Antitrust for Dominant Digital Platforms: An Alternative to the Monopoly Power Standard to Restore Competition

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Abstract

Antitrust law is meant to promote competition by prohibiting anticompetitive business practices such as mergers and acquisitions as well as exclusionary conduct. Judicial interpretation of antitrust law has allowed dominant digital platforms to undertake anticompetitive actions without prosecution. The Sherman Antitrust Act should be amended to remove the monopoly power standard that allows firms to engage in anticompetitive conduct as long as the conduct does not create or uphold monopoly power. The amendment would make anticompetitive conduct illegal regardless of monopoly power, as long as six proof requirements are met. This would result in lessened market concentration, which would benefit technological innovation and the economy, American technological leadership, and the free flow of information.

Antitrust for Dominant Digital Platforms: An Alternative to the Monopoly Power Standard to Restore Competition

Antitrust law serves to "prohibit business practices that unreasonably deprive consumers of the benefits of competition, resulting in higher prices for products and services."[1] In essence, it seeks to curb the efforts of firms to reduce competition and create and maintain monopolies.[2] Antitrust law uses general terms to outline the legality of certain business practices and mergers, and it allows the courts to determine the specific terms of which mergers and practices are permitted based on the evidence in each case.[3] In the modern era, the chief goal of US courts in regard to antitrust law has been to protect competition for the benefit of consumers. This framework is known as the consumer welfare standard.[4]

Although antitrust enforcement was once robust, it has waned in recent decades due to conservative judicial interpretation.[5] Courts use the monopoly power standard to interpret antitrust law as only making it illegal for firms to engage in anticompetitive conduct when that conduct establishes or maintains monopoly power.[6] By continuing to prevent challenges against

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[1] United States Department of Justice, "ANTITRUST LAWS AND YOU," *United States Department of Justice*, updated March 2022, https://www.justice.gov/atr/antitrust-laws-and-you.

[2] Abbott, Alden, "US Antitrust Laws: A Primer," *George Mason University Mercatus Center*, March 2021, https://www.mercatus.org/research/policy-briefs/us-antitrust-laws-primer.

[3] Ibid.

[4] Ibid.

[5] Stucke, Maurice E., and Ezrachi, Ariel, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement," *Harvard Business Review*, December 2017, https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

[6] Hovenkamp, Herbert J., "Antitrust and Platform Monopoly," *University of Pennsylvania Carey Law School*, November 2021, https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3194&context=faculty_scholarship.

the market power of dominant digital platforms in the technology industry, the monopoly power standard hinders competition, which results in lessened technological innovation, declining American technological leadership, and rising online misinformation. In order to address recent issues with the Sherman Antitrust Act, the Act should be amended to prohibit conduct that significantly reduces competition, regardless of whether or not that conduct produces monopoly power.

History of Antitrust

There is a long history of antitrust law in the United States. Reformers in the late nineteenth century began to fear the rise of concentrated economic power, which they viewed as capable of negatively influencing politics and preventing new firms from achieving economic success.[7] This sentiment led to the enactment of the first of the three main pieces of antitrust legislation, the Sherman Antitrust Act, in 1890. The Sherman Act bans all conspiracies, contracts, and combinations that unreasonably restrain both interstate and foreign trade.[8] Several notable banned practices are agreements amongst competitors to fix prices, allocate customers, and rig bids. These actions are punishable as criminal felonies. The Sherman Act also makes it unlawful to monopolize any part of interstate commerce and defines monopoly as a firm gaining control of the market for a good or service by suppressing competition with anticompetitive conduct, not by having superior goods or services.[9] This act had some initial success, but it was

[7] Sawyer, Laura Phillips, "US Antitrust Law and Policy in Historical Perspective," *Harvard Business School*, 2019, https://www.hbs.edu/ris/Publication%2520Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf.

[8] United States Department of Justice, "ANTITRUST LAWS AND YOU."

[9] Ibid.

largely met by administrative neglect and judicial hostility.[10] This lead to the passage of the Clayton Act and the Federal Trade Commission Act in 1914. The Clayton Act is a civil statue, meaning that it carries no criminal penalties.[11] It prohibits mergers and acquisitions that are likely to lessen competition. The government uses this act to challenge mergers that would likely increase prices for consumers. Firms and individuals considering mergers and acquisitions above a certain size are required to notify the Department of Justice's Antitrust Division and the Federal Trade Commission.[12] The Federal Trade Commission Act also carries no criminal penalties, and it prohibits unfair competition methods in interstate commerce. The act also established the Federal Trade Commission (FTC).

Both the FTC and Department of Justice (DOJ) enforce the federal antitrust laws. Their authorities overlap in some areas, but the agencies complement one another in practice.[13] Through years of antitrust enforcement, the two agencies have developed expertise in particular markets and industries. Before either agency opens an investigation, it will consult with the other to avoid duplicating efforts.[14]

The 1940s to late 1970s is considered by many scholars to be the golden era of antitrust law.[15] In that era, antitrust was viewed as the best way to promote competition, which was seen

[10] Stucke, Maurice E., and Ezrachi, Ariel, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement."

[11] United States Department of Justice, "ANTITRUST LAWS AND YOU."

[12] Ibid.

[13] Federal Trade Commission, "The Enforcers," *Federal Trade Commission*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/enforcers.

[14] Ibid.

[15] Stucke, Maurice E., and Ezrachi, Ariel, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement."

as the best way to combat fascism. The 'competition ideal', which is the democratic principle that economic and political power should be dispersed from the hands of a few in order to foster better economic opportunities for the many, was seen as being under threat from the spread of the fascist system.[16] The enforcement agencies and the courts used the Clayton Act to prevent concentration of economic power from getting out of hand, and they also used the Sherman Antitrust Act to prosecute monopolization and restraints on trade.[17] In 1958 the Supreme Court stated that the Sherman Act "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[18] Overall, this period saw the reemergence of key economic laws and the removal of a spirit of inactivity that had defined the earlier era.

In the late 1970s, antitrust enforcement and policy declined sharply with the rise of the Chicago School of Economics, which the fiscally conservative Reagan administration enthusiastically endorsed with its appointments to the courts and its enforcement focuses.[19] This period left enforcement of cartels intact, but it saw an almost complete end to antitrust enforcement. The challenge of mergers amongst competitors was rare, and challenges of vertical mergers, which is when one business acquires another that is in the same supply chain but at a different stage of production, were even rarer.[20] The public became less interested in antitrust policy as it became more technical and relied on abstract economic concepts. Members of the

[16] Ibid.

[17] Ibid.

[18] Ibid.

[19] Ibid.

[20] Ibid.

public and government alike became less concerned with increasing economic concentration.[21] Courts abandoned prior values in favor of economic philosophies which taught that markets were made of rational participants that would naturally lead to the self-correction of monopolization. Government interference in business practices through the enforcement of antitrust law was seen as an enemy of free markets rather than as a promoter of competition.

Although the view of the Chicago School is still held by many on the political right, the United States has moved into a new era of antitrust policy. The mainstream school of thought surrounding antitrust has been shifting toward what scholars have dubbed 'hipster antitrust' or the 'New Brandeis School.'[22] This movement is more populist in nature and calls for regulation that focuses on broader measures of competition. Many members of the populist left and populist right have begun to call for greater antitrust enforcement, and no economic industry has been under more scrutiny than the technology industry. Under President Trump, the government famously challenged AT&T's acquisition of Time Warner.[23] This signaled a shift in policy, as previously the government rarely challenged vertical mergers and acquisitions. Some critics accused President Trump of having political motivations behind the challenge, as he is an open critic of Time Warner's CNN.[24] In December of 2022, the Senate began to consider bipartisan legislation that would prevent large digital platforms from promoting their products over the products of their competitors and that would ban Google and Apple from forcing developers to

[21] Ibid.

[22] Patterson Belknap, "A Brief Overview of the "New Brandeis" School of Antitrust Law," *Patterson Belknap Webb & Tyler LLP*, November 2018, https://www.pbwt.com/antitrust-update-blog/a-brief-overview-of-the-new-brandeis-school-of-antitrust-law.

[23] Stucke, Maurice E., and Ezrachi, Ariel, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement."

[24] Ibid.

use their app stores.[25] Democratic leadership in the Senate has signaled that such legislation is a top priority, and the White House has also given the bills its support. Democratic and Republican lawmakers alike have criticized the control that powerful technology companies have over the media, public opinion, and the economy.[26] In a period where polarization dominates the political sphere, it is notable that a heavy economic issue has bipartisan momentum in a clear direction. Studies have found that over three quarters of industries in the United States have experienced increased concentration in the past twenty years.[27] Additionally, since 1982, the fraction of firms that have existed for five or less years has fallen from one half to one third of all firms.[28] These economic trends provide a strong case as to why the laissez faire Chicago School of antitrust has become less popular, even amongst conservatives.

Exclusionary Conduct and The Monopoly Power Standard

Most digital platforms are not natural monopolies in their given sectors, which makes it necessary for them to strategically engage in exclusionary behavior to maintain their positions as dominant platforms.[29] The most significant threat to these dominant platforms is emerging small firms that create similar platforms. Large technology companies know that small startups with

[25] New York Post Editorial Board, "Is Chuck Schumer going to let Big Tech quash popular antitrust reform?" *New York Post*, December 2022, https://nypost.com/2022/12/18/is-chuck-schumer-going-to-let-big-tech-quash-popular-antitrust-reform/.

[26] Ibid.

[27] Stucke, Maurice E., and Ezrachi, Ariel, "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement."

[28] Ibid.

[29] Hovenkamp, Herbert J., "Antitrust and Platform Monopoly."

new approaches can grow into dominant platforms, as this is the process that most of the current giants used to achieve their own success.[30]

One of the most common types of exclusionary conduct that firms engage in is mergers and acquisitions that reduce competition. The FTC identifies three types of mergers and acquisitions that may substantially lessen competition or create a monopoly.[31] The first type of anticompetitive merger is the horizontal merger, which is a merging of two firms that operate at the same level in the same market. This can harm competition by altering the competitive environment as to make it easier for remaining firms to coordinate on aspects of competition such as pricing and output.[32] It also allows the merged firm to raise prices on its own to increase its profits, which is known as the unilateral effect. In both cases consumers will generally suffer the anticompetitive consequences of higher prices, fewer choices, and lower product quality. The second type of anticompetitive merger is the vertical merger, which is a merger between two firms that have a buyer-seller relationship, such as a manufacturer merging with a supplier.[33] Some vertical mergers increase competition and benefit consumers by generating cost-savings and coordination, but they can also reduce competition by making it harder for competitors to access manufacturing services or obtain parts. The third type of anticompetitive merger is the potential competition merger, which is when a competitor buys a company that is planning to

[30] Ibid.

[31] Federal Trade Commission, "Competitive Effects," *Federal Trade Commission*, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/mergers/competitive-effects.

[32] Ibid.

[33] Ibid.

enter and compete in its market.[34] These mergers prevent potential competition that would result from the acquired firm entering the market, and they also remove competitive pressures on the buying firm that would have been created by the entry of a new firm. The merged firm may raise its prices after eliminating its competition.[35]

Of course, there are constantly new startups in the technology industry, with many achieving some success. Some would use this fact to argue that the current dominant digital platforms do not possess the power to unnaturally maintain their monopolies. However, the problem lies in a much deeper level of the startup process. As discussed above, potential competition mergers are quite common, which results in successful startups with undeveloped growth potential being acquired by dominant platforms before they can emerge as viable competitors.[36] In fact, many entrepreneurs start their firms with the goal of being bought out, and it is easier to get capital investment for a firm that is likely to be acquired than for a firm with promising technology that seeks to stay independent.[37] The result of this widespread phenomenon is that dominant digital platforms remain at the top not solely because they provide the best prices or quality of product, but because they make it much more difficult for viable competitors to emerge.

Most acquisitions of startup firms by giants in the technology sector are only partially horizontal, or not at all horizontal.[38] As defined above, a horizontal merger is the combination of

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[34] Ibid.

[35] Ibid.

[36] Hovenkamp, Herbert J., "Antitrust and Platform Monopoly."

[37] Ibid.

[38] Ibid.

two companies that operate in the same market. Antitrust enforcement today focuses mostly on horizontal mergers, with vertical mergers receiving far less scrutiny.[39] The type of merger with arguably the least enforcement is the conglomerate merger, which is a merger between firms with a relationship that is neither horizontal nor vertical.[40] Unfortunately, most startup acquisitions are classified as conglomerate, meaning that they barely receive attention from the enforcement agencies. This is because acts of monopolization, including within the technology industry, fall under section 2 of the Sherman Act, which requires proof of market dominance.[41] Current doctrine holds that a firm must hold a large market share of a relevant market that is properly defined. In the market of internet platforms, the definitions of a market and a market share are untrustworthy and unstable.[42] This interpretation of antitrust law is known as the monopoly power standard, as conduct is only prohibited if it is anticompetitive and if it produces or maintains monopoly power for a firm. Under the monopoly power standards, legal definitions of markets make it near impossible for regulators to prove that a firm is using conduct to establish a monopoly in a sector of the economy.

When defining markets, many questions arise. For example, do online product sales and advertising fall into the same market or separate market as traditional physical product sales and advertising? A good example of a market that brings difficult definitions is the search market, which is made up of search engines such as Google, Yahoo, and Bing.[43] In the search market, it

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Clix, "What is the Search Market?" *Clix*, https://clix.co/faq/2013/05/15/term-of-the-week-search-market/.

is easy to define Alphabet as having market dominance, as its Google Search has had a stable 85 percent market share for over a decade.[44] However, digital advertising only accounts for half of all advertising, raising the question of whether regulators should view Alphabet as having only a 42.5 percent share of the advertising market or an 85 percent share of a separate digital advertising market. Additionally, while it would be feasible to condemn a horizontal acquisition by Alphabet in the search market, it is not as possible to do so for any of the numerous acquisitions it makes in other markets. Another example is Amazon, which lacks a dominant market share in most markets other than eBooks. While Amazon controls around 67 percent of the eBook market, eBooks only account for 20 percent of the overall book market.[45]

The existence of the monopoly power standard and the lack of clear definitions of markets make it possible for Alphabet, Amazon, and other giants in the technology industry to gain significant, but not monopolistic, shares in any market they desire. As long as a firm does not conduct mergers and acquisitions in a clearly defined market where it already has dominance or will gain dominance from its behavior, it is free to engage in any conduct. For example, under the current doctrine, a dominant digital platform like Alphabet would likely be free to use mergers and acquisitions to gain a 40 percent share in every separate market in the technology sector. Alphabet would be able to argue that it does not hold a monopoly in any given market and that its holdings are within separate markets. While Alphabet holds a clear monopoly in the search market, which is its original and primary market, it is not considered anticompetitive for it to engage in mergers and acquisitions in adjacent markets.

[44] Hovenkamp, Herbert J., "Antitrust and Platform Monopoly."

[45] Ibid.

Regulators coming after an acquisition made by a dominant digital platform face an uphill battle of proving that firms engaging in anticompetitive conduct gain monopoly power through their actions. Regulators are challenged with two main problems in this regard. First, the firm may expand the theoretical parameters of the market it is in to argue that it does not control a significant share. This is how Alphabet justifies its dominant share in the advertising market, and Amazon its dominant share in the book market. Second, the firm may argue that even if it controls a significant share of a certain market, its merger or acquisition took place in a separate market. Because the judicial system does not define markets within the technology industry in a standard and proper way, it is hard for regulators to convince judges that an action was anticompetitive according to the current interpretation of the Sherman Act.[46]

Clearly, dominant digital platforms engage in exclusionary conduct through mergers and acquisitions to maintain their dominant positions. However, these platforms also engage in unilateral exclusionary conduct. There are three main ways that giants in the technology industry unilaterally suppress their competition.

First, dominant technology firms bias the results of searches on their platforms to downgrade third party products and promote their own.[47] Google has been widely accused of search bias, and although it was charged by the European Union, the FTC did not pursue legal action after it conducted its own extensive investigation.[48] Private investigations have found that Google artificially promotes its own site YouTube when users search for videos. The Antitrust

[46] Ibid.

[47] Kirkwood, John B., "Tech Giant Exclusion," *Florida Law Review*, last revised August 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3761448.

[48] Ibid.

Subcommittee in the House of Representatives has also presented evidence of self-preferencing by Google.[49] Amazon has also been accused of engaging in two types of search distortion. First, it promotes its own products above the products of rival sellers who sell on Amazon.[50] Second, it gives preference to products that give Amazon a greater profit margin. Reports have also accused Apple of search-bias. Many common searches in the iPhone App Store result in Apple's own apps being promoted.[51] However, Apple has argued that this was the result of its apps being the most popular, which is a possibility.

The second type of unilateral exclusionary conduct deployed by giants in the technology industry is product copying. Many critics have accused dominant digital platforms of copying the products of third parties who sell on their platforms in order to undercut them.[52] Firms have been accused of utilizing confidential nonpublic data that they collect on the third parties to copy their products. Often, the platforms will offer their copies at prices lower than the original to undercut competition. It is easy to imagine how this deprives competitors of business and disincentivizes innovation. However, it also limits funding to start ups, as investors are wary of the trend of product copying.[53] There is also the possibility that dominant firms use the threat of product copying to acquire smaller rival firms at lower prices. Reports from the press strongly suggest that Amazon and Apple have engaged in product copying to undercut their rivals.

[49] Ibid.

[50] Ibid.

[51] Ibid.

[52] Ibid.

[53] Ibid.

The third type of unilateral exclusionary conduct deployed by giants in the technology industry is refusal to deal with competing firms. Amazon has been accused of signing deals with sellers that force it to remove competing suppliers from its platform.[54] Apple temporarily removed Spotify from the App Store, allegedly because it threatened Apple Music. Apple and Google were also sued by Epic Games for removing the popular video game Fortnite from their platforms.

Amending the Sherman Antitrust Act

The monopoly power standard, which stems from the leading interpretation of the Sherman Antitrust Act, is used in the status quo to determine whether or not conduct by firms in the technology sector is anticompetitive. Therefore, it follows that the Sherman Act must be amended to establish a new standard that would give regulators the authority to prosecute mergers and acquisitions done by dominant digital platforms. Specifically, the adoption of Professor of Law John B. Kirkwood's proposal would be beneficial. Kirkwood supports amending the Sherman Act to prohibit conduct that reduces competition significantly, regardless of whether or not that conduct produces monopoly power.[55] This solution would give regulators the authority to penalize all anticompetitive actions done by dominant firms, but it would also avoid splitting up firms or forcing them to divest from their products. The goal of this approach is to maximize competition brought by startups while avoiding the loss of competition that would accompany overregulation and the breaking up of firms.

As explained above, the current interpretation of the antitrust law is known as the monopoly power standard, which holds that actions are only anticompetitive when they help a

[54] Ibid.

[55] Ibid.

firm acquire a monopoly power. However, the Federal Trade Commission Act on paper contains provisions that should be able to resolve the issues of the limited Sherman Act without an amendment. Section 5 of the Federal Trade Commission Act prohibits methods of competition that are unfair, regardless of whether or not they come from acts of collusion or result in monopoly power.[56] In practice, there are three main limitations to the scope of antitrust enforcement under Section 5 of the Federal Trade Commission Act.

The first limitation is that violations of Section 5 cannot result in treble damages. Treble damages require the defendant to pay the plaintiff three times the amount in damages in addition to the damages.[57] Although treble damages can be used in many antitrust cases associated with different sections of antitrust law, they cannot be used in pure Section 5 cases.[58] The FTC also cannot seek civil penalties for Section 5 violations. Although the FTC once had the power to do so, the Supreme Court recently ruled that it has no authority to pursue restitution.[59] This means that if a dominant digital platform were to determine that engaging in exclusionary conduct would be profitable, a potential Section 5 violation would pose little threat and hardly affect the firm's conduct. An amendment to the Sherman Act would ideally include the right of private citizens and enforcement agencies to pursue restitution, civil damages, and treble damages. Only significant financial penalties can change the decision calculus of a firm and disincentivize exclusionary conduct.

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[56] Ibid.

[57] Legal Information Institute, "Treble damages," *Cornell Law School*, https://www.law.cornell.edu/wex/treble_damages.

[58] Kirkwood, John B., "Tech Giant Exclusion."

[59] Ibid.

The second limitation to Section 5 enforcement is that the Department of Justice has no power to enforce it.[60] As outlined above, the FTC and DOJ cooperate on enforcement and delegate their focuses based on which agency has more expertise in each specific area. This means that if the FTC lacks relevant industry expertise relating to a potential Section 5 violation, it will either suffer from a lack of knowledge during prosecution or choose not to pursue enforcement. In addition, if the FTC is burdened by other priorities, it cannot delegate Section 5 cases to the DOJ, forcing it to abandon potential suits. This also affects firms' financial calculus, as they know there is less of a chance of enforcement. Amending the Sherman Act would give both the FTC and DOJ the authority to enforce regulations against exclusionary conduct in the technology industry because both agencies have the power to enforce the Sherman Act.

The third limitation to Section 5 enforcement is that there are few pure Section 5 actions. Courts have rarely been willing to sustain a pure Section 5 challenge ever since the shift in philosophy in the 1980s.[61] The FTC has only found substantial success in brining Section 5 charges against attempts to collude and has not found any success in the prosecution of unilateral exclusion. The language of Section 5 indicates that it is meant to reach beyond the confines of the Sherman Act, meaning that an amendment would unlock its true potential.[62]

Critics of broadening the scope of the Sherman Act would argue that the proposed amendment will be used to target procompetitive behavior. Of course, it is true that while antitrust can be a useful tool in promoting competition, it can also deter competition if it is too

[60] Ibid.

[61] Ibid.

[62] Ibid.

strict and expansive. Kirkwood's six proposed proof requirements should be adopted so that the scope of the amendment is restricted in order to prevent attacks on procompetitive behavior.

The first proof requirement is significant market power. The current monopoly power standard holds that anticompetitive conduct must be conduct that produces or maintains a monopoly. The new standard brought by the amendment would only require plaintiffs to prove that conduct is likely to result in significant market power.[63] Significant market power is traditionally seen as having a share that is at least 30 percent of the market.[64] The defendant would have to define the relevant market and prove that the defendant's anticompetitive conduct assisted it in maintaining or acquiring its significant share. Essentially, the amendment shifts the plaintiff's burden from proving that conduct establishes monopoly power to proving that it establishes a significant market share.

The second requirement is barriers to entry. The plaintiff would have to prove that the defendant used anticompetitive conduct to prevent new firms from entering the market.[65] Barriers to entry are a good indicator of whether or not challenged conduct is likely to be procompetitive or anticompetitive. If there are no barriers to entry, then the challenged conduct is not necessarily preventing firms from entering the market, and the plaintiff's challenge would be rejected. This protects the ability of dominant firms to engage in procompetitive conduct.

The third and arguably most central requirement is anticompetitive conduct. The plaintiff must prove more than just that the challenged conduct establishes barriers to entry. It must also prove that the action is likely to significantly raise prices, decrease product quality, chill

[63] Ibid.

[64] Ibid.

[65] Ibid.

innovation, or limit consumer choice.[66] Courts follow the consumer welfare standard, meaning that they look at whether conduct is likely to harm consumers.[67] If conduct harms the success of rival firms but benefits consumers then it would not be deemed anticompetitive, and the plaintiff's case would be dismissed.

The fourth requirement is overall harm to competition. In cases where the defendant is unable to establish a justification for its conduct, the court would simply rule the conduct anticompetitive if the plaintiff has brought any evidence. In situations where the defendant proves that its conduct would benefit competition, the court would be tasked with weighing the costs of the procompetitive and anticompetitive effects.[68]

The fifth requirement is precise theory. Plaintiffs would be tasked with explaining their legal theory in terms that would be clear for other firms to understand and that would be precise enough to allow firms to avoid the specific problem without sacrificing procompetitive conduct.[69] This requirement is of critical importance due to the legal precedent that each case has the potential to set. Judges look to prior case law to make their decisions, which makes precise legal theory a necessary component.

The sixth and final requirement is likelihood. The plaintiff would have to clearly prove that the first four requirements were 'likely' to be met. Showing that conduct established a

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[66] Ibid.

[67] Ashton, Fred, "Why the Consumer Welfare Standard Is the Backbone of Antitrust Policy," *American Action Forum*, October 2022, https://www.americanactionforum.org/insight/why-the-consumer-welfare-standard-is-the-backbone-of-antitrust-policy/#:~:text=The%20consumer%20welfare%20standard%20provides,objective%20application%20of%20antitrust%20jurisprudence.

[68] Ibid.

[69] Ibid.

'dangerous possibility' or 'reasonable probability' of significant market power would not be enough.[70]

These six proof requirements to limit the scope of the amendment would establish a significant barrier to attacks on procompetitive conduct. Defendants would have six areas that they could use to rebut the plaintiff's case. They could employ these grounds throughout the process of litigation to beat an attack on desirable conduct, as they could establish motions to dismiss and take other actions.[71]

Economic Consequences of Reduced Innovation

Clearly, the existing antitrust regime allows dominant digital platforms to engage in anticompetitive and exclusionary conduct, which has resulted in rising concentrated market power. Competition is the core concern of antitrust policy, and antitrust policy is commonly referred to as competition policy. Concentrated market power negatively harms competition and innovation in the technology sector, which results in lessened economic growth.

Studies have proven that in the wake of the Covid-19 recession, rising market power is preventing new firms from entering the market.[72] Key indicators of market power, such as price markups and revenue concentration, are on the rise. In the technology sector specifically, the pandemic resulted in greater market concentration due to a lack of competition.[73] Dominant firms do not face competition due to their exclusionary conduct, which allows them to entrench

[70] Ibid.

[71] Ibid.

[72] Georgieva Kristalina, et al., "Rising Market Power—A Threat to the Recovery?" *International Monetary Fund*, March 2021, https://www.imf.org/en/Blogs/Articles/2021/03/15/blog-rising-market-power-a-threat-to-the-recovery.

[73] Ibid.

their power even further. The lack of competitive pressures due to a lack of rival innovators has resulted in less business dynamism in the technology sector, meaning that there is less innovation than what should naturally occur.[74] If there were not barriers to enter the market due to exclusionary conduct, new firms would act as disruptors, meaning that their innovation would compel all firms to reduce their prices and innovate. The lack of disruptive new firms results in an incalculable loss of economic growth, as there are countless missed opportunities for job creation, technology industry expansion, and rising incomes.[75] Research has proven that dominant firms are able to pay their employees less due to a lack of competing employers.[76] This results in less incentives for worker productivity and less spending by workers in the broader market.

Another inhibitor to innovation caused by market concentration in the technology sector is data siloing. When the technology market and internet are dominated by a few firms, only these firms have access to data collected on the internet. This data is isolated and concentrated, or siloed, meaning that only the dominant firms can innovate based on existing data.[77] Startups are inhibited because they must innovate without access to all relevant data, which results in less capable technology. In addition, the dominant platforms often struggle to effectively utilize all of the data.[78] When only a single firm has access to a set of data, only that firm is exploring how it

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Foster, Dakota, "Antitrust investigations have deep implications for AI and national security," *Brookings Institution*, June 2020, https://www.brookings.edu/techstream/antitrust-investigations-have-deep-implications-for-ai-and-national-security/.

[78] Ibid.

can be utilized. If the firm lacks the capacity or relevant experience to effectively utilize the data, then the data's innovative potential remains untapped. Furthermore, a third of executives at large firms in the United States have reported that data siloing inhibits collaboration within the sector.[79] Firms are less willing to share information that is exclusively theirs, meaning that they will forego the capabilities and expertise that would be brought by collaboration with other firms. The amendment would resolve data siloing in several ways. First, as previously explained, it would lessen market concentration by enabling startups to be successful. This would result in data being spread out across the technology sector. Firms would be more likely to collaborate on innovative projects, as both firms would benefit from sharing information with one another. In addition, more data becoming public would allow multiple firms to utilize the data, which would result in greater ideas resulting from innovation. Second, some efforts to exclude firms from accessing data could be deemed anticompetitive exclusionary conduct. This would aid in ending data concentration. Overall, the amendment would result in greater innovation due to greater market access to information that enables research and development.

Furthermore, research suggests that ongoing technological innovation is necessary for long term economic growth across the board, not just in the technology sector.[80] Specifically, many studies have proven a direct correlation between the technological capacity of a nation and its global economic ranking.[81] This is because the introduction of new technologies into an economy generally decreases the cost of production and supports the establishment of new

[79] Ibid.

[80] Kheyfets, Boris, and Chernova, Veronika, "Comparative Assessment of the Influence of a Technological Factor On Economic Growth," *Eastern-European Journal of Enterprise Technologies,* April 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3818223.

[81] Ibid.

industries while increasing the efficiency of existing industries. This process is consistent with Schumpeterian economic theory, which holds that economic growth is driven by 'creative destruction,' which is the process of new innovations replacing traditional innovations that become obsolete over time.[82] This means that over time production will become more efficient due to new innovations cutting out production costs. Therefore, it holds that technological innovation increases economic growth exponentially. When there is a lack of technological innovation due to concentrated market power in the technology industry, economic and societal development will suffer.

Policies such as the proposed amendment would aid in creating an environment where firms are incentivized to create new efforts to compete through improvements in innovation and productivity.[83] The amendment would give the government enough power to create an environment of competition without giving it the power to restrict competition. Some critics argue that the 'national champions model' of allowing several technology firms to maintain market power is better for innovation, as they believe that these large companies have more knowledge than smaller ones. However, the amendment would not break up firms such as Google and Amazon. Rather, it would give competitors an equal opportunity in the market, which would incentivize the existing firms to innovate in order to keep their customers. This theory is supported by empirical examples. In countries in Asia, the Middle East, and Latin America where governments followed the national champions model, consumers were forced to

[82] Ibid.

[83] Aghion, Philippe, et al., "Competition, Innovation, and Inclusive Growth," *International Monetary Fund*, March 2021, https://www.imf.org/en/Publications/WP/Issues/2021/03/19/Competition-Innovation-and-Inclusive-Growth-50269.

pay higher prices for lower quality products.[84] It has been found that mergers between rivals remove incentives to innovate, as the former rivals innovated based on a desire to steal the business of their competitor.[85] Robust antitrust enforcement is able to limit anticompetitive mergers, resulting in greater innovation. Dominant firms engage in exclusionary conduct for the purpose of producing barriers to entry.[86] As a principle, greater rivalry leads to greater competition, as dominant firms fear losing their position and emerging firms desire to gain access to the market.[87] Therefore, it is critical that antitrust policy enables the process of creative destruction by prosecuting anticompetitive mergers, acquisitions, and exclusionary conduct.

Geopolitical Consequences of Reduced Innovation

Clearly, the economy is harmed by reduced innovation caused by market concentration in the technology sector. Of course, the economy is the area that most scholars focus on when writing about antitrust, as competition and innovation are directly connected to economic growth. However, the United States defense industrial base is affected by the innovative environment to arguably the same degree.

Some scholars are labeling market concentration in the technology sector a national security threat due to its implications on the effectiveness and readiness of the United States military.[88] Market concentration in the technology sector results in lower quality, higher costs,

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[84] Ibid.

[85] Federico, Giulio, et al., "Antitrust and Innovation: Welcoming and Protecting Disruption," *Innovation Policy and the Economy* 20, 2020, https://www.journals.uchicago.edu/doi/full/10.1086/705642?af=R.

[86] Ibid.

[87] Ibid.

[88] Sitaraman, Ganesh, "The National Security Case for Breaking Up Big Tech," *Knight First Amendment Institute*, 2020, https://academiccommons.columbia.edu/doi/10.7916/d8-7ymn-8c63.

corruption and fraud, and reduced innovation in the defense industrial base.[89] Due to rising costs enabled by concentrated market power, the Department of Defense's budget is redirected from spending on technological research and development to spending on monopoly profits. This results in lowered military readiness, as the military is supplied with a lower quantity of inferior equipment. It has been proven that 67 percent of nearly 200 weapons systems contracts had no competition.[90] In addition, nearly half of all defense contracts went to the same small cluster of firms. This data strongly suggests that a lack of competition affects the entirety of the defense industrial base. The Department of Defense is enabling this market concentration and is in a sense following the national champions model. Executives of defense startup companies have called the Pentagon a bad customer that is heavily skewed in favor of the large established firms.[91] The government's attitude has created a chilling effect where investors and entrepreneurs are hesitant to invest in startups, which has resulted in reduced innovation. Companies with a monopoly or large market share over a specific technology can essentially hold the government hostage by raising prices and forcing the Pentagon to pay them or forego the purchase of the equipment. Not only does this result in greater government expenditures, but it leaves the military vulnerable to capacity shortfalls.[92] If a firm with a monopoly over an item faces a supply chain issue, then the Pentagon has no other suppliers to turn to for that item. The Defense Department released a report in 2018 where it listed the most vulnerable items in its

[89] Ibid.

[90] Ibid.

[91] Ibid.

[92] Ibid.

military supply chain.[93] Many of these items were manufactured by one or two domestic companies, and some were only manufactured by foreign firms. The report notes that a sudden loss of supply would irreplaceably disrupt the Pentagon's space, military, satellite, and missile manufacturing programs in addition to others. This means that a sudden issue within any one firm could severely limit the United States' capacity to supply its missile defense and satellite intelligence systems, resulting in a loss in deterrence and readiness.

Fortunately, increased antitrust enforcement can solve many of the issues associated with concentration in the defense industrial base. Increased competition would end the risk caused by a small number of firms dominating the market, as competitive innovation would allow the Pentagon to spend less money on better quality products and have alternative sources in case of supply disruptions. The proposed amendment would make it anticompetitive for firms in the defense sector to engage in anticompetitive acquisitions and mergers. This would likely incentivize investment in startups by removing the barriers to entry that currently discourage investors. Although the amendment would not force the Department of Defense to give contracts to new firms, startups would have a greater opportunity to grow, which would help them secure contracts in the future.

Market concentration in the technology sector also has implications for the competition between the United States and China. All companies in China have ties to the Chinese Communist Party, and no major company in China is independent of the government.[94] Technology and artificial intelligence is classified by the Chinese government as dual use technology, meaning that all technological innovation in China is seen as applicable to the

[93] Ibid.

[94] Ibid.

military. This means that all companies in China's technology sector assist the Chinese military, either directly or indirectly. However, it is not just Chinese technology companies that engage in this process. American companies with business in China are inadvertently fueling China's rising technological capabilities.[95] The technology that is brought to China by American firms ends up in the hands of the government, as all Chinese firms that gain this technology are required to share it with the state.[96] In addition, virtually all Chinese technology firms have agreed to share their data with the government, which fuels China's attempts to spread its digital authoritarianism. China uses concentrated data to surveil its citizens, promote centralized economics, and increase its power.[97] China also shares this technology with governments around the world to spread its influence. Not only does the Chinese government use technology made by American firms, but it also uses data that is stored by these firms. Some of this data is freely acquired through business, but American companies in China are routinely subject to espionage and surveillance by the state.[98] Another concern with the presence of American technology firms in China is that if China were to impose sanctions or tariffs on these companies, the United States' supply chains in the technology and defense sectors would be severely disrupted.[99] As stated previously, there are some defense technologies that are not produced by American firms. In some cases, the Pentagon is forced to deal with Chinese firms, meaning that it is indirectly funding the progress of its rival.

[95] Ibid.

[96] Ibid.

[97] Ibid.

[98] Ibid.

[99] Ibid.

The proposed amendment would solve many of the issues that are associated with market concentration and China. It is proven that increased antitrust enforcement would lessen market concentration and enable competition. Currently, most American technology firms choose to do business in China. In a fractured market, it is likely that some firms would build their supply chains outside of China and even develop their capabilities in the United States.[100] Big technology firms are willing to comply with the censorship and surveillance associated with doing business in China because they are desperate to access the Chinese market.[101] Smaller firms would not have the capacity to access the Chinese market, meaning that they would not willingly give China access to their data. Even if the technology market is deconcentrated, it is likely that many firms would continue to do business in China. However, it would be more difficult for the Chinese government to engage in surveillance when data is spread out. It would have to engage in operations involving many firms as opposed to a few. Increased competition would also raise the likelihood of American firms producing technology in every area useful to the Pentagon, which would allow the United States to stop doing business with Chinese firms.[102]

The United States and China are engaging in a global competition to spread their influences, and technological development plays a very important role. As explored earlier, China is engaging in tactics to further the technological progress of its economy, government, and military. This is concerning because of its geopolitical implications. According to many international relations theorists, rapid changes in the global balance of power are the most likely

[100] Ibid.

[101] Ibid.

[102] Ibid.

cause of conflict and war.[103] Currently, the United States has the most powerful military and the newest military technology. This power shapes international engagement and diplomacy, as all actors, including China, base their actions knowing that the United States has the most power. Although power can shift due to many factors, new technologies can shift the balance of power faster than ever before.[104] As China's technological and military capacities have increased, it has become more assertive in claiming contested territory in the South China Sea.[105] China would not currently initiate traditional armed conflict in the South China Sea or in other areas such as Taiwan, largely because it knows that the United States would defeat it due to superior capabilities. However, China would be more likely to initiate conflict if it has new emerging technologies.[106] China may believe that if it increases its technological capabilities, the United States would be less likely to retaliate to an attack or defend its allies. In addition, Russia would be more likely to initiate conflicts with members of the NATO alliance or escalate the war in Ukraine if it had greater technology.[107] The solution to avoiding potential conflict and war with China or Russia is for the United States to maintain and further its technological leadership. If China and Russia feel that the United States has a clear edge in its technological and military capacities, then they will be less likely to initiate or escalate conflict. Not only would a potential conflict lessen the power and economy of the United States, but it could potentially escalate to

[103] Kroenig, Matthew, and Gopalaswamy, Barath, "Will disruptive technology cause nuclear war?" *Bulletin of the Atomic Scientists*, November 2018, https://thebulletin.org/2018/11/will-disruptive-technology-cause-nuclear-war/.

[104] Ibid.

[105] Ibid.

[106] Ibid.

[107] Ibid.

nuclear war between the United States and China or Russia.[108] Therefore, it is critical that the proposed amendment comes into law, as it would encourage competition that would allow the United States to maintain its technological superiority, thus preserving peace and the balance of power.

Market Concentration and Misinformation

It is widely known that misinformation exists on the internet. In order to understand the rising phenomenon of misinformation, it is critical to examine how dominant digital platforms allow harmful information to spread, and even encourage it. Individuals who are looking to gain popularity and profit will inevitably spread misinformation online. What is concerning is that giants in the technology industry purposely encourage misinformation for financial gain.

Dominant firms such as Google and Meta have created 'filter bubbles' where users are only exposed to information that supports their preexisting beliefs.[109] Algorithms are designed to feed users with content based on what they have previously searched for and viewed. Once an account has been involved in online circles associated with a certain ideology, the algorithm will endlessly provide that account with content supporting that ideology. Dominant platforms craft these algorithms because they know that users will stay on the platforms when they are seeing information that they agree with. This information is more likely to evoke emotions in users that encourage them to look for more information on the platform and share what they have found with others. All of this increased activity results in greater revenue for the dominant firms, largely due to advertisements. This process of information distribution has greatly contributed to

[108] Ibid.

[109] Fukuyama, Francis, et al., "How to Save Democracy From Technology, Ending Big Tech's Information Monopoly," *Foreign Affairs*, 2021, https://www.foreignaffairs.com/articles/united-states/2020-11-24/fukuyama-how-save-democracy-technology.

the environment of polarization in the United States, as citizens on both sides of the political isle are moving further apart ideologically. However, there is a potentially even greater threat that could arise from the unchecked power of dominant digital platforms. Platforms could program their algorithms to alter what users see, thereby shaping their views on any number of subjects.[110] Giants in the technology sector have the power to influence popular opinion on any subject and even alter elections.

The power of information held by dominant digital platforms has the ability to destroy the liberal democratic system.[111] Firms have the power to promote illiberal ideas and candidates, which would erode republican institutions over time. In addition, widespread misinformation lessens the ability for peaceful and constructive discourse in society. Tens of thousands of journalism jobs have been lost, and the information once brought by traditional news media is now delivered by less qualified and more polarized sources on social media platforms.[112] This has resulted in the widespread distribution of information that is less accurate, less well edited and reviewed, and less well reported. The deliverance of highly targeted misinformation and propaganda by Facebook and Google, among other firms, has resulted in an atomization of the public and the deterioration of constructive political and societal interaction.[113]

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[110] Ibid.

[111] Ibid.

[112] Lynn, Barry C., et al., "Competition Policy for the Twenty-First Century: The Case for Antitrust Reform," *United States Senate Committee on the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights*, March 2021, https://www.judiciary.senate.gov/imo/media/doc/Lynn%20-%20Antitrust%2021st%20C%20-%20%203-__11-21%20.pdf.

[113] Ibid.

Misinformation does not just erode democratic governance and civil society, as it also poses a threat to our society's ability to respond to existential threats. Misinformation has resulted in a phenomenon of 'truth decay,' where citizens within society are unable to agree on basic facts about important issues.[114] A prime example of this was the Covid-19 Pandemic, as misinformation that was spread online about the cause of the pandemic and treatments to the virus hindered the ability of our society to unite around efforts to overcome the situation. On other issues such as climate change and domestic terrorism, disagreement is just as prevalent.[115] With all of these issues and more, online users will only be fed information that confirms the beliefs of the filter bubble that the algorithm has placed them in. Governments, private institutions, and citizens are unable to agree on how to respond to problems. In many cases, large portions of the population disagree over which problems are even relevant, or warrant being addressed. Until the power of information held by giants in the technology industry is removed, truth decay will erode our ability to solve society's biggest issues.

The proposed amendment would aid in lessening the spread of misinformation in two main ways. First, it would end market concentration that gives firms the ability to target users with misinformation. Data that firms collect by utilizing their market dominance gives them the ability to learn virtually everything a user shares about themselves online, thus equipping the firms with tools to target the users with misinformation. Furthermore, highly concentrated data is

[114] Rich, Michael D., "Think Tanks in the Era of Truth Decay," *RAND Corporation*, October 2020, https://www.rand.org/blog/rand-review/2020/10/think-tanks-in-the-era-of-truth-decay.html.

[115] Ibid.

easier for governments and other actors to surveil and steal data from.[116] Leaked data on user preferences can be used by advertisers and individuals seeking to promote false information. The amendment would resolve this issue, as competitive markets incentivize firms to increase their data privacy.[117] In addition, when a users' data is spread out between multiple firms, those looking to target users with misinformation would have to gain their data from multiple sources, making their efforts more difficult and less likely to be effective.

The second way that the proposed amendment would aid in lessening the spread of misinformation is by making the manipulation of information anticompetitive. Currently, there is reasonable ground to label dominant digital platforms engaging in misinformation as destroying competition, as users, buyers, and sellers are not given an accurate representation of the platform.[118] However, current antitrust law is not able to pursue action against these acts of misinformation when the accused firm cannot be proven to have market power.[119] The amendment would give prosecutors and regulators the authority to go after conduct that is anticompetitive even if it does not establish or uphold monopoly power, meaning that misinformation would likely be considered anticompetitive. Firms would change their algorithms away from promoting false information to avoid antitrust prosecution.

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[116] Kira, Beatriz, et al., "Regulating digital ecosystems: bridging the gap between competition policy and data protection," *Industrial and Corporate Change* 30, no. 5, October 2021, Pages 1337–1360, https://academic.oup.com/icc/article/30/5/1337/6356942.

[117] Ibid.

[118] Colangelo, Margherita, and Maggiolino, Mariateresa, "Manipulation of Information as Antitrust Infringement," *Columbia Journal of European Law*, last revised April 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3262991.

[119] Ibid.

Conclusion

Clearly, antitrust law surrounding dominant digital platforms must be revised. While antitrust enforcement in the United States was once robust, the power of the nation's antitrust laws has been limited since the 1980s due to conservative judicial interpretation. There is a growing bipartisan movement to increase antitrust enforcement, especially in the technology sector. The existing judicial standard of antitrust enforcement, which is informally known as the monopoly power standard, hinders competition by encouraging conduct that results in consequences such as raised prices and reduced product quality. The Sherman Antitrust Act should be amended in line with Professor of Law John B. Kirkwood's proposal to prohibit conduct that reduces competition significantly, regardless of whether or not that conduct produces monopoly power. This solution would give regulators the authority to penalize all anticompetitive actions done by technology giants, and it would also avoid splitting up firms or forcing them to divest from their products. There are three main harms that are caused by the lack of competition. First, lessened innovation due to market concentration in the technology sector harms the economy. Second, this lessened innovation harms the United States' technological leadership, which risks conflict with China. Finally, market concentration allows technology giants to encourage the spread of misinformation that is harmful to society. The proposed amendment would sufficiently address and resolve each of these harms.

Although antitrust enforcement has waned in recent decades, calls for action are on the rise. If the United States seeks to have a competitive economy and military, and if the world would benefit from the free flow of information, then the Sherman Antitrust Act must be amended in order to limit the market power of dominant digital platforms that is cultivated and maintained through anticompetitive and exclusionary conduct.

Antitrust policy affects competition, which in turn affects areas such as national security and the flow of information. More research should be done that directly ties antitrust policy to these areas, as there are not many sources that make the connection all in one paper. In addition, research should be done to determine the level of political support for the proposed amendment. Although major figures in both political parties have called for increased antitrust enforcement of dominant digital platforms, there currently no members of Congress who advocate for amending the Sherman Act in line with Kirkwood's proposal. The political feasibility of this goal must be assessed in order to determine its likelihood of becoming law.

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