welfare" principle, which has produced a great deal of resistance from people who do not understand its meaning. The misunderstanding is largely the fault of Robert Bork, who borrowed a general welfare concept from economics and then renamed it "consumer" welfare. Rhetorically, that was a *tour de force* and contributed a great deal to its popularity. It has also contributed to lower output and higher prices as a result of practices that should have been condemned but were not. "Output" is measured by quantity, quality, or innovation, but all three contribute to consumer value. Facilitating higher output both reduces prices and improves product quality, as sellers need to reach more buyers.

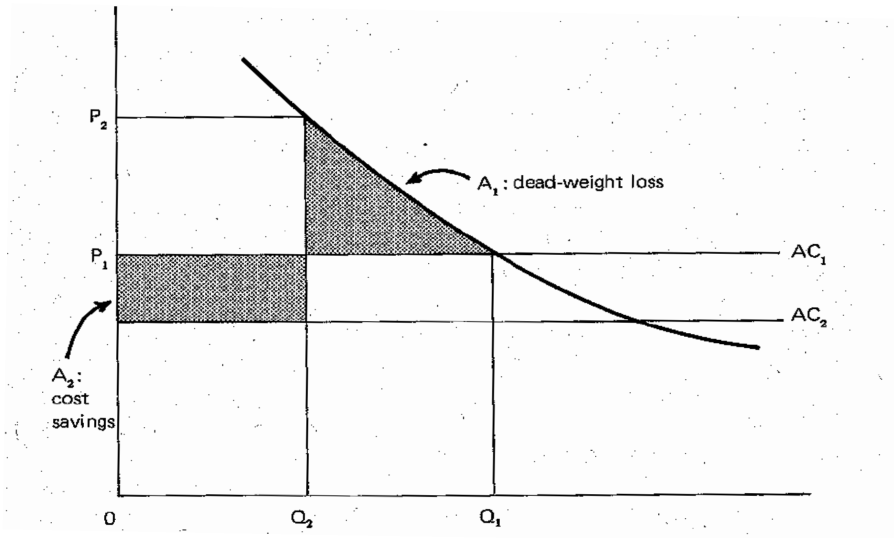
The fundamental problem with Bork's vision of consumer welfare was that he included producer profits as part of the welfare of consumers. For example, if a practice produced $500 in consumer losses but $600 in producer gains, Bork could label it as promoting "consumer welfare" even though actual consumers were losers. The impact of this has shown up prominently in Supreme Court opinions. For example, the dissenters in the *Actavis* case could proclaim that the goal of antitrust law is to improve consumer welfare even as they would have approved of a practice – pay-for-delay pharmaceutical patent settlements – that led to higher drug prices and harmed actual consumers.[9] The same thing is true of the majority opinion in Ohio v.

[9]FTC v. Actavis, Inc., 570 U.S. 136, 161 (2013) (Roberts, C.J., dissenting).

Amex, which declared support for the consumer welfare principle even while approving a practice the imposed high consumer prices on every affected transaction.[10]

Bork's definition of "consumer welfare" as including producer profits was his way of addressing practices that could be efficient even as they created monopoly. Mergers are a commonly given example, but there are others. Bork borrowed a very well-known figure from economist Oliver Williamson as his model. A challenged practice might create a monopoly, producing its deadweight loss designated A_1 in the figure, but also reducing costs by area A_2. Bork's consumer welfare principle stated that this practice should be approved if the cost savings area was larger than the deadweight loss area. Bork used the figure below and described its meaning in *The Antitrust Paradox*.[11] The one thing he did not describe in any detail was the relationship between O_1 and O_2 at the bottom of his figure. The bottom line represents output, and O_2. in the figure is about half the distance between the zero point and O_1. That is to say, this particular practice reduced output by roughly half even as it was generating enormous efficiencies. The actual output reduction could be greater or less than half, depending on the shape of the demand curve and the extent of the cost savings.

[10]Ohio v. Am. Express, 138 S. Ct. 2274, 2290 (2018).
[11]ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 107 (1978).



The one thing that Bork did say about output was that "any efficiencies associated with a firm's size are very likely to outweigh any restriction of output on the consumer welfare scale."[12] The statement is mystifying, but one thing it reveals is how little Bork knew about business. He appeared to think that the efficiencies that resulted from larger firm size came from the number of square feet in a plant or the number of facilities a firm owns, or some other thing that he associated with a "firm's size." But large size produces efficiencies mainly by increasing output.

This is a case of what Ronald Coase famously called "blackboard economics," where the geometry makes sense when you draw it with a piece of chalk, but it has little or no correspondence to the real world.[13] Bork never addressed the eminently important policy question of exactly what type of situation produces these results. The most important economy that firms achieve through mergers or joint ventures is economies of scale, but these generally accrue at greater

[12] Id. at 179.
[13] RONALD H. COASE, THE FIRM, THE MARKET, AND THE LAW 19, 28 (1989).

rather than lesser output. Further, per unit fixed costs vary inversely with output. For example, a firm that has fixed costs of $1000 and produces 200 units has per unit fixed costs of $5. But if that firm reduces its output to 100 units while its fixed costs remain unchanged, its per unit fixed costs rise to $10. So the monopolies that Bork must have had in mind were not firms with substantial fixed costs. But in that case, what was the source of durable monopoly?

Finally, but too often forgotten, is the impact of output on labor. Labor is largely a variable cost, and at the lower end of the pay scale it is almost entirely a variable cost.[14] As a result, price increasing/output reducing practices harm not only consumers, they also hurt labor – and perhaps significantly. This remains one of the biggest blind spots in the Neo-Brandeis movement: it legitimately states a strong concern for practices such as noncompete clauses that limit labor mobility, but it ignores the far bigger labor issue that affects many more workers, which is what happens to jobs when excessive protectionism for small business results in lower output.[15]

The press typically does not have the patience for all of these fine points. To the extent they relate "consumer welfare" to "Bork" they acquire the impression that consumer welfare is some kind of right-wing conspiracy to harm people in order to preserve high profits for firms. Properly defined, however, consumer welfare favors maximum sustainable output, which is consistent with competitive markets and benefits both consumers and suppliers, including workers. It manifestly does *not* favor high profits. The concept of maximum sustainable output is not a license to produce cheap goods. To the contrary, to the extent firms prefer better or more innovative products, satisfying those needs is a form of output.

[14] Further developed in Herbert Hovenkamp, *Labor's Interest in Antitrust* (SSRN, Jan. 23, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4015834.
[15] *Ibid*.

Higher output solutions can harm competitors, however, and for that reason various small business interests have opposed them. When a firm increases its production, improves the quality of its product or invests more in innovation, that is typically bad for rivals. Small business interests raised these concerns during the formative years of antitrust enforcement, again during the New Deal, during the 1960s, and finally now. Brandeis' name is so often mentioned today because he was a champion of small business,[16] including of legal rules that imposed higher costs on larger firms for the benefit of smaller ones. For example, one of his well known dissents expressed support for state laws passed at the behest of small business that imposed higher taxes on chain stores than on single store operations.[17] In fact, he conceded that a possible effect of the statute was to make it unprofitable for the chains to do business in the state.[18] He was also a lifelong supporter of resale price maintenance, or manufacturer limitations on retailer price cutting. For Brandeis, RPM induced by retailer groups was a way of preventing larger firms from selling at lower prices.[19] The same concerns were reflected in the 1960s when the government condemned the Brown Shoe merger because it resulted in either "lower prices or in higher quality for the same price," and this

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[16]*See, e.g.*, Barak Orbach, *Antitrust Populism*, 14 N.Y.U. J. L. & BUS. 1 (2017).

[17]*E.g.*, Liggett Co. v. Lee, 288 U.S. 517 (1933) (Brandeis, j., dissenting from decision striking down state statute that taxed chain stores at progressively increasing rates as the number of stores increased).

[18]"The statute seeks to do this by subjecting the latter to financial handicaps which may conceivably compel their withdrawal from the state." *Liggett*, 288 U.S. at 541 (Brandeis, j., dissenting).

[19]*See* Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 905-906 (2010). On Brandeis' activism, *see* Laura Phillips Sawyer, AMERICAN FAIR TRADE: PROPRIETARY CAPITALISM, CORPORATISM, AND THE 'NEW COMPETITION," 1890-1940 (2019).

harmed smaller competitors who could not compete.[20] Consumer welfare as maximum sustainable output is consistent with, although it does not compel, the existence of large firms.

A second position that has more rhetorical appeal than factual support is that the best thing that antitrust can do in areas of uncertainty is nothing. As a result, antitrust policy should be invoked only against very egregious practices such as naked price fixing. The fundamentals of this view were developed in the 1940s and 1950s by prominent Chicago School scholars such as George J. Stigler and Milton Friedman. The view migrated into the legal literature after it had largely become obsolete in economics, but it has proven to be very resilient, mainly because it brings profits to so many firms.[21]

This idea, which goes by the name of "error cost" analysis, begins with the premise that markets are robust and will naturally work themselves pure toward acceptable levels of competition. Judicial errors, by contrast, take a much longer time to correct. As a result, overdeterrence in antitrust is a much bigger problem than underdeterrence.[22] Justice Gorsuch reflected this view in the oral argument in the *Amex* case when he suggested that "judicial errors are a lot harder to correct than an occasional monopoly."[23] When we are

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[20]United States v. Brown Shoe, 179 F.Supp. 721, 738 (E. D. Mo. 1959), *aff'd*, 370 U.S. 294 (1962). The District Court's full statement is:

> Company-owned and company-controlled retail stores have definite advantages in buying and credit; they have further advantages in advertising, insurance, inventory control and assists and price control. These advantages result in lower prices or in higher quality for the same price and the independent retailer can no longer compete ….

[21]*See* Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 PENN. L. REV. 1843 (2020).

[22]Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2-3 (1984).

[23]*See* Transcript of Oral Argument at 18, Ohio v. Am. Express Co. (Feb. 26, 2018) (No. 16-1454):

in doubt, the best thing to do is nothing. Today, the right's adherence to error cost analysis in spite of a forty-year long explosion of economic evidence that undermines it is one of the most important sources of capture in the private economy. Both of its premises are wrong. Far from working inevitably toward competition, the amount of monopoly in the economy has been increasing steadily since the 1980s. Further, for their part judges are quite capable of overruling or limiting bad antitrust decisions, and often in a timely fashion.[24]

A third error is thinking that the large platforms are inherently bad and that the only good way to fix the problem is to break them up. Enthusiasm for breakups has waxed and waned across the history of antitrust enforcement. Courts are not very good at restructuring firms. The risks are significant that an imposed breakup will do more harm than good. Bad breakups can cause considerable harm to consumers, labor, and other affected interests, and often without solving the monopoly problem at hand.

Not all "breakups" are alike. It is important to distinguish divestitures of previously acquired assets – that is, the undoing of mergers – from breaking off assets that were internally developed.[25] Indeed, the unwinding of unlawful mergers has always been a well-established part of antitrust enforcement policy and remains so. The reason that we do much less of it today is a consequence of legislation that was passed in 1976[26] requiring most important mergers to be

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> why shouldn't we take Judge Easterbrook's admonition seriously, that judicial errors are a lot harder to correct than an occasional monopoly where you can hope and assume that the market will eventually correct it? Judicial errors are very difficult to correct."

[24]*See* Hovenkamp, *Antitrust Error Costs*, *supra* note __.

[25]For example, Rory Van Loo, *In Defense of Breakups: Administering A "Radical" Remedy*, 105 Corn. L. Rev. 1955 (2020) (dealing mainly with spinoffs of acquired assets).

[26]Hart-Scott-Rodino Antitrust Improvements Act, codified at

reported before they occur. The result is that legal challenges typically precede the actual acquisition, and no breakup ever occurs. If the government wins, the remedy is an injunction barring the merger.

The statute does not eliminate the right to challenge consummated mergers, and a few such cases do occur.[27] Post-merger breakups are still an acceptable remedy for mergers that turn out later to be problematic. Whether a breakup is the best remedy depends in part on how well integrated the acquired firm's assets are into the acquiring firm. For example, the FTC's pending complaint against Facebook challenges its acquisitions of Instagram and Whatsapp, several years after they occurred and even though they were reviewed and approved at the time.[28] Both firms retain separate platforms and customer subscriptions,[29] however, and neither is fully integrated into Facebook's main platform. Breaking them off from Facebook should be manageable, although it may require some sharing of user information.

By contrast, breaking up internally developed assets is more difficult, and there is a greater chance of an error. However, even these can succeed. One case in point is the telephone system, broken into seven regional firms by an antitrust consent decree in 1982.[30] That breakup was a policy success, however, because it insisted on interoperability and thus preserved nearly all of the beneficial network

15 U.S.C. §§ 15c-15h, 16, 18a (1976).

[27] *See* Menesh S. Patel, *Merger Breakups*, 2020 WIS. L. REV. 975.

[28] Complaint for Injunctive and Other Equitable Relief ¶ 64, FTC v. Facebook, Inc., 1:20-cv-03590-JEB (D.D.C. Dec. 9, 2020). *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2033 (2021).

[29] See https://www.instagram.com/; and https://www.whatsapp.com/.

[30] United States v. AT&T Co., 552 F. Supp. 131, 141-42 & n.42 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

effects of a unitary phone system. That consent decree should offer a playbook for Facebook and a spun-off firm such as Instagram.

An effective breakup must break *into* a monopoly, however, and not merely spin it off. For example, some have suggested that Alphabet, the parent of Google, should spin off Google search. But if Google search is itself the monopoly, all that breakup will do is transfer the monopoly to a different owner. If a firm produces 80% of the market's toasters and 50% of the market's blenders, spinning off the blender division will simply give us one firm that continues to control 80% of the toasters and a second that controls 50% of the blenders. In order or to break up the monopoly we need to divide toaster production, but in most markets, and particularly digital ones, that is much more difficult to accomplish.

To be sure, one monopoly division in a firm may be able to cross-subsidize another division, but then we need to sort out how much of this is beneficial and how much is harmful. For example, in the *Berkey* case the court refused to condemn Kodak's simultaneous introduction of a new camera and film cartridge that were compatible only with one another. The mere fact that one department in the firm "benefits from association" with another division with monopoly power should not be unlawful.[31] In this case consumers found the new camera/film package so desirable that it swept the market. Further, in most cases there are nonstructural alternatives such as injunctions that will work better. In *Berkey* the plaintiff did not seek divesture of Kodak's film business, but only an order compelling Kodak to predisclose technology in progress that might harm a rival.[32] For example, Android handheld manufacturers have made Google Search the default search engine, but that practice was ended in the EU by an

[31]Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).
[32]*See Id*. at 281 (reversing district court's jury instruction that required a monopolist to predisclose if its new technology made "it impossible for a competitor to compete with Kodak in the camera market unless it could offer products similar to Kodak's….").

injunction, not a breakup.[33] The same thing could happen under United States law.

Simply breaking up firms without considering these effects can make a firm smaller but almost certainly not more attractive. For example, we might break Facebook into one firm exclusively for men and another exclusively for women, or perhaps into different firms for different geographic areas. Or we could divest video posting, or message boards or some other feature. Removing features would make Facebook smaller, but it would also be crippling, not only for Facebook itself but also for its users, shareholders, employees and other suppliers. Indeed, the very features that make Facebook attractive also explain why it is large – namely, the ability to connect a very large network of members without significant restriction, and to offer an aggregated set of features that these members want on demand in differing combinations.

There are more promising alternatives, although we have less experience with them. One is compelled "interoperability," which has become a term for a decree that requires a dominant firm to share some operations or data with other firms. The grandparent of such remedies is the consent decree that broke up the telephone company,[34] subsequently expanded by the 1996 Telecommunications Act,[35] which permitted smaller phone carriers to interconnect with the dominant carriers. For more than a decade interconnection was supervised by a single federal judge, Harold Greene.[36] Then federal and state telecom

[33] See Google to Allow Android Users in Europe Choose Default Search Engine (Reuters, Aug. 2, 2019), available at https://www.reuters.com/article/eu-google-antitrust/google-to-allow-android-users-in-europe-choose-default-search-engine-idUSL4N24Y2GY.

[34] United States v. AT&T, *supra* note __.

[35] Telecommunications Act of 1996, 47 U.S.C. § 251(c) (2018).

[36] *See* Joseph D. Kearney, *From the Fall of the Bell System to the Telecommunications Act: Regulation of Telecommunications Under Judge Greene*, 50 HASTINGS L.J. 1395 (1999).

agencies took over that task. The result was the creation of the national telephone network as we have it today, which has largely achieved the gold standard among networks: everyone can talk to everyone else.

Interoperability remedies could also be made to work in markets for things like ride-hailing services. For example, Uber and Lyft might be joined under a common app and the two firms or their drivers bid by posting their fares. The user of the app would select a car based on price, location, or other features. Making interoperability work in more complex situations such as Facebook or consumer search engines would be more challenging but very likely doable. Interconnection remedies are a particularly promising alternative on two-sided platforms with substantial direct and indirect network effects. Here, the network becomes more valuable as the number of users on both sides increases. Breakup remedies that interfere with that will not only make users worse off but they will also be unstable because they are not equilibrium solutions.

Other types of interoperability – although that term may be a misnomer – are also worth trying out. Full interoperability is "dynamic" in the sense that all covered firms participate in ongoing changes, which occur more-or-less simultaneously across all platforms. "Static" interoperability can also be effective at promoting competition. One example is data portability. Facebook limits user ability to switch away by making customer data nonportable. Overall, Facebook users face low switching costs and there are few limits on their ability to switch to an additional or alternative networking site. As a user's history of photos, videos, and other communications becomes larger and more valuable to that user, however, the cost of switching is higher. In his January, 2022, decision sustaining the FTC's complaint, Judge Boasberg described this as a barrier to entry resulting from high switching costs, and he is correct.[37] A form of

[37] FTC v. Facebook, Inc., ___ F.Supp.3d ___, 2022 WL 103308 (D.D.C. Jan. 11, 2022):

relief worth considering is a requirement that data be stored in a commonly addressable and portable format that is controlled by the customer and transferable at will. This is not the same thing as full interoperability, which would mean that a customer's changes on one platform would be automatically synched to appear on other platforms as well. Whatever the precise solution, fashioning it should begin with the premise that customers are the owners of their personal data.

An alternative with promise but no track record outside of voluntary arrangements is the reorganization of management rather than the firm itself. That is, if you cannot make the firm's assets structurally more competitive perhaps you can make its management more competitive.[38] For example, suppose Amazon was reorganized under a board consisting of several competing Amazon market participants with separate businesses of their own. This board would have oversight over merchant selection and sales policies. Plenty of precedent exists for treating the decisions of corporations run by directors with independent businesses as agreements among the participants rather than as the unilateral actions of the parent firm. Important Supreme Court decisions involving the Chicago Board of

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> …[T]he FTC advances a modern variation on that well-established barrier to entry. It alleges that "because a core purpose of personal social networking is to connect and engage with personal connections, it is very difficult for a new entrant to displace an established personal social network in which users' friends and family already participate." In other words, why would new users go to a social space that does not include their important contacts?

Citing 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶421h (4th ed. 2015).

[38] *See* Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2021-2032 (2021).

Trade,[39] the Associated Press,[40] and the NFL[41] involved such structures. The Supreme Court had no difficulty treating their conduct as agreements among their members rather than unilateral conduct. Similar reasoning has been applied to hospital staff privileges boards[42] and real estate associations whose members are active brokers.[43] When the individual members – even if stockholders in a common enterprise – collude with one another, §1 of the Sherman Act can be brought to bear.

The significance is that collaborative conduct is treated under a much more aggressive standard than is unilateral conduct. The concerns shift toward agreements that reduce output and raise price, rather than the strict standards that apply to monopolizing conduct. For example, unilateral refusals to deal are almost never unlawful under the antitrust laws, while concerted refusals can be. Purely vertical restrictions such as most-favored-nation clauses requiring suppliers to discriminate against competitors are subject to the rule of reason. However, if these restrictions are horizontal because they are imposed by agreement among a group of competitors they can be unlawful per se. Even under the rule of reason, however, the market power requirements under existing law are lower. Under such a structure,

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[39]Bd. of Trade of Chi. v. United States, 246 U.S. 231, 239 (1918) (agreement among shareholders of an Illinois corporation).

[40]Associated Press v. United States, 326 U.S. 1, 3-4 (1945) (same, members of New York Corporation).

[41]Am. Needle, Inc. v. NFL, 560 U.S. 183, 189-96 (2010) (individual teams controlling NFL IP-licensing subsidiary treated as conspiring actors).

[42]*E.g.*, Boczar v. Manatee Hosps. & Health Sys., Inc., 993 F.2d 1514, 1517 (11th Cir. 1993).

[43]*E.g.*, Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1144-47 (9th Cir. 2003).

practices would be much easier to reach, although they would still require a showing of competitive harm.[44]

Finally, a fourth position lies in the remedies contained in legislative proposals pending in Congress under the name "self-preferencing."[45] This term refers to situations where a platform provides its own goods or services as well as the goods or services of others, and then somehow discriminates against the third parties. The legislation clearly targets Amazon, but it also has relevance for any covered platform that offers marketplaces for both their own services and those of others, or who engage with a range of suppliers or advertisers.

The idea is a complete misfire to the extent that it ignores that consumer switching is usually more costly in traditional brick-and-mortar stores. For example, a customer in a physical Wal-Mart store who is unhappy with Wal-Mart's preferencing of an in house product over a rival brand can switch by driving to a different store. By contrast, a customer unhappy with Amazon's product selection can find alternatives with a mouse click. The damage done by these provisions would be limited if they contained a market power requirement, but as of this writing they appear not to. Rather they are explicitly directed at platforms of a certain gross size. For example,

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[44]The proposal is developed more fully in Hovenkamp, *Platform Monopoly*, *supra* note __at 2021-2031.

[45]*See* American Innovation and Choice Online Act, S.2992, 117th Congress (2021-2022), available at https://www.congress.gov/bill/117th-congress/senate-bill/2992/text. *See also* Taylor Hatmaker, *The First Big Tech Antitrust Bill Lumbers Toward Reality*, TECHCRUNCH, Jan. 20, 2022, available at https://techcrunch.com/2022/01/20/tech-antitrust-self-preferencing-bill-american-innovation-and-choice-online-act/.

Amazon is covered even though it has non-dominant market shares in most products that it sells, save a few items such as eBooks.[46]

As currently formulated, the pending self-preferencing legislation is an affront to both antitrust policy and intelligent regulatory policy. Indeed, it displays all the signs of special interest capture disguised as an antitrust law. Covered firms are chosen in a way designed to handicap a small number of digital firms for the benefits of smaller firms or those that are dedicated to older technologies.

A related concern is based on accusations that Amazon and perhaps other firms collect data on goods that it sells for third parties and then takes advantage of this data to engineer copies of these goods, typically selling them at a lower price.

About the worst solution for these problems is a structural separation rule. That would deprive customers of the benefits of intraplatform competition, which is substantial on platforms such as Amazon, but also on others such as eBay. Amazon presents a rather different problem from the chain stores that provoked Louis Brandeis's anger in the 1920s and 1930s.[47] A big chain such as A&P largely sold its own goods in competition with smaller firms, who suffered greatly from the increased competition. By contrast, Amazon's relationship with third party sellers is as both competitor and broker, and it is important to segregate these out.

Amazon's in house sales of its goods through its house brands, such as AmazonBasics, affects rivals in a variety of ways. First, there is one set of small firms who choose not to sell on Amazon at all, and they certainly face more competition, but they are not the target of

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[46] See https://nrf.com/blog/2021-top-100-retailers (Amazon less than 10% even among list limited to ten largest retailers, based on 2021 data)

[47] *E.g.*, Liggett Co. v. Lee, 288 U.S. 517 (1933), discussed *supra*, note __.

these bills because they are already off the platform. Second are small firms that sell on Amazon and that may be vulnerable if Amazon manipulates its displays or terms or reverse engineers their products. Third are large firms that have premium brands of their own. The largest dollar volume of AmazonBasics sales come from these products. These include things like alkaline batteries, which Amazon sells in competition with brands such as Duracell, Eveready, or Energizer. Duracell is owned by Berkshire-Hathaway, one of the largest firms in the country, but the other name brands are also large firms. A second large category is consumable office supplies, where its principal competitor is 3M, another very large firm. A third is small electronic appliances such as toasters, where it competes with Black & Decker, the largest maker of small appliances, and Cuisinart. A fourth is electronics cables, sold in competition with Anker and Belkin. For all of these, the impact of Amazon's own product presence is clear: consumers have an additional choice and the premium brand must cut its price or lose sales. The only entity that will benefit if Amazon is forbidden from selling AmazonBasics and Duracell batteries on the same website is Berkshire-Hathaway.

This hardly means that antitrust is toothless. It just needs to search more carefully for competitive harm. One is platform most-favored clauses, which require sellers to sell to others only at higher prices. Another is exclusive dealing, and there may be others that can be challenged under §1 of the Sherman Act.

The final problem here is reverse engineering and knockoffs. The literature here is heavily anecdotal and focuses on relatively few instances,[48] but clearly some exist. The problem raises several questions. First, is Amazon using information supplied by these third-party sellers that is not generally available? For example, anyone can

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[48]*See Investigation of Competition in Digital markets, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary* (2020), available at [competition_in_digital_markets.pdf (house.gov)](competition_in_digital_markets.pdf).

purchase a product from Amazon and examine it, or else read Amazon's own posted customer reviews. For purposes of making a knock-off, the most valuable source of information is a copy of the product itself. If that is mainly what one needs in order to make a knockoff, then we are looking at this problem in the wrong way. Thankfully, the current version of the Innovation and Choice Online Act[49] limits coverage to situations where platforms use nonpublic data to inform their reverse engineering.[50] Whether that describes a significant set of instances is doubtful.

Second, what about the role of the intellectual property laws? If the products that Amazon is copying are protected by utility or design patents, copyrights, or trademarks, Amazon is guilty of infringement. If not, then the general policy of American law is to permit, even encourage, copying of things that are in the public domain. Witness, for example, the considerable enthusiasm we show for the ability to copy patented pharmaceutical drugs when their patents expire.

Once again, this is not to say that Amazon is not doing anything anticompetitive, but rather that this issue needs to be pursued more dispassionately, very likely more individually, and with more fact finding in order to determine which conduct is harmful and which is not.

Conclusion

One important feature of the digital economy is its lopsided contribution to the economy, with a growth rate as much as four times greater than that of the economy overall.[51] This is true mainly because

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[49] Supre note __.
[50] Id. at §2 (b)(3).
[51] Kevin Barefoot, et al, *Defining and Measuring the Digital Economy* (U.S. Dept. of Commerce, Bur. Econ. Analysis (2018), available at Working Paper: Defining and Measuring the Digital Economy

that part of the economy has provided both businesses and consumers with products and technologies that they value. It takes a special arrogance to deny this migration and substitute for it some version of a past that no longer exists.

(bea.gov) (estimating GDP growth in digital economy during 2006-2016 at 5.6%, against a general economic growth rate of 1.5%).