Antitrust and Tech Monopoly: A General Introduction to Competition Problems in Big Data Platforms

Testimony
Before the Committee on the Judiciary
of the Ohio Senate

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Chairman Eklund and Ranking Member Thomas, it is my pleasure to appear here and offer these remarks. Thank you in particular for spending your time with us in Cleveland, before we students, staff, and faculty of Cleveland State University. I am pleased to present a general introduction to the nature of the big data platforms, the competition problems they pose, and issues in the application of antitrust to them. This work has been my bread and butter, as I have been teaching antitrust for a long time and writing about these businesses in particular. I applaud the Committee and Attorney General Yost for your interest in this important topic.

If Ohio is to take some special role in this conversation, it will be in keeping with a long history, because antitrust in some real sense begins in Ohio. Senator John Sherman of Ohio introduced the bill that became the federal Sherman Act of 1890, the world’s first major competition law, and Ohio adopted one of the first state antitrust statutes shortly thereafter. Even before then, Ohio led

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1 I have taught antitrust law at Cleveland State University for 17 years. My major work on the tech sector has been a book just out called United States v. Apple: Competition in America (Harvard University Press, 2019). I’ve written several other books and articles, including a leading treatise, Sullivan, Grimes & Sagers, Antitrust Law: An Integrated Handbook (West, 3d ed. 2015). I’ve testified in Congress and before the Antitrust Modernization Commission and engaged in various other activities involving federal antitrust law.

2 Ohio, like most states, has its own antitrust statute. The Valentine Act, which appears as 13 O.R.C. ch. 1331, was adopted in 1898, in part to address perceived shortcomings in federal law as it then existed. An excellent general summary of the history and law of the Valentine Act is The Valentine Act: A Monograph on Ohio’s Antitrust Law (OSBA, Daniel R. Warncke & Michael R. Rickman, eds. 2008) [hereinafter “Valentine Act Monograph”].
the nation in the trust-busting fervor of the Gilded Age, achieving initial success in a widely followed corporate-law action against Standard Oil.\textsuperscript{3} More generally, American antitrust has always preserved a place for state government action, despite having a powerful statutory tool at the federal level. Before the Sherman Act, all states enforced common law rules against restraint of trade and monopoly, and Congress has repeatedly made clear its intent that they maintain their traditional role.\textsuperscript{4} States are authorized to enforce the federal law\textsuperscript{5} and their own statutes, and they have always done so, especially after Congress in the 1970s provided funding for their antitrust bureaus and gave them federal parens patriae power.\textsuperscript{6} State legislatures have also frequently intervened to give protections from competitive injuries over and above those provided under federal law. Ohio’s Valentine Act, for example, is patterned after the federal Sherman law, and Ohio courts generally follow federal law when interpreting it, but it is at least nominally “much broader and stronger [in its] terms.”\textsuperscript{7} Likewise, in several instances, states have adopted special rules to provide greater or different protection than federal law, and the courts have held it broadly within their constitutional power.\textsuperscript{8}


\textsuperscript{5} States may sue as plaintiffs when they are personally injured by antitrust violations, Georgia v. Evans, 316 U.S. 159 (1942), and since 1976 they have been authorized by statute to bring federal actions on behalf of their own citizens, see infra note 6.


\textsuperscript{7} List v. Burley Tobacco Growers’ Co-op. Ass’n, 151 N.E. 471, 474 (Ohio 1926).

\textsuperscript{8} See, e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 131-32 (1978) (upholding, over federal constitutional challenge, state statute that prohibited discrimination in distribution of gasoline, even though the same discrimination enjoyed an explicit statutory defense under federal antitrust law; “[I]t is illogical to infer that by excluding certain competitive behavior from the general ban against discriminatory pricing, Congress intended to preempt the States’ power to prohibit any conduct within that exclusion.”); California v. ARC America Corp., 490 U.S. 93, 105 (1984) (upholding state statute that reversed the “direct purchaser” rule of \textit{Illinois Brick Co. v. Illinois}, 431 U.S. 720 (1977); “Ordinarily, state causes of action are not pre-empted solely because they impose liability over and above that authorized by federal law”).

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To summarize the body of the remarks to follow, tech platforms have grown large very quickly, and they have done it in part through conduct that seems competitively problematic. However, there are problems in American antitrust now that have kept it from meaningfully limiting their growth, and enforcers will face very serious hurdles to actions against them, despite their size and apparently exclusionary behavior. Realistically, barring some substantial change in the personnel of the federal judiciary, resolving those problems probably requires federal legislative action. There need not be fundamental change; it might be good enough for Congress to reaffirm that antitrust should be enforced as it once was, and not with the restrictive, skeptical timidity that has governed the courts since the 1970s. That might include statutory amendment directing that minimum market shares for antitrust violation be lowered, or that presumptions be re-established to reinvigorate merger or monopolization law. But there still seems plenty of room for state government action. That might take the form of litigation under existing federal or state law, and indeed Attorney General Yost is already part of a coalition investigating various platforms for possible action. The General Assembly might also amend or add to the Valentine Act or adopt some other free-standing state legislation tailored to the tech platforms. It would be well within the traditional work of the state Attorneys General and the state legislatures were Ohio to take action in this vital area.

I. The Nature of the Problem

The fundamental nature of the problem of tech monopoly has been that tech markets seem special, and traditional antitrust rules seem possibly too antiquated or clumsy to deal with them. It might help focus the issues to put them in the context of a real-world dispute, and I will very immodestly choose a particular case on which I have done a lot of work. I expect that a lot of the
problems that will be raised by your discussion today were also at the heart of a project that has been my major focus for several years, a book about the so-called “eBooks case.”\textsuperscript{9} Formally known as \textit{United States v. Apple},\textsuperscript{10} that case was a Justice Department suit against the Apple computer corporation and several publishing firms, in which the defendants were found to have fixed the prices of electronic books. On the surface it seemed like an easy case, because the publishers—head-to-head, horizontal competitors—fixed the retail prices of their products. That sort of conduct essentially always violates antitrust, and is punished most severely of all antitrust violations. But to much of the public it was not an easy case at all. The reason was the power of a tech platform that was not a party to the case, but was very important to it, the online retailer Amazon. The defendants claimed they needed their conspiracy to protect themselves from Amazon, which they said had forced them into very disadvantageous deals to sell electronic versions of their books at desperately low prices. They said it was part of Amazon’s scheme to monopolize the entire market for books. Critics of the government’s case said that it had sued the wrong defendant, and that preventing the publishers from circling their wagons just perversely empowered the real monopolist. But then a whole different problem was that however big or powerful Amazon seemed, at least on the surface it hadn’t done anything except give high quality products and service to consumers at low prices, and so it seemed just to have succeeded through effective competition. At any rate, Amazon’s conduct would have been hard to challenge under any existing antitrust rule, as they tend to extol vigorous price competition as their most basic goal.

At the heart of this difficult controversy were several tensions relevant to today’s hearing. There was unquestionably a serious disruption at work. Very low priced eBooks posed real challenges for the publishers, for brick-and-mortar bookstores, and perhaps for authors, and it

\textsuperscript{9} Sagers, \textit{supra} note 1.
\textsuperscript{10} U.S. v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015).
seemed likely that traditional institutions and ways of doing business would have to change. But
it also seemed like those changes must just be the ordinary incidents of technological change, and
therefore consequences of competition that should be tolerated if we’re to have competitive
markets as a matter of policy. And in the difficult process of sorting out what to believe, the debate
was dogged by recurrent fears that in this special sector competition itself might be the problem.
Vigorous price competition might sometimes destroy other important values. Likewise it has come
to be suggested frequently that the problem is the law itself, because our 130-year-old statutory
framework has not kept up with the pace of change. Accordingly, in recent years we have begun
to see more and more drastic reform proposals, like those to give antitrust exemptions to firms
purportedly disadvantaged by the New Economy\(^\text{11}\) or to replace antitrust altogether, either by
return to public utility regulation of powerful firms or even more radical visions.\(^\text{12}\)

Later on, I will suggest my own view whatever the failures of antitrust may have been in the
Apple case, and in other cases in the New Economy,\(^\text{13}\) they result not from the special nature of
high tech markets, or the nature of books or information products, or from technological disruption.
The problem is just that American antitrust has generally become extremely difficult to enforce.
The United States is far behind the European Commission, for example, which has imposed more
than $9 billion in antitrust fines on Google alone. I happen to believe that what is needed to bring


\(^{13}\) In my personal view, antitrust failures in Apple amount only to the difficulty of suing both the publisher cartel and Amazon for the dangers it poses. See Sagers, supra note 1.
the United States in line is not radical change or the adoption of some different paradigm. It is just to shore up the antitrust we’ve had for 130 years, and use it appropriately.

The rest of this initial discussion will describe the major tech platforms as they currently exist, and then will discuss certain special problems they seem to pose that often make them seem hard to address with existing antitrust rules.

A. The Platforms

The tech platforms of significance in America differ from one another in many ways, and their differences are relevant to the problems they pose and their exposure to antitrust liability. Each of them is a complex business with many individual parts and lines of business, and they can’t be done full justice in a short review. But we can give general outlines, and think about broad differences and similarities. Firms that I think are among the most interesting are Amazon, Apple, Facebook, Google, and Microsoft. No doubt many other firms deserve attention, but this review will at least expose a lot of the important issues.

Amazon. At the very beginning of the internet as a commercial phenomenon, in 1994, Amazon was launched as an online retailer of consumer goods. It began exclusively as a bookstore, selling hard-copy books at retail, which at that time it procured from book wholesalers and delivered to consumers by mail. Even before its founding, however, Amazon’s leadership envisioned it as an “Everything Store”—a firm that would one day sell literally every consumer product. In doing that it could harness the true commercial power of the new world wide web and do things no terrestrial retailer could do. Because online product display is essentially costless, Amazon could present an inventory of retail products that for a brick-and-mortar store would require essentially infinite floor space.14 In its extraordinary success in this project, Amazon has been much more than just an

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internet site or a consumer-facing software company. It has also made major innovations in logistics and automation. However, while its achievements have provided substantial benefits to at least some constituencies, they have also been the focus of sustained criticism, as for the labor practices and abuse of small suppliers by which Amazon is said by some to have achieved them.\textsuperscript{15}

In any case, Amazon is now much more than just a retail Everything Store, as perhaps more than any of its peers it has branched into a varied range of other businesses. Some are natural complements to its distribution logistics business, the biggest being its cloud services platform Amazon Web Services (AWS). AWS provides a pre-existing infrastructure on which other firms can build their own online businesses, capitalizing on the structure that Amazon built for itself during its own growth as a retailer. AWS is by far the largest cloud-computing provider and accounts for most of the entire firm’s operating profits.\textsuperscript{16} A newer, different effort directly related to Amazon’s retail strategy is the “smart home” product, Amazon Echo, and its voice-operated virtual personal assistant, Alexa. The Alexa product has attracted much competitive concern, as it can be used to purchase items from Amazon, and many have alleged that Amazon preferences its own products or those of preferred retailers in the results it returns to consumers’ Alexa shopping queries. Likewise related to Amazon’s distribution business is its development of a range of private-label consumer products, including clothing, electronics, kitchenware, pet products, and dozens of others.\textsuperscript{17}


Amazon has entered a number of businesses further afield. In recent years it bought the brick-and-mortar grocer Whole Foods, and it has built a major video content production business called Amazon Studios. CEO Jeff Bezos personally purchased the Washington Post, and has integrated it in some limited ways with Amazon’s businesses (as by providing discounted access to Prime members).

Amazon has also seemed almost unique in the aggressiveness by which it has built these businesses, especially in retail. It has been a cost-cutting, low-price retailer across its products. In some cases it has pushed for market shares with breathtaking promotional efforts. When it launched the Kindle reader in 2007, essentially creating a market for electronic books when all prior efforts had failed, it priced its eBooks at the essentially break-even retail price of $9.99. It also took the unheard-of step of providing free wi-fi access for Kindle owners for downloading electronic books. Another example is Amazon’s subscription membership service, Amazon Prime. Prime provides very fast, free shipping on retail goods, access to free video and music content, and other benefits, for a yearly subscription price that for years was thought, both within and outside Amazon, to be a money loser. The vigor of all this marketing on the one hand has clearly been beneficial at least to Amazon’s retail consumers, by providing low prices and high quality service in the short term and by funding logistical innovations in the longer term. But it is has also driven recurrent allegations that Amazon has engaged in monopsony or predatory pricing all throughout its many lines of business.¹⁸

Amazon probably does not have “monopoly” shares in particular retail markets as they would be traditionally defined in American antitrust, unless either electronic books or voice-operated personal assistants are distinct relevant markets. However, in some of its sectors it is very large

¹⁸See, e.g., Mitchell & Lavecchia, supra note 15.
and grown quickly. Some of its biggest shares are still in books. Amazon’s share of electronic books has varied over time, but has at times been as high as 90%, and its share of all books sales is about 40%. Likewise, if voice-operated virtual assistants can in some way be defined as a relevant market, Amazon’s Alexa appears to have about 70%.19

Amazon has some other large market shares, though they may fall short of the traditional legal definition of “monopoly.” While it remains small in retail generally, with an overall share of retail sales of about 5%, its share of electronic retail is quite large—perhaps about 50%. That is so despite competition from eBay and the several brick-and-mortar stores that have built big online portals, like Walmart, Target, Best Buy, and Home Depot. All of them remain small by comparison.20 Amazon’s large share probably owes much to the dominance of the Amazon Prime service, which has about 85 million members, or roughly two-thirds of American households.21

Finally, Amazon also has a very large share of cloud computing services. AWS is the largest provider in that market, with a market share at present of nearly 50%, making it three times the size of its nearest competitor.22

Amazon has been dogged by allegations of anticompetitive conduct throughout its history. Most commonly it has been said to have fought for market share by pricing predatoryly. Pricing is generally said to be “predatory,” at least within antitrust law, when it is actually below cost—when the predator literally loses money on each sale, because the price is so low—and it has no purpose

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21 Gershorn et al., *supra* note 16.

except to kill off competitors. It seems fairly implausible that Amazon has engaged in nearly as much genuine predation as is alleged. It would have been pouring many billions of dollars down the drain for upwards of twenty years, in markets in which entry would likely be easy as soon as it raised its prices again to recover its massive losses. But the predation story takes on at least superficial plausibility from the remarkable fact that Amazon went for so many years without earning profits. It basically broke even from the time of its founding in 1994 until it finally started reporting substantial profits in 2016. And at least in some discrete instances it may well have pushed for market share with periods of sustained, deliberate losses.

Amazon has engaged in some other conduct that may have been anticompetitive. It has been fairly acquisitive, and many of its acquisitions seemed strategically designed to stave off competition or to coopt incumbent competition in markets it wanted to enter. At any rate, many of its acquisitions have been extremely aggressive, and certain examples are now notorious. Its acquisitions of Diapers.com and the online shoe store Zappos both followed desperate price wars and extremely strong-armed acquisition negotiations.  

Amazon has also come under much criticism for its relations with suppliers. It may well have used the power it derives from retail market shares and consumer loyalty to force wholesale prices and terms down to monopsonistic levels. And finally, it appears that Amazon has used various tactics to advantage its own products and services, perhaps in ways that are anticompetitive. It appears that Amazon preferences its own products in display of search results and in the Alexa shopping service, and it also preferences the products of firms that have paid it premiums or used its fulfillment or other services. Moreover, it appears to use its control of sales data, including sales of its own retail partners in the Amazon

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23 In both cases, Bezos is said to have coerced reluctant acquisition targets by building new Amazon stores from scratch, one in diapers and the other in shoes and handbags. It then competed directly with them at desperation prices, losing tens or perhaps hundreds millions of dollars in very short spans of time. See Stone, supra note 14.
Marketplace, to guide it in the introduction of its own private-label products. Critics claim that when it does so, it then takes steps to disadvantage the competing products it has copied.\footnote{24 See Julie Creswell, Amazon the Brand-Buster, N.Y. TIMES, June 24, 2018.} Amazon is currently under investigation for some of this conduct in Europe.\footnote{25 European Commission, Press Release: Commission Opens Investigation Into Possible Anti-Competitive Conduct of Amazon (July 17, 2019), available at https://europa.eu/rapid/press-release_IP-19-4291_en.htm.}

**Apple.** Like Amazon, Apple has evolved significantly from its origins, and has expanded and built dominance in a variety of sectors. Begun in the 1970s as a pioneer of the personal computer revolution, Apple would change its focus and evolve after a period of severe difficulty in the 1990s. Since then, it has built its model less around specific hardware products and more around a whole consumer ecosystem of products, in which a suite of Apple devices can be the hub of the consumer’s digital life. In the course of it, Apple has been a major innovator, largely creating both mobile computing and digital media distribution as viable commercial businesses, and building an unparalleled brand for product quality.\footnote{26 See generally Walter Isaacson, Steve Jobs (Simon & Schuster, 2011).}

Apple has been accused of anticompetitive conduct in a variety of contexts. Its deals for the distribution of entertainment content and software, for example, have included exclusivity and other terms that may have limited competition. For example, Apple happened to play a leading role in the eBooks case, where it coordinated a price-fixing conspiracy among book publishers to set the retail prices of their eBooks. It was Apple that proposed and implemented contractual terms with the publishers that not only fixed the retail prices of eBooks they would sell on Apple’s new iPad, but would also fix their prices on Amazon and all other eBook retailers.

The conduct of most interest at the moment seems to be Apple’s ownership of the App Store, and its prominence in the distribution of software. About 70 percent of revenue earned by mobile apps in the United States occurs across the iOS platform, and it faces meaningful challenge only
from Google’s Android platform, which has the rest.\textsuperscript{27} Software developers have accused Apple for years of using control of the App Store to force them to use services for which it charges inflated fees, or to exclude their products in favor of its own. Apple is currently the subject of a complaint lodged in Europe by the Swedish music-streaming firm Spotify. The complaint accuses it of using App Store rules to coerce developers into using Apple’s proprietary payment system, for which it charges them a 30% commission. It further claims that Apple denies to some third-party products the same advantages that it gives to its own products. For example, Spotify claims that on purely pretextual grounds, Apple excluded Spotify from the Siri functionality on the Apple Watch, even though it allowed Siri for Apple Watch to play music from Apple’s own streaming music service.\textsuperscript{28}

Another way Apple has used the App Store to exclude or coopt competing products has been its routine practice of “sherlocking.” Apple monitors apps sold for Apple devices, and then incorporates the most popular features into its own Apple products. It appears that sometimes it has then taken steps not only to copy the competing app, but to exclude it from the App Store, a step that typically will spell that app’s demise.\textsuperscript{29} As the practice has grown, critics have recalled

\textsuperscript{27} Reed Albergotti, \textit{How Apple Uses Its App Store to Copy the Best Ideas}, WASH. POST, Sept. 5.


The practice was named for a notorious case in which Apple coopted an app called Watson. A third party developer designed Watson as a downloadable app for purchase that could be installed on Mac desktop computers, and would integrate search features directly into the Mac operating system. After Watson grew in popularity, Apple released a new product of its own called Sherlock, which incorporated Watson’s features and was pre-installed as a free component in Mac operating system upgrades. Watson, naturally, went defunct. \textit{You’ve Been Sherlocked}, THE ECONOMIST: BABBAGE BLOG, July 13, 2012, \textit{available at} https://www.economist.com/babbage/2012/07/13/youve-been-sherlocked.
with some bitterness Steve Jobs’s famous admission that “We have always been shameless about stealing great ideas.”  

**Facebook.** Social media platforms have for the most part operated in a different and narrower space than the other major platforms. They provide a free communication and information-sharing service, and they make their money mainly through sales of advertising that appears in users’ feeds of news and status updates. They have not for the most part ventured into the diversified range of products and services that other platforms have.

The biggest of the social media platforms by a very wide margin is Facebook, and its dominance in advertising is matched only by the search engine Google. The dominant online advertisers have gotten their large shares by way of a major technological advantage over traditional media. They are massive machines for collecting highly individualized, user-specific consumer data, and they couple it with the means to deliver precisely targeted ads at extraordinarily low cost. Traditional media technologies are badly disadvantaged, because they depend on less focused, less efficient, and much more expensive delivery to less differentiated groups of viewers. The rise of the online platforms has therefore been widely blamed for the rapid demise of print and broadcast media.

Facebook for some years has controlled roughly 20% of digital advertising revenue, running second to industry leader Google’s 35-40% share. Because more money is now spent on digital advertising than print or broadcast, and digital therefore accounts for slightly more than half of all

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advertising, the two of them together account for upwards of one quarter of all U.S. ad spending. They have often been called the digital advertising “duopoly.”

Facebook too has engaged in some conduct that seems plausibly anticompetitive. Above all it has been acquisitive. It is known to have attempted several times to acquire its closest competitor, Twitter, and it has strategically acquired other firms that could threaten its position in social media and data collection, like WhatsApp and Instagram.

**Google.** Google, like other platforms, has evolved and expanded into a variety of lines of business. It famously began as a dorm-room project, funded on credit cards, by two Stanford graduate students in the mid-1990s. Their early project was just a search engine, but it grew very rapidly because it improved so much on the several internet search engines that had existed up to that point. Google is now overwhelmingly dominant in search, with about 90% of all internet searches. It has used search to build a very profitable dominance in its primary business, which is digital advertising. As mentioned, Google for some years has held 35-40% of all digital ad revenues, challenged mainly by Facebook as a distant second. Advertising still generates almost all of Google’s revenue.

Since its origins, however, Google as much as any other platform has expanded into a bewildering and varied range of businesses. In the early 2000s it launched the so-called “Google Books” project, in which it has attempted to digitally scan every single extant hardcover book ever written. It developed a computer operating system and internet browser known as Chrome, and has licensed a popular line of laptop computers that run it, known as Chrome Books. It holds a

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substantial position in mobile computing, having developed the Android mobile operating system and distributed software to it through a competitor to the Apple App Store known as Google Play. It owns the video distributor YouTube, a travel business and restaurant recommendations engine, and markets a voice-operated virtual assistant called Nest. It has been a leader in the development of driverless cars, and has a division devoted to smart cities technologies. These are only some of its many businesses.

Like all the other firms discussed here, Google has faced many accusations of anticompetitive conduct, and Google has been the subject of several massive antitrust fines imposed by the European Commission (EC). A theory investigated both by the U.S. Federal Trade Commission (FTC) and by the EC is that Google has manipulated search results to preference its own products. For example, a search for airline reservations might turn up as the first or a prominent result Google’s own Google Trips travel service. If critics are to be believed, Google also takes steps to rank competitors’ sites further down in search results, knowing that users rarely investigate search results outside those close to the top. The FTC investigated this conduct but failed to take action, but in 2017 the EC found it to violate European competition law, and imposed a fine of about $2.7 billion. Since then, the EC has imposed two other multi-billion-dollar fines, for excluding competitors from its Android operating system and for requiring advertising customers to use its AdSense advertising platform exclusively. Google has also been extremely acquisitive, and has often acquired targets very strategically to head off competitive threats. That may be true of

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33 Nitasha Tiku, *The EU Hits Google With a Third Billion-Dollar Fine. So What?*, *WIRED*, March 20, 2019, available at https://www.wired.com/story/eu-hits-google-third-billion-dollar-fine-so-what/. In fairness, while its Google actions are often taken as proof that the EC has been much more aggressive in antitrust than the United States, Google is also much more dominant in Europe. It controls about 85% of digital advertising there and more than 70% of mobile operating systems.
YouTube, the online maps engine Waze, and several firms to shore up its advertising business, like DoubleClick and AdMob.

**Microsoft.** Microsoft was born at the same time as Apple, in the heady hacker culture of the mid-1970s revolution in personal computing. The two were leading rivals for some years, but Microsoft eclipsed Apple during the 1980s and 1990s, soon to become an overwhelmingly dominant maker of personal computer operating systems. Microsoft also became a serious antitrust concern at that time, as it emerged that its success did not follow just from the quality of its products. The Justice Department in fact began a series of antitrust challenges to Microsoft in the mid-1990s concerning its Windows operating system and related products, and they culminated in an en banc ruling of the D.C. Circuit court of appeals, a decision that has become one of the most important antitrust decisions of latter days.\(^\text{34}\) Microsoft is important both for its general significance in the law of monopolization, and for its trenchant analysis of the special technological issues surrounding dominance in Windows. In particular, many critics said that the government could not show any meaningful harm because its case depended on Microsoft’s development of an internet browser, called Internet Explorer. Critics observed that Explorer was distributed for free, and were incredulous that giving away a quality product for free could be any part of a consumer injury of relevance to antitrust law. And yet as the Microsoft court explained, in a meticulous, per curiam opinion by the full en banc court widely assumed to have been written by the conservative antitrust expert Douglas Ginsburg, distributing Explorer for free was an effective and deliberate strategy to protect Microsoft’s market share in operating systems.

In more recent times Microsoft has not been nearly as much discussed as an antitrust concern. That may be because following the Microsoft decision, Apple grew hugely to challenge its major

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product, the operating system Windows. It may also be because the oversight remedy imposed on
Microsoft following the D.C. Circuit decision is widely thought to have made it a more cautious
firm that has avoided aggressively exclusionary conduct. Microsoft remains very large, however,
and should not be underestimated. There is in fact recent evidence that it may be experimenting
with tactics similar to those in the original Microsoft litigation.35

B. Different Kinds of Competition Problems

High tech markets seem to present special technological problems, that may make them seem
ill-suited to ordinary competition or to mask their real competitive significance. These problems
may make traditional antitrust rules seem inappropriate to them. I will suggest that that is often
much less true that it may seem.

The Problem of Free Products. One persistent problem in high tech products, and especially
online or software products, is that they often seem to be distributed for free. It can be hard to see
how giving goods away could harm competition or otherwise be undesirable, especially when they
are technologically innovative or otherwise desirable to consumers. As in the Microsoft case,
critics of antitrust enforcement have often decried suggestions that free products could ever cause
consumer harm or injure competition. But we should pause and consider how likely it is that the
extremely aggressive, for-profit corporations that now dominate Silicon Valley would give away
valuable goods for free. It seems likely driven by some strategic motive, which may very well be
harmful.

35 See, e.g., Rani Molla, Why the Government Is Investigating Apple, Amazon, Google, and Facebook for
There are at least two important reasons that “free” products might pose competitive problems, and indeed they can be severe. First, “free” products might not actually be free at all, and rather are compensation paid for the consumers’ attention or personal data or other valuable assets. This is an old insight. The conventional wisdom that “if the product is free, you’re the product” dates at least to criticism of broadcast television in the early 1970s. Many products are delivered to consumers for free, so that access to those consumers can be sold to third parties, as in advertiser-supported products like social media, internet search, YouTube video, and broadcast television and radio. That consumer attention can be monetized as a product is not inherently bad or good, at least so far as economic theory or mainstream competition policy is concerned. Its significance is rather that we should understand “free” goods transactions not as one-sided giveaways, but as mutual, commercial exchanges of things of value. As in any other exchange, they should be governed by market forces kept healthy by competition.

The second major concern is quite different. Software and online goods makers have often distributed components of larger bundles of goods without charging separately for them, and have often done so strategically to disadvantage rivals or stave off new or developing competitive threats. The best known example was at the heart of a leading monopolization case, the Microsoft litigation discussed above. Microsoft appeared to give away the browser Internet Explorer for free, as it was bundled with the Windows operating system without separate charge. But as the court explained, the real reason for doing it was to stymie the growth of the then-leading browser product, Netscape. Microsoft feared Netscape not because Microsoft wanted to dominate internet

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browsers, but because it wanted to keep its dominance in operating systems. It was widely thought, and the government proved at trial, that Netscape had the potential to evolve into a so-called "middleware" product. Middleware, were it to come into being, would permit third-party software developers to create products that could work on more than one operating system, without any modification. If such products could be easily produced, then developers would not find it so important to write software for the dominant platform, and consumers would not find it so important to purchase the platform for which all the software had been written. In other words, Microsoft's efforts to keep competing operating systems from running software that could run on Windows, including by its effort to thwart the development of middleware, was key to preserving its operating system monopoly. Making sure that consumers used Internet Explorer, even though Microsoft gave it away for free, could therefore preserve a monopoly that existed not because the Windows product was inherently better or deserved consumer loyalty.

Any number of other examples of seemingly free products might be exclusionary or anticompetitive in this same way. "Sherlocking," for example, often has the appearance of giving goods to consumers for free, since platform owners tend to incorporate the copied goods into their existing products without additional charge. And indeed, there is some evidence that Microsoft itself engaging in similar conduct again. 38

Data as a Competition Problem. Major concern with high tech businesses has surrounded their collection of data, but oftentimes abuses in data seem hard to fit within conceptions of traditional antitrust and competition policy. Often the concern is just that data are collected or shared without consumers' awareness or acquiescence, and so the problem seems more one of privacy or

38 See Molla, supra note 38,
consumer protection than competition. Existing antitrust rules may seem inapt, and it may be hard to see how likely antitrust remedies would address the underlying concern.

However, control over data could pose competition problems, addressable with existing antitrust law, in at least a few ways. First, ownership of large pools of highly individualized consumer data is very commercially valuable, and might give firms market power in the market for advertising. If firms engage in exclusionary conduct to keep other firms from developing similar data, or engage in acquisitions to acquire exclusive control over monopoly-sized collections of data, there may be grounds for monopoly or merger challenge.

Second, platforms might use control of confidential data to plan their own strategies and disadvantage competitors. That criticism has frequently been raised, for example, of Amazon’s introduction and privileging of its own private label goods over third-party Amazon Marketplace sellers, and it is central to the theory of Apple “sherlocking” and otherwise disadvantaging competing apps in the App Store. For this reason, presidential candidate Elizabeth Warren has suggested new federal legislation to prohibit vertical integration by powerful firms into retail products sold on their own platforms, a program that reflects the suggestions of several academic proposals.

Third, concentration and monopoly might preclude non-price competition in privacy protection or other terms of service that would benefit consumers. If there are ten popular social media platforms, for example, they might compete with each other in all kinds of ways, including by offering better privacy protections for consumers’ data. They might do that because they would be eager to earn subscribers, and consumers tend strongly to prefer more privacy than less. Each

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39 Elizabeth Warren, It’s Time to Break Up Amazon, Google, and Facebook, MEDIUM, Mar. 8, 2019, available at https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.
40 See, e.g., Kahn, supra note 12.
of them likely has a strong interest in offering less protection, however, since the social media business model depends on monetizing consumer data on as elaborate and individualized a basis as is possible. Therefore, if they can manage to limit competition among them, by conspiracy, monopolistic exclusion, or acquisition, they likely would reduce the consumer protections that competition had forced on them. That would constitute a reduction of product quality directly related to reduction of competition, and it would be well within the concerns traditionally recognized by antitrust law. As what might possibly be a real-world example, in 2014 Facebook acquired the popular instant messaging app WhatsApp. WhatsApp had built its loyal customer base on its very strict privacy protections. At the time of the acquisition—which stoked much popular controversy, precisely because it was feared that Facebook would not honor WhatsApp’s privacy tradition—Facebook promised that it would maintain WhatsApp as a free-standing entity and would honor its traditional privacy commitments. Predictably, however, by early 2019 Facebook announced plans to renge on those commitments, and began integration of WhatsApp into its Facebook Messenger product, to much criticism. Again, Senator Warren, among many other critics, has explicitly proposed unwinding the WhatsApp acquisition, for this reason.

**Information, “Fake News,” Democratic Institutions, and Censorship.** In some ways, the concerns of contemporary antitrust law—higher prices or reduced choice and quality—no doubt fail to capture the issues dearest to big-tech critics across the political spectrum. Some have come to be very concerned that the powerful platforms now censor politically disfavored speech. Others are very concerned that their dominance in the distribution of news and information, coupled with their decimation of the traditional news media, has destabilized shared norms for the reliability of

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news reporting, and thus have enabled a world of “fake news,” with serious consequences for social institutions.

For better or worse, these kinds of concerns are not very directly addressable with existing antitrust rules. To be sure, more competition among news and information platforms might plausibly encourage higher standards of journalistic integrity or otherwise improve information standards. Failure to meet those standards, if it is caused by concentration or anticompetitive conduct, could constitute antitrust injury, as a loss of product quality. But improvements in this respect would at best be an indirect benefit of antitrust action, which under current standards would likely to have to be based on more traditional arguments of anticompetitive harm.

II. Theories of Liability

So, if any of the foregoing state genuine competition concerns, what can be done about them? The following briefly describes our current antitrust law and the likelihood of antitrust liability for any of the major platforms, given what is publicly known.

Existing antitrust law effectively makes three things illegal: firms may not *conspire* with each other to restrain trade; they may not *monopolize*, which means to engage in unilateral exclusionary conduct when they happen to have substantial power in their markets; and they may not *acquire* each other in ways that unduly limit competition. It seems plausible that actions might be taken under any of these theories against one or more of the major platforms for some one or other of their recent actions, though substantial challenges probably face any such action under contemporary law.
A. Conspiracy

Federal law prohibits “contract[s], combination[s] . . . , [and] conspirac[ies], in restraint of trade,” and the Valentine Act imposes a similar rule.\(^\text{42}\) Generally speaking it is desirable to antitrust enforcers if they find evidence of some anticompetitive agreement, because multilateral action tends to be much easier to challenge than unilateral action or anticompetitive acquisitions.

Conspiracy cases tend to be very easy for enforcers when they involve certain narrow kinds of conduct considered most seriously anticompetitive—those categories of conduct known in antitrust as “per se illegal.” Under current law, only horizontal price fixing and market allocation are generally held per se illegal. Examples of that sort of conduct can be found among the major platforms—for example, per se illegal conduct was at the heart of the Apple eBooks case, and Apple was found liable for it—but it is apparently rare, so far as publicly available information discloses.

Conspiracy cases can be brought to challenge other multilateral agreements, of course. The cases are just more difficult to bring because, by contrast to per se cases, the challenged conduct is not itself automatically illegal. Plaintiffs in those cases must prove, under the so-called “rule of reason,” that the challenged conduct caused an unreasonable injury to competitive markets. In practice that means proving that they caused more injury to consumers, in the form of higher prices or reduced output or quality, than any offsetting benefit they might generate. Plaintiffs typically attempt to make that showing by putting on evidence that the conduct could cause harmful price or output effects if the defendant holds some market power, and then demonstrating market power by proving that it holds a large market share protected by entry barriers.

While rule of reason cases are generally thought to be difficult to bring, there are plausible candidates for rule of reason liability among the tech platforms, even on publicly available information. For example, several of the firms have had market share in particular products in the range of 40-50%, and it appears that in some of those cases they used contracting practices that are plausibly anticompetitive and could violate the law. For example, if it could be shown that Amazon’s AWS, with a market share of about 50%, has imposed undue exclusivity terms on its customers, there could be a viable action under Sherman Act § 1.

B. Monopoly

Unilateral conduct is illegal when it constitutes “monopolization.” To show illegal monopolization, a plaintiff must prove that (1) the defendant holds “monopoly power” in some relevant market, and that (2) it has gotten or maintained that power through “exclusionary conduct.”

The major problem for monopolization challenge in high tech markets will be the first element. Courts have not set any explicit minimum market share that must be shown to demonstrate “monopoly power,” but have indicated that it must generally be something like 70% or more, and must be protected from entry or other factors that would cast doubt on its evidence of market power. At the moment, major platform firms might hold market share sufficient for § 2 challenge in certain contexts, if relevant markets can be defined fairly narrowly. Perhaps the best candidate at the moment is Apple’s domestic share of mobile software distribution. While U.S. courts are unlikely to reach the same conclusion as the European Commission, and find that one mobile

45 See generally Sullivan, Grimes & Sagers, supra note 1, at 91-102.
platform can be its own relevant market,\textsuperscript{46} Apple might be found to have as much as 70% of mobile software distribution, since it faces meaningful competition only from Google Android. Other means of consumer software distribution—meaning mainly download or distribution on physical media for desktop or laptop computers—seem distinctly different and imperfect as substitutes. There are other, probably less likely candidates. Google surely has a monopoly share in internet searches, if search is found to be a relevant market. Amazon has sufficient market shares if eBooks or voice-operated personal assistants can be defined as relevant markets.

Monopoly-sized market shares might be possible in some other areas, if markets are defined more creatively. For example, Amazon’s 50% share of electronic commerce would not support a § 2 claim even if a market were defined that excluded brick-and-mortar competitors. However, it seems possible that a proper market definition, that truly captures Amazon’s actual power over its suppliers and customers, might be more like “online, in-home distribution logistics,” or “in-home, next-day delivery.” If so, Amazon’s share might be quite a lot larger.

C. Acquisitions

Finally, acquisitions are illegal at federal law when their “effect . . . may be substantially to lessen competition, or to tend to create a monopoly,”\textsuperscript{47} and the Valentine Act has an apparently similar rule.\textsuperscript{48} Silicon Valley has in fact been extremely acquisitive for many years, and as seen above, the tech platforms have been both very active and apparently strategic and exclusionary.

\textsuperscript{46} Comm’n Decision, Case AT.40099 (Google Android) (July 18, 2018) (finding Google Android to be a unique product, not directly competitive with Apple iOS, and finding Google to have dominant control over it).


\textsuperscript{48} Few mergers have been challenged under the Valentine Act, and it is not entirely clear whether it applies to them. On the one hand, O.R.C. § 1331.02 specifically prohibits any “combination, contract, or agreement” if its “purpose and effect” to place it “in the hands of a trustee,” and the definition of “trust” in O.R.C. § 1331.01(C) would seem to encompass any anticompetitive merger, at least if its purpose is anticompetitive. The Ohio Attorney General brought challenges to mergers under this section in a few very early cases. But on the other hand, when the Attorney General sued under § 1331.02 in 1981 to challenge a hostile takeover of Marathon Oil by Mobil, the General Assembly
Like the rest of our antitrust, merger law has become extremely difficult to enforce. On the present state of the law, only the largest, most concentrating mergers are usually challenged, and enforcers typically struggle to prove liability in litigated merger challenges even to very big, seemingly dangerous deals. Moreover, merger challenge is effectively never brought to deals that are not horizontal—that is, deals that are not between direct, head-to-head competitors. The difficulty of challenging non-horizontal deals under current law was on graphic display last summer in United States v. AT&T, the government’s first challenge to a vertical merger in forty years. Though the deal was very large and the government’s theory of harm was supported by an elaborate and well-established economic theory, the government not only lost, it was treated to a scathingly critical trial court decision incredulous that harm from the deal could even be imagined.49

That state of the law will probably undermine challenge to most important acquisitions in the tech industry. They tend to be vertical or conglomerate, and not horizontal. While there will frequently be some plausible theory that an acquisition is designed to head off competitive threats in the future—as when Facebook acquired WhatsApp, a not obviously horizontal deal that nevertheless neutralized a potential competitor for consumer data collection, or when Amazon acquired Diapers.com, a competitor in a field Amazon had not yet entered but intended to do—the courts will generally look very skeptically on any challenge that is not both very large and clearly horizontal.

III. Conclusions: Is Existing Law Enough?

shored up the statute by enacting a new provision explicitly prohibiting anticompetitive mergers in petroleum. O.R.C. § 1331.021. By doing that, the legislature may have inadvertently indicated its view that § 1331.02 itself does not apply to acquisitions. See Valentine Act Monograph, supra note 2, at 5.2-5.3.

In my view, the major problems posed by the current big tech platform firms are like the problems posed in the Apple eBooks case. The need is not so much to radically change our existing antitrust laws, but just to enforce the ones we have. We have not meaningfully done that in perhaps forty-five years or more, and we are now reaping the results, in high-tech as well as many other markets. Because the federal judiciary is unlikely to reverse course, really meaningful change seems likely to require action from the federal legislature. However, there still seems plenty that state governments and others can do to make use of the laws we’ve got, especially just by bringing investigations and actions of the kind that many state Attorneys General are now undertaking.

Thank you again very much for the opportunity to present my views, and please let me know of any other way I can be of use.

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