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April 1, 2020

Dear Mr. Chairman and Members of the Subcommittee:

Thank you for your invitation to submit information and recommendations regarding competition in the digital marketplace. It is a great honor and a privilege to be able to contribute my views on competition in digital markets, a topic that is at the core of most of my academic research and writing, as well as my work consulting with private-sector clients.

I am currently an associate professor at the University of Miami School of Law, an affiliated fellow with the Thurman Arnold Project at Yale, and a member of the advisory board of the American Antitrust Institute. Prior to joining academia, I practiced law with the U.S. Department of Justice Antitrust Division, where I was involved in a variety of antitrust investigations and litigation.

It is my view that the current state of competition and antitrust enforcement in digital markets warrants substantial legislative reforms. Antitrust law has been hamstrung over the past several decades, and the unique features of digital markets cast this unfortunate development into sharp relief. The following discussion identifies several much-needed reforms in this vital area.

My contributions are organized as follows. Part I discusses the current state of, and the dearth of antitrust enforcement in, the digital marketplace. Part II offers six recommendations for how to reshape substantive antitrust law to meet the challenges posed by digital markets. Three of these are changes to existing law; the other three comprise new explicit prohibitions on harmful conduct. Part III turns to the institutional structure of antitrust enforcement. Given the varying winds of change that can blow through enforcement agencies, I suggest that the best way to create a resilient, effective institutional structure is to revitalize private-sector enforcement. Thus, Part III recommends repealing the Federal Arbitration Act (at least as to antitrust cases), eliminating the judge-made “Antitrust Injury” requirement, and eliminating the judge-made “Indirect Purchaser” limitation. Appendix A includes citations and hyperlinks to my relevant prior writings on these topics.

Thank you again for the opportunity to contribute.

Warm regards,

A handwritten signature in blue ink, appearing to read 'John M. Newman', is written over a white background.

John M. Newman

I. COMPETITION AND ANTITRUST IN THE DIGITAL MARKETPLACE

Antitrust experts have increasingly come to agree that digital markets exhibit certain features that can facilitate the creation and increase the durability of market power. Monopoly-level market shares in the range of 65–90% are not uncommon. Conduct that is generally agreed to be at least potentially anticompetitive has occurred across a wide variety of these markets. Yet successful enforcement actions in the United States have been in short supply. A few merger cases have been brought, but they have tended to involve relatively small markets. When federal agencies have stepped in, they have often taken the side of the tech giants.¹ This upside-down state of affairs stands in stark contrast to other jurisdictions around the world, which have increasingly taken the lead on competition-law issues.

A broad variety of factors has contributed to this status quo. The Supreme Court has repeatedly chosen to ignore legislative history and Congressional intent, instead relying on controversial (and often industry-funded) economic theories.² Other statutes, including the Federal Arbitration Act, have been interpreted so as to hobble private enforcement.

Moreover, influential commentators within the antitrust community have militated against enforcement in digital markets.³ Their views, however, rely on unfounded assumptions. The bare fact that some Silicon Valley tech firms *started* in garages does not mean they lack market power today.⁴ The question is not whether some tiny startup could theoretically enter a given market, but what it would take to act as a meaningful competitive constraint on the incumbent. It may be relatively easy to create a rudimentary search engine, mapping application, or social network—but is *meaningful* entry so easy? To the contrary, it will often require hundreds of millions (or billions) of dollars, years of time, access to proprietary datasets, etc. Network effects are present in many digital markets, and they can be particularly powerful once an industry has matured. This, in turn, can facilitate incumbents’ ability to free-ride on innovative rivals by simply copying their features—a strategy far more likely to be successful when the copycat has a massive installed user base. And although competition may sometimes be “just a click away” in a semantic, technical sense, switching costs are not nearly as low as this bromide suggests. Most digital products and services are highly differentiated and do not offer data portability. Once a person starts using a particular service, it often becomes a repository for her photos, conversations, contacts, and much more. And users may simply become neurologically hard-wired over time, creating a type of path dependency that (again) favors incumbents.

Digital-product suppliers have repeatedly engaged in conduct that appears to fit the mold of classic antitrust violations, yet have thus far largely escaped liability in the United States. Google’s conduct involving its Android mobile operating system, for example, is eerily similar to

¹ See John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1551–52 (2019).

² See, e.g., Daniel Crane, *Antitrust Antitextualism*, NOTRE DAME L. REV. (forthcoming); Sanjukta Paul, Reconsidering Judicial Supremacy in Antitrust (Mar. 30, 2020) (unpublished manuscript), <https://bit.ly/39wxeP9>.

³ See, e.g., Stigler Ctr., *Judge Richard A. Posner in Conversation with Professor Luigi Zingales*, YOUTUBE (Mar. 30, 2017), <https://perma.cc/5K5G-RN2R> (“I was surprised to read . . . that there are criticisms being made of Amazon, Microsoft, and Google. I was shocked. That’s blasphemy.”); Robert H. Bork, Opinion, *Antitrust and Google*, CHI. TRIB., Apr. 6, 2012 (“There is no coherent case for monopolization because a search engine, like Google, is free to consumers.”).

⁴ Newman, *supra* note 1, at 1512.

Microsoft’s anticompetitive strategies involving its desktop operating system in the late 1990s. Facebook’s kneecapping of Vine resembled a classic exclusionary refusal to deal. Amazon has allegedly engaged in widespread predatory pricing,⁵ tying, and other well-recognized anticompetitive strategies. And digital giants have often simply acquired or merged with their rivals, entirely and permanently eliminating a source of both present and future competition.

Despite this, antitrust challenges in the United States have been quite rare. And *successful* antitrust challenges have been rarer still. In fact, I am not aware of a single successful antitrust case involving a zero-price digital market. Federal regulatory agencies and judicial embellishments onto the actual underlying statutes have been among the primary obstacles to successful antitrust enforcement in digital markets. Thus, legislative solutions are needed.

II. RESHAPING SUBSTANTIVE ANTITRUST LAW

Antitrust law has largely failed to address the challenges posed by digital markets. What follows are a set of proposed legislative reforms designed to address that failure. Many of these would also have the salutary effect of improving antitrust more generally—and thereby helping to return our economy and society to a place of resilience and strength.

A. Fundamental Changes

Recommendation #1: Clarify that antitrust is not a “consumer welfare” prescription.

Antitrust insiders often refer to antitrust as having embraced a unified standard: “consumer welfare”. Yet, when pressed, nearly all true experts will admit that, despite the brevity of this label, each of its component parts is misleading. The resulting confusion and misunderstanding has done a great deal of harm to antitrust, particularly in the digital-market context.

First, antitrust law is not concerned only with “consumers”. Congress has never used such a narrow lens when crafting the antitrust laws, whether in 1890, 1914, 1936, or 1950. Instead, Congress has always maintained a broader vision: these statutes are meant to protect “any person who shall be injured” by a violation.⁶ Concentrated power can harm upstream suppliers: workers, farmers, and small producers of all sorts. It can harm customers who are not end-use consumers. And it can harm competitors, without whom competition is nonexistent. Antitrust has long taken into account harms to each of these different types of market participants, not just harm to consumers. Moreover, antitrust law condemns some conduct that clearly *benefits* consumers. In labor markets, for example, employers are the “consumers” of the relevant product (labor), much like they are the consumers of other inputs like electricity. Thus, when employers collude to suppress wages, a clear “consumer” benefit results, in the form of lower prices. Yet this type of conduct is widely viewed as anticompetitive—and even *per se* illegal.⁷ It is clear that antitrust does not concern itself only with harm to “consumers”.

⁵ See, e.g., Note, Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 753 (2017).

⁶ 15 U.S.C. § 4(a).

⁷ See, e.g., U.S. DEP’T OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 3 (2016).

Second, what Robert Bork and others mean by “welfare” is quite different from the general meaning of that term. In common usage, “welfare” refers to “general health, happiness, and safety.”⁸ But in antitrust circles, it denotes merely the difference between what a buyer was hypothetically willing to pay and the actual price of a product. This is the neoclassical economic concept of “surplus”—and even economists will admit that “surplus” is not “welfare.”⁹ A series of judicial decisions beginning in the late 1970s have increasingly cabined antitrust to this narrow notion of “surplus”, all while paying lip service to “welfare”.

The widespread usage of the “consumer welfare” label has caused no small amount of mischief, perhaps most markedly among the generalist judges tasked with adjudicating most antitrust disputes. Judicial usage of the label did not begin until 1979, nearly a century after the Sherman Act’s passage. Quoting an academic argument that is now universally regarded as inaccurate, the Supreme Court off-handedly referred to the Act as a “consumer welfare prescription.”¹⁰ Unfortunately, the label stuck. Despite its descriptive inaccuracy, it retains rhetorical force. It has likely contributed to systematic underenforcement in a variety of sectors.

These problems may manifest most sharply in digital markets for at least two reasons. *First*, it is not always clear who the “consumers” in digital markets are. It is common to reflexively think of natural persons as always playing the role of “consumers”. But in an advertising-supported business model, in which attention is a core product, it is advertisers that act as the pure “consumers”. Because the upstream exchange between an intermediary (like Google or Facebook) is a barter exchange of attention for the relevant digital product, humans instead play a hybrid role—“producers” of attention, and also “consumers” of search results, social networking, etc. Similarly, users both “produce” and “consume” the majority of digital content in online spaces like Facebook, Twitter, et al. Trying to cabin antitrust analysis solely to effects on pure “consumers” in these markets is likely to yield blinkered and bizarre results.

Second, these are often zero-price markets, which are different in a number of ways from the traditional markets contemplated by neoclassical economists. If “surplus” (“welfare”) is simply a price below the customer’s willingness to pay, then zero-price markets may—at least on their face—not look like markets at all. The “surplus” framework has led some of antitrust’s most celebrated and influential figures to conclude (mistakenly) that without prices, there can be no markets, and certainly no negative “welfare” effects.¹¹ In sum, the label seems more likely to serve as a convenient means for dismissing cases than as a useful descriptor.

Congress could clear up a great deal of confusion by simply clarifying that the antitrust laws are not a “consumer welfare prescription.” Their coverage extends to all of the trading partners, as well as the competitors, of a concentrated source of power in the marketplace.

⁸ Definition of “Welfare”, <https://www.oxfordlearnersdictionaries.com/us/definition/english/welfare>.

⁹ See, e.g., Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 ANTITRUST BULLETIN 455 (2018).

¹⁰ *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)).

¹¹ See, e.g., Bork, *supra* note 3; see also Geoffrey Manne & Joshua Wright, *What’s an Internet Monopolist?*, TRUTH ON MKT. (Nov. 22, 2010), <http://perma.cc/L4UF-UC7K> (“[T]hese monopolists are really pathetic at extracting profits, as most of them give away their products for free . . .”).

Recommendation #2: Clarify that market definition is not required for a violation.

Defining a “relevant market” is a peculiar and artificial exercise, yet one that occupies an outsized role in contemporary antitrust analysis. Real-world economies are not delineated by precise metes and bounds. And market definition is, at best, only an indirect way to assess the likelihood of what we really care about: power and effects.¹² Unfortunately, judges have elevated it to outcome-determinative status in many cases.

This development is particularly troubling with regards to competition in digital markets. In its 2018 *AmEx* opinion, a majority of the Supreme Court indicated for the first time (in a footnote) that plaintiffs in vertical restraint-of-trade cases must define the “relevant market”.¹³ Properly read, *AmEx* applies to a very narrow subset of so-called “two-sided” businesses, making the footnote mere *dicta*. But a great many digital markets are thought (incorrectly, in my view) to be “two-sided”. Defendants have already begun arguing for a broad reading of *AmEx*. Even the plaintiffs in a recent price-fixing lawsuit against Amazon seem to believe *AmEx* applies to their case.¹⁴

Compounding the problem, antitrust institutions in the United States have embraced a particularly technical and onerous means of defining markets. The “hypothetical monopolist test”, as often employed, is a metaphysical exercise that requires plaintiffs to “prove” convoluted counterfactuals like what the marketwide price would have been if the defendant’s challenged conduct had never occurred and the candidate grouping of transactions were completely controlled by a fictional dominant firm. Put another way, plaintiffs must prove what a firm that does not exist supposedly would have done in a world that does not exist. *Res ipsa loquitur*.

As difficult as clearing these hurdles may be in a traditional market, the complexities of many digital markets will make things harder still. The hypothetical-monopolist test in wide use by federal agencies is explicitly price-centric—yet many digital markets lack prices.¹⁵ Digital products themselves are often quite complicated, combining multiple features into (arguably) a single product and multiple products into complex ecosystems. Anticompetitive conduct can cause negative ripple effects that may be excluded by a formal market definition. *AmEx* itself provides a ready example of this. The defendant’s restraints of trade vis-à-vis online and offline merchants cause higher across-the-board retail prices, since merchants could not individually try to induce customers to use lower-cost cards. The inflated merchant fees are partially refunded to AmEx’s relatively wealthy cardholders in the form of “Membership Rewards.” Of course, customers who pay with cash, checks, or food stamps do not receive rewards-points refunds. Thus, these customers end up subsidizing lavish perks for the jet set. Yet the Court’s tortured market-definition exercise seems to have caused it to ignore this negative ripple effect.

By acting to make clear that formal market definition is not a requisite element of an antitrust violation, Congress could pave the way for more effective antitrust enforcement across the entire economy. Avoiding the need to engage in this artificial exercise will eliminate inefficient

¹² Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 444, 493 (2010).

¹³ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018).

¹⁴ Complaint, *Frame–Wilson v. Amazon.com, Inc.*, No. 2:20-cv-00424, at 4 n.5 (W.D. Wash. Mar. 19, 2020).

¹⁵ John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 60–61 (2016).

societal expenditures, freeing up time, resources, and energy for more important tasks. These salutary effects will be particularly concentrated in digital markets.

Recommendation #3: Clarify that proof of a particular type of effect is not a requisite element for a violation.

Orthodox antitrust law’s focus on price effects has increasingly attracted criticism. Less well-recognized, though no less important, is its deep obsession with output. Some antitrust scholars adopt a particularly narrow version of “consumer welfare”. Under their view, all of antitrust boils down to an inquiry into output effects. So long as a trade restraint does not have the direct, quantifiable effect of reducing output, it must be benign.¹⁶ This strain of thought found purchase with a majority of the Supreme Court in its 2018 *AmEx* opinion. Even though the United States had proven harmful price effects *and* that the resulting profits were not entirely passed on to AmEx cardholders, the Court imposed a new hurdle: output effects. Because demand for credit cards overall had been increasing during the relevant time period, the Court decided that there must not have been an antitrust violation—despite a trial record replete with proof of actual injury to competition, competitors, direct customers, and society at large.¹⁷

Requiring proof of output effects—or any other particular type of effect, for that matter—is a profoundly awful way of conducting antitrust analysis. This is so for at least three reasons. *First*, the “output-only” version of Consumer Welfare Antitrust is paradoxical even on its own terms. Output and welfare are not always directly correlated. Some anticompetitive conduct can increase output yet reduce welfare. Coercion (including tying), externalizing costs, deception, creating information asymmetries, and a host of other strategies fit this description. Conversely, some procompetitive behavior can reduce output yet increase welfare. This is true of agreements among competitors to limit deception, misleading conduct, or pollution, all of which have been explicitly or implicitly allowed by antitrust authorities.¹⁸

Second, some anticompetitive conduct is not directed at output. In such cases, shifting to focus on output—a second-order effect at most—will waste resources. For example, consider horizontal price-fixing by powerful sellers, generally considered one of the most harmful anticompetitive strategies available. If the conduct is price-centric, why insist on an inquiry into output effects? Doing so would be a drag on enforcers’ and courts’ scarce resources and precious time—which is why decades of antitrust precedent counsel against it.

¹⁶ ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 122 (1978) (1993 ed.) (“The task of antitrust is to identify and prohibit those forms of behavior whose net effect is output restricting and hence detrimental.”); I PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 114 (4th ed. 2013) (“[T]he overall goal is markets that maximize output.”); Frank H. Easterbrook, *The Limits of Antitrust*, 63 *TEX. L. REV.* 1, 31 (1984) (“[I]f arrangements are anticompetitive, the output and market share of those using them must fall.”).

¹⁷ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2289 (2018) (“The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%.”).

¹⁸ *See, e.g., Calif. Dental Ass’n v. Ass’n v. FTC*, 526 U.S. 756, 773–74 (1999) (refusing to apply the *per se* illegality rule to a horizontal agreement limiting deception on the grounds that the conduct “could have different effects from those ‘normally’ found in the commercial world, even to the point of promoting competition”).

Third, output effects are often difficult, and even practicably impossible, to prove. This is especially true of complex, interrelated digital markets. What is the appropriate way to measure Facebook’s or Google’s “output”? The necessary data may never be available, especially to plaintiffs who are increasingly unable to reach even the discovery stage of litigation. And suppose the data are available. There are costs to defendants who must gather and produce it, to plaintiffs who must hire teams of attorneys and experts in an attempt to untangle it, and to judges who must settle the “Battles of the Experts” that will inevitably result. Those costs will far too often be unjustified, especially since the relevance for welfare analysis will often be ambiguous, and the relevant conduct may have little to do with output in the first place.

Congress could do a great deal of good by clarifying that no single particular type of effect is a requisite element of an antitrust violation. Insistence on proof of an output reduction is just as badly misguided as an over-fixation on price effects. If antitrust is to become robust enough to deal with digital markets, more flexibility is needed.

B. New Prohibitions

Recommendation #4: Prohibit abuses of dominance.

Many of the business practices that seem to have been most appalling to the American public of late do not squarely fit the mold of either “monopolization” or a “restraint of trade”. The core antitrust statutes have been interpreted to apply only to the creation, enhancement, or entrenchment of market power, rather than the exercise of market power. Enormous price hikes on life-saving pharmaceuticals, widespread privacy-reducing data extraction, threats to bury a firm in search results unless the victim pays up—all of these might be viewed as the *exercise* of power, and therefore beyond the reach of antitrust laws as currently construed.¹⁹ They could, however, fit the mold of “abuses of a dominant position”, which many jurisdictions around the world prohibit.

The explosion of zero-price business models in digital markets has elevated the importance of prohibiting abuses of dominance. Dominant firms in zero-price markets are unlikely to exercise their power by introducing positive prices. Instead, they must deploy more exotic extractive strategies that may be even more harmful. For example, excessive data extraction may yield negative externalities. “Steering” users to favored counter-parties can have the spillover effect of increasing concentration in different markets. And so on.

European enforcers—who have taken the lead on applying competition law in digital markets—have used prohibitions on abuse of dominance to do so. The European Commission’s case involving Google’s self-preferencing in search results, for example, was brought as an abuse-of-dominance case.²⁰ The Bundeskartellamt’s case involving Facebook’s data practices was similarly brought using an abuse-of-dominance theory.²¹

¹⁹ Of course, if they involve an agreement in restraint of trade, Sherman Act § 1 could (at least in theory) apply.

²⁰ See Eur. Comm’n, Google Search (Shopping), Case AT.39740 (June 27, 2017).

²¹ Press Release, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (July 2, 2019).

A statutory prohibition of abuses of dominance would be a substantial addition to the U.S. enforcement toolkit. Congress, when it created the FTC Act’s prohibition of “unfair methods of competition,” very likely intended to proscribe practices like those described above. The Supreme Court has stated that Section 5 is broader than the Sherman Act.²² Yet lower courts, particularly beginning in the 1980s, have severely cabined Section 5. By explicitly prohibiting abuses of dominance, Congress would help to revive this important area of law and better align antitrust enforcement with societal welfare.

Recommendation #5: Explicitly prohibit consummated anticompetitive mergers.

Clayton Act § 7, the core statute governing anticompetitive mergers and acquisitions, is arguably worded prospectively (“may be substantially to lessen competition, or to tend to create a monopoly”).²³ Courts have generally been willing to apply it retroactively. But the general stance that has been adopted, certainly by the enforcement agencies, is that the vast majority of merger review should be conducted ex ante. Merger challenges overall have become quite rare, but challenges to consummated deals have become practically an endangered species.

This is a strange state of affairs. It can be relatively difficult to predict with certainty what will occur in the future. Ex post, however, evidence regarding effects will be more readily available, and will allow for much clearer assessments. The only real argument against ex post merger review seems to be the old objection to “unscrambling the eggs”. But the fears underlying that objection are generally unfounded. Firms spin off business units all the time. Enforcement agencies regularly oversee and facilitate divestitures as part of ex ante merger review. And digital-product suppliers often engage in less physical intermingling of assets than their offline counterparts, such that the relevant “eggs” may not be scrambled at all.

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

Recommendation #6: Prohibit commingling of assets done primarily for the purpose of avoiding a structural remedy.

In 2019, amidst bipartisan calls for antitrust restructuring of Facebook, CEO Mark Zuckerberg announced that, for the first time, the firm would move to integrate Facebook (the site) with Whatsapp and Instagram, two of the most significant competitors it had acquired over the past decade. Mr. Zuckerberg is clearly no fan of the idea of structural antitrust remedies. Later that year, on a leaked audio file of internal Facebook meetings, he referred to antitrust as an “existential” threat and said that he would “go to the mat and . . . fight” a government-brought

²² FTC v. Ind. Fed’n of Dentists, 476 U.S. 447, 454 (1986).

²³ 15 U.S.C. § 18.

antitrust lawsuit.²⁴ Many observers have suggested that Facebook’s planned commingling of assets formerly owned by its competitors was prompted not by a desire to improve its products, but instead to make it more difficult for antitrust enforcers to operationalize a structural remedy.²⁵

It is not clear that the current statutory framework prohibits the commingling of assets *per se*, even when done primarily (or wholly) for the purpose of avoiding a structural remedy.²⁶ But such conduct clearly has the potential to prolong a monopoly or entrench market power. Congress could strengthen the enforcement toolkit—while also reinforcing the message that anticompetitive acquisitions can be challenged post-consummation—by explicitly prohibiting such conduct.

III. REVAMPING THE INSTITUTIONAL STRUCTURE BY REVITALIZING PRIVATE ENFORCEMENT

Congress and state legislatures established a tripartite structure for antitrust enforcement. Federal agencies, state attorneys general, and private market participants have each historically played an important role in antitrust oversight. A number of recent developments in substantive antitrust doctrine, some of which are discussed above, have severely hampered that role across the board. At the same time, however, courts have erected procedural roadblocks that especially limit the role of private-sector enforcement—a particularly cruel irony in light of the fact that it is these front-line market participants who most directly experience the effects of concentrated power and anticompetitive conduct. The following recommendations seek to remedy the wrong turn taken by the judiciary in this important area of antitrust policy-making.

Recommendation #7: Repeal the Federal Arbitration Act, at least as to antitrust cases.

The Supreme Court has adopted an increasingly absolutist interpretation of the Federal Arbitration Act, one that has begun to gut private antitrust enforcement by consumers and small businesses. Under *Italian Colors*,²⁷ a powerful firm can rely on contractual mandatory-arbitration-plus-class-waiver provisions to achieve near-total immunity from antitrust class actions. Many antitrust violations cause immense harm, but that harm is spread out over hundreds, thousands, or millions of people. Thus, the harm to each individual may be relatively small, even if the aggregate harm is vast. Yet mandatory-arbitration-plus-class-waiver provisions force each individual to pursue—or, more realistically, not pursue—a remedy on her own. As Judge Posner put it, “[O]nly a lunatic or a fanatic sues for \$30.”²⁸

The chilling effects from this judicial expansion of the FAA will be felt especially strongly in digital markets. Lengthy written contracts (“terms of service”) are near-ubiquitous in this context. Buying a loaf of bread directly from your local grocery store will not likely subject you

²⁴ BBC, *Leaked Zuckerberg Audio: ‘You Go to the Mat and You Fight’*, Oct. 1, 2019, <https://www.bbc.com/news/technology-49893913>.

²⁵ See, e.g., David N. Cicilline, Opinion, *The Case for Investigating Facebook*, N.Y. TIMES, Mar. 19, 2019.

²⁶ See generally John M. Newman, *Anticompetitive Product Design in the New Economy*, 39 FLA. ST. U. L. REV. 681 (2012) (describing courts’ defendant-friendly approach to unilateral design-related conduct in digital markets).

²⁷ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

²⁸ *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). Moreover, the incentive structure is such that counter-parties will not bargain these clauses away. See Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 3 FORDHAM INT’L L.J. 771, 775 (2015).

to a dense thicket of contractual obligations, but buying that same loaf via Amazon certainly will. Unsurprisingly, those contracts often contain mandatory-arbitration-plus-class-waiver provisions.²⁹ Repealing the FAA as to antitrust claims would help to revitalize the vital role of actual market participants in upholding our antitrust laws, especially in digital markets. Moreover, to ensure that large firms do not simply accomplish similar ends by using standalone class-waiver provisions, Congress should also consider rendering void *any* contractual derogation of the right to collective enforcement of the antitrust laws.

Recommendation #8: Eliminate the judge-made “Antitrust Injury” requirement.

Congress extended enforcement authority to “any person . . . injured . . . by reason of anything forbidden in the antitrust laws.”³⁰ Historically, the most important issues in a given case were whether the defendant violated the law, and whether the plaintiff was injured thereby.³¹ But in 1977, the Supreme Court created an elaborate and poorly understood additional requirement for private plaintiffs: they must prove “antitrust injury.”³² Today, courts frequently dispose of cases on antitrust-injury grounds, even where the plaintiff has suffered injury that “could not possibly have been caused by anything *other than* an antitrust violation.”³³

The antitrust-injury requirement was likely developed as a “procedural” way to address perceived problems with substantive antitrust law. The foundational case involved plaintiffs who were upset that the defendant had purchased and revived previously failing bowling alleys located nearby the plaintiffs’ own alleys.³⁴ This type of conduct is clearly not an antitrust violation, so the Court could have simply resolved the case—and other courts could resolve similar cases—on substantive grounds. Moreover, substantive antitrust law has changed considerably since the Court created the antitrust-injury requirement. The vast majority of conduct is now analyzed under the rule of reason, instead of the *per se* illegality rule. Plaintiffs lose a jaw-droppingly high percentage—more than 99%, by one count—of rule-of-reason cases.³⁵ If ever the need existed for an extra procedural “back door” to dispose of cases, that time has clearly passed.

The temptation to dispose of valid cases on “antitrust injury” grounds is likely to be particularly strong in digital markets. As noted above, the relevant markets and fact patterns may often be fairly complex, leaving at least some judges looking for an easy way out. Moreover, the relevant injuries may be unfamiliar, especially in zero-price digital markets.

Congress could help to revitalize market-participant antitrust enforcement by doing away with the convoluted, judicially crafted “antitrust injury” requirement. Of course, some causal

²⁹ See, e.g., Facebook Commercial Terms, https://www.facebook.com/legal/commercial_terms (last visited Mar. 27, 2020); Amazon Conditions of Use, <https://www.amazon.com/gp/help/customer/display.html/?nodeId=508088> (last visited Mar. 27, 2020);

³⁰ 15 U.S.C. § 15(a).

³¹ Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 697, 697 (2003).

³² *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

³³ Davis, *supra* note __, at 700 (emphasis added).

³⁴ *Brunswick Corp.*, 429 U.S. at 481.

³⁵ Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009) (finding that defendants won 221 of 222 rule-of-reason cases during 1999–2009).

connection between the violation and the plaintiff’s injury should be required. Yet a showing of actual and proximate cause ought to be sufficient to deal with the vast majority of cases. In some unusual settings, the relevant injury may not be readily susceptible to standard quantification methods. One could certainly envision this happening in a zero-price digital market. But in such cases, alternative remedies like injunctive relief or disgorgement of illegitimate profits should remain available. The antitrust-injury requirement leads instead to unnecessary false negatives, reducing marketplace efficiency and dynamism as a result.

Recommendation #9: Eliminate the judge-made “Indirect Purchaser” limitation.

In *Illinois Brick*, yet another defendant-friendly Supreme Court decision issued in 1977, the Court decided for the first time that only “direct” customers can sue dominant firms to recover damages from supracompetitive prices.³⁶ It goes nearly without saying that this decision flies in the face of Congressional intent—again, the language of Clayton Act § 4 grants standing to “any person” injured by an antitrust violation.³⁷ Many in the antitrust community, including the bipartisan Antitrust Modernization Commission, believe *Illinois Brick* should be overruled.³⁸

Illinois Brick’s indirect-purchase rule undoubtedly creates a chilling effect on private antitrust enforcement in digital markets. Direct counterparties may understandably be reluctant to initiate antitrust lawsuits against a digital giant. Tech firms that operate online information portals (think Amazon, Google, Zillow, etc.) enjoy a particularly powerful advantage: they can often steer their users among various competing product or service providers. Such steering can be particularly effective in digital contexts. For example, the first page of Google Search results may receive 9,800% more clicks than the second page.³⁹ Being buried in search results can be devastating.⁴⁰ Thus, some digital firms enjoy a unique ability—what one analyst calls “hyperswitching”—to shift transaction volume among competing suppliers.⁴¹ And as a result, they wield a powerful cudgel against direct counterparties, who may (again, understandably) be very reluctant to trigger a backlash by filing an antitrust lawsuit. I personally have been contacted via anonymous email with reports of anticompetitive activity by a powerful digital firm; anonymity was insisted upon due to fear of retaliation.⁴² Indirect purchasers have much less to fear, and could therefore provide an important source of private-sector antitrust enforcement.

Eliminating the Supreme Court’s unpopular and inefficient ban on “Indirect Purchaser” lawsuits would help to restore the original Congressional intent underlying the Clayton Act. It would also help to correct the litigation-incentive problem created by the threat of retaliation by dominant firms. The beneficial effects of such a move would extend to all markets covered by antitrust laws, and particularly to digital markets.

³⁶ *Ill. Brick Co. v. Ill.*, 431 U.S. 720, 728–29 (1977). The resulting body of law is messy, as many states have amended their state antitrust laws so as to depart from the *Illinois Brick* rule, and lower federal courts have created some limited exceptions to the rule. This doctrinal confusion further militates in favor of repeal.

³⁷ 15 U.S.C. § 15(a).

³⁸ See ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 265–70 (2007).

³⁹ Newman, *Antitrust in Digital Markets*, *supra* note 2, at 1508.

⁴⁰ This was the dynamic at the core of the European Commission’s *Google (Shopping)* case.

⁴¹ Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 845–46 (2019).

⁴² Email from piaoawh to johnnewman@law.miami.edu (Mar. 29, 2020, 4:54 P.M. ET) (on file with author).

APPENDIX A: Relevant Prior Publications

Regulating Attention Markets (2020) ([link](#)).

Antitrust in Attention Markets: Objections and Responses, 59 SANTA CLARA L. REV. 743 (2020) ([link](#)).

Antitrust in Digital Markets, 72 VANDERBILT L. REV. 1497 (2019) ([link](#)).

The U.S. Forgot What Antitrust Is For, THE ATLANTIC (Sept. 11, 2019) ([link](#)).

Procompetitive Justifications in Antitrust Law, 94 INDIANA L.J. 501 (2019) ([link](#)).

The Myth of Free, 86 GEORGE WASHINGTON L. REV. 513 (2018) ([link](#)).

Complex Antitrust Harm in Platform Markets, ANTITRUST CHRON., May 2017, at 52 ([link](#)).

Antitrust in Zero-Price Markets: Applications, 94 WASHINGTON U. L. REV. 49 (2016) ([link](#)).

Antitrust in Zero-Price Markets: Foundations, 164 U. PENNSYLVANIA L. REV. 149 (2015) ([link](#)).

Anticompetitive Product Design in the New Economy, 39 FLORIDA ST. U. L. REV. 681 (2012) ([link](#)).