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The Battle with Big Tech: Analyzing Antitrust Enforcement and Proposed Reforms

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SYMPOSIUM

THE BATTLE WITH BIG TECH: ANALYZING ANTITRUST ENFORCEMENT AND PROPOSED REFORMS

WELCOME AND INTRODUCTORY REMARKS

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PANEL ONE: HOW DID WE GET HERE? A REVIEW OF MAJOR ANTITRUST CASES, QUESTIONS, AND CONTROVERSIES

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Charles L. Denison Professor of Law, New York University School of Law

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iii. Harry First is the Charles L. Denison Professor of Law at New York University School of Law. From 1999-2001 he served as Chief of the Antitrust Bureau of the Office of the Attorney General of the State of New York. Professor First's teaching interests include antitrust, regulated industries, international and comparative antitrust, business crime, and innovation policy. Professor First is the co-author of the casebook Free Enterprise and Economic Organization: Antitrust (7th ed. 2014) (with John Flynn and Darren Bush), as well as a casebook on regulated industries (with John Flynn). He was twice a Fulbright Research Fellow in Japan and taught antitrust as an adjunct professor at the University of Tokyo. Professor First's most recent scholarly work has focused on various aspects of antitrust enforcement and theory. Professor First is a contributing editor of the *Antitrust Law Journal*, foreign antitrust editor of the *Antitrust Bulletin*, a member of the executive committee of the Antitrust Section of the New York State Bar Association, and a member of the advisory board of the American Antitrust Institute.

iv. Jonathan Jacobson is Senior Of Counsel in Wilson Sonsini Goodrich & Rosati's New York office. Considered one of the country's preeminent antitrust litigators and thought leaders, Jonathan has taken a lead role in many high-profile antitrust litigations, investigations, trials, and appeals. He served as the Chair of the ABA's Section of Antitrust Law from 2017-2018. Among other noteworthy representations, Jonathan has served as lead counsel for Coca-Cola in several cases, including *PepsiCo v. Coca-Cola*, a leading monopolization case under Section 2 of the Sherman Act. He also argued the *Vitamin C* case in the Supreme Court and on remand; led the representation of American Express in *United States v. Visa USA*; defended Google in the *Dreamstime, Digital Advertising, KinderStart, Person, TradeComet*, and *myTriggers* cases; defended Netflix in *In re Online DVD Rental Antitrust Litigation*, and Live Nation and Clear Channel in Heerwagen, *In re Live Concert Antitrust Litigation*, and *It's My Party v. Live*

KEYNOTE ADDRESS

THE NEW ANTITRUST PARADOX

Maureen K. Ohlhausen[vi]
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Nation. Jonathan was appointed by Congress to serve on the Antitrust Modernization Commission, responsible for reviewing and recommending potential changes to the nation's antitrust laws. In addition to serving as a past Chair of the ABA's Section of Antitrust Law, he previously served as an officer, council member, and in several other Antitrust Section positions, including editorial chair of *Antitrust Law Developments (6th ed.).* He has written or edited numerous articles and books spanning the gamut of antitrust topics, including exclusionary practices, merger enforcement, government and other civil litigation matters, and cartel enforcement.

v. Spencer Weber Waller is the John Paul Stevens Chair in Competition Law, Director of the Institute for Consumer Antitrust Studies, and Professor at Loyola University Chicago School of Law where he teaches antitrust, intellectual property, civil procedure, and international litigation courses. He is a member of the Advisory Board of the American Antitrust Institute and the editorial boards of the *Antitrust Law Journal* and the *World Competition Law and Economics Review*. Professor Waller is the author, co-author, or editor of eight books and over one hundred articles on United States and international antitrust, including *Antitrust and American Business Abroad*, the leading treatise in the field, and the first full-length biography of Thurman Arnold, the founder of modern antitrust enforcement in the United States. He is the co-editor and contributor to *Brands, Competition Law and IP* (Cambridge University Press 2015). His recent scholarship focuses on antitrust, brands, class actions, high-tech industries, innovation, and intellectual property. He is the recipient of the 2014 Concurrence Antitrust Writing Award. Professor Waller previously taught and served as associate dean at Brooklyn Law School.

vi. Maureen K. Ohlhausen chairs the firm's Global Antitrust and Competition practice. Her practice focuses on antitrust, privacy and data security and consumer protection investigations and litigation both in the U.S. and abroad. She advises top-tier clients across a wide variety of industries including technology, retail, telecommunications, social media, and life sciences. Maureen is sought after for her depth of experience both nationally and globally on antitrust and Federal Trade Commission (FTC)-related matters. She is known for her relationships with officials in the U.S. and abroad, with a particular emphasis on Europe and China. She most recently led the FTC as Acting Chairman and Commissioner where she directed all aspects of the FTC's antitrust work, including merger review and conduct enforcement, and steered all FTC consumer protection enforcement, with a particular emphasis on privacy and technology issues. She regularly led the U.S. delegation at international antitrust and data privacy meetings and is the only FTC Commissioner to have received the Robert Pitofsky Lifetime Achievement award in recognition of her knowledge of and contributions to the Commission. Prior to her role as Commissioner, she led the FTC's Internet Access Task

Force, which produced an influential report analyzing competition and consumer protection legal issues in the areas of broadband and internet. A recognized thought leader, Maureen is a frequent author and speaker and is often quoted by leading print and broadcast media on antitrust, FTC, and privacy and data security matters. She has published dozens of articles on antitrust, privacy, intellectual property, regulation, FTC litigation, telecommunications and international law issues in prestigious publications. She has also testified over a dozen times before the U.S. Congress, including recent appearances before the Senate Commerce Committee and the House Energy and Commerce Antitrust Sub-Committee. Maureen previously headed the FTC practice group at a leading telecommunications law firm, representing and counseling telecommunications and technology clients on antitrust compliance, privacy and consumer protection matters before the FTC and the FCC. She began her legal career as a clerk at the U.S. Court of Appeals for the D.C. Circuit.

WELCOME AND INTRODUCTORY REMARKS

Morgan Hagenbuch: Hi, everyone. We're going to get started in a few minutes. Feel free to just continue to settle in. I just wanted to get the Zoom started, thanks to everyone joining us on Zoom.

Okay, I'll go ahead and get really started now. Thank you all who are in the live audience or joining us on Zoom for joining the *Fordham Journal of Corporate & Financial Law* for our annual Symposium. I'll be back to cover some more housekeeping items and provide some opening remarks in just a moment. But first I'm going to turn the mic over to Professor and Associate Dean of Research Youngjae Lee for some introductory remarks.

Professor Lee: Okay, thank you, Morgan. Good afternoon to all our guests here today at Fordham Law School, and to those of you who are joining us by Zoom. We're glad to have you here today for the *Fordham Journal of Corporate & Financial Law* Symposium.

For years, the *JCFL* Symposium has brought together legal professionals from all different backgrounds to discuss and examine the most pertinent topics in the field, and this year is no different. Today's symposium is about antitrust and big tech. Over the past few years, the practices of some of the world's largest technology companies, often referred to as "big tech," have come under a regulatory microscope. Our panels today will discuss the rise of big tech, analyze the evolution of antitrust enforcement strategies, and debate the desirability of various types of reforms. We are excited to have with us here today some of the leading practitioners, scholars, and advocates at the forefront of the antitrust space. With a line up like this, we are without a doubt in for an afternoon engaging discourse.

I would like to take a moment to thank our panelists, both those who are here today and those who have joined by Zoom. Our keynote speaker today is Maureen Ohlhausen, a partner at Baker Botts, in D.C., and the former FTC Commissioner and acting FTC Chair from 2017-2018. And also Fordham Law administration, especially Shanelle Holley and Morgan Benedit, our event coordinators, for their efforts in making today possible. The *Journal's* faculty advisors, Professors Caroline Gentile and Sean Griffith, my colleagues, for their guidance and support of the Symposium, and to Morgan Hagenbuch, the Symposium Committee, and the *Journal's* Volume XXVIII staff for their hard work in putting together and hosting today's event. I'm so proud that you've chosen this topic and put together such an amazing looking lineup and symposium. And now I'll turn this over to Morgan.

Morgan Hagenbuch: Thank you, Professor Lee, for the kind introduction, and once again good afternoon to everyone. As Professor Lee stated, I am Morgan Hagenbuch. I am the *Journal's* Volume XXVIII Symposium Editor, and I am thrilled to see so many of you in the live audience and on Zoom. I did look at the zoom attendance numbers and there are a lot of you, great to see you all.

Before we begin, I would like to take care of a few housekeeping matters. First, a few notes for our zoom audience, though I am sure most of us are Zoom experts at this point. You have been muted upon your arrival onto the zoom. You also cannot be seen. Your video and sound are all off. So, rest assured.

There is a Q&A feature on Zoom, on the bottom. We will reserve the last 15 minutes of both panels, as well as the keynote address, for questions from the audience. If you have a question, please submit it through the Q&A feature, and we will do our best to answer them, though note that time may not allow for us to get to all of the questions. Everyone should have received a final email that included a copy of today's agenda, as well as some additional reading materials, many of which are written by our wonderful panelists today. You can also access these materials by using your camera to scan the barcode on the screen.

Okay, now turning it over to the real opening remarks. We are honored to have a truly impressive panel of prominent practitioners and leading scholars here with us today to share their insights and expertise surrounding antitrust and big tech. In preparation for today's event, I watched a lot of videos from panels and conferences held by various law schools and competition institutes over the last few years. And, in nearly every single one of those panels, the moderator would begin by noting that the event could not be more timely, given all that was happening in antitrust at the time. So I, like those moderators, feel it my duty to tell you that this symposium could not be more timely. In all seriousness, it is a great time to talk about antitrust and big tech. Major lawsuits against big tech companies by both federal enforcement organizations are ongoing, new lawsuits are being initiated by private companies and state attorneys general regularly, and legislation aiming to rein in big tech continues to be introduced and debated in the U.S. legislature and in governing bodies abroad.

Today's symposium is titled "*The Battle with Big Tech: Analyzing Antitrust Enforcement and Proposed Reforms*," and it hopes to cover how we got to what seems to be a breaking point with big tech, and where antitrust enforcement should go next. Our first panel, titled "*How Did We Get Here? A Review of Major Antitrust Cases, Questions, and Controversies*" will cover some of the major tech antitrust cases in recent history, identifying some open questions and controversies that were created along the way. The second panel will then turn to the present day, discussing some of the major government cases against Facebook and Google, discussing the pros and cons of antitrust legislation currently pending in Congress, and debating whether full-fledged antitrust reform is possible or even desirable.[*]

[*] In the Symposium's second panel, titled "What's Next? A Discussion on the Desirability of Reforms," the panelists engaged in a discussion of some of the major government cases against big tech companies, considered pending antitrust legislation in the U.S. government and abroad, and provided their thoughts on where antitrust reform could go next. The panelists—each with a unique professional background—shared their insights on recent efforts to reign in big tech, identifying some of the challenges with antitrust reform and providing their perspective on the goals of antitrust and antitrust reform.

PANEL ONE: HOW DID WE GET HERE? A REVIEW OF MAJOR ANTITRUST CASES, QUESTIONS, AND CONTROVERSIES

Morgan Hagenbuch: Okay, I will now introduce the members of our first panel who we are thrilled to have in person with us today. Our first panelist is Professor Harry First. Professor First is the Charles L. Dennison Professor of Law at New York University School of Law. Professor First is a specialist in antitrust law and is widely considered an icon in the field. Our second panelist is Jonathan Jacobson. John is Senior Of Counsel at Wilson Sonsini Goodrich & Rosati's New York office, Considered one of the country's preeminent antitrust litigators and thought leaders, Jon has taken a lead role in many high-profile antitrust litigations, investigations, trials, and appeals. Our final Panelist is Professor Spencer Weber Waller. Professor Waller is the John Paul Stevens Chair in Competition Law, Director of the Institute for Consumer Antitrust Studies, and Professor at Loyola University's Chicago School of Law. Professor Waller is the author, co-author or editor of eight books and over one hundred articles on United States and International Antitrust, including Antitrust and American Business Abroad, the leading treatise in the field.

I think the panelists were sitting in that exact order on stage. I did not plan that. Okay, and with those introductions, I will kick off our first panel. Our first panel is titled, "*How Did We Get Here? A Review of Major Antitrust Cases, Questions and Controversies*" and, given that we're discussing major antitrust cases, I thought it appropriate to start with one of the most major cases in the last few decades. The *Microsoft* case.[1] Professor First, as I understand, you've written extensively on the topic, including a book. Perhaps you could start by giving the audience a brief overview of the *Microsoft* case, and why it's such an important case in antitrust history. Panelists please turn your microphones on.

Harry First: Okay, thank you, Morgan, and thank you all for coming. I want to thank Morgan for putting this together, and the editors and everyone else at the *Journal* who was involved, although I have a feeling they all left it to her to do, so we really want to thank her for doing

1. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

all the work and the Editor in Chief for sitting here in the front. No, I'm sure you worked as well. So, it was a great start to say, you know it couldn't be more timely, and then juxtapose it with, how did we get here? So, if we want to start at the beginning, it was then, with *Microsoft* that an antitrust conference couldn't have been more timely. So go back in time, a quarter of a century. I stumble on the number of years that this was. *Microsoft* was the last major monopolization case that government antitrust enforcers brought under Section 2 of the Sherman Act.[2] So from then—it was brought in 1998, the main case—until now, the cases filed in 2020, there's basically been a desert.[3]

So let's go back to *Microsoft*, get a little background of how we got here.[4] I used to like to tell my students that, or I did, that *Microsoft* was the antitrust case of the century. So, when *Microsoft* was being litigated, it was front page news. Actually, this is very rare. When you teach antitrust, no one was paying any attention to you at all until *Microsoft* came along. Then it was front page of the New York Times, the Wall Street Journal, the Washington Post. This was a big deal, so I would say this was the most important case, the antitrust case of the century. But the question really is—this is a way to frame how we think about it—which century? *Microsoft* and monopolization cases are litigated under a statute passed in the nineteenth century, the Sherman Act,[5] which forbids monopolization, or attempts to monopolize, hasn't been basically amended since 1890. So, we have the nineteenth century. *Microsoft* was about conduct in which Microsoft engaged in the twentieth century, particularly the last decade of the twentieth century, when it was the technological powerhouse of the day, and it was about its conduct at that time.[6] So we have the twentieth century. *Microsoft* was finally decided by the appellate court in the twenty-first century, and the remedy was carried out over the first decade of the twenty-first century.[7] So, the case of the century—the case of 3 centuries. An old statute, litigated in one century, decided in the next, with a remedy that was intended to go forward into the twenty-first century. So, this is, in a sense, the scope of what we're talking about.

2. Sherman Anti-Trust Act, 15 U.S.C. § 2.
3. *Microsoft Corp.*, 253 F.3d 34.
4. *Id.*
5. 15 U.S.C. § 1.
6. *Microsoft Corp.*, 253 F.3d 34.
7. *See id.*

A little idea of what the case was about: Microsoft had, at the time, a monopoly of the market, which was defined as the operating system for the personal computer, the Intel-based personal computer, not Apple. Put away all those little Apple icons that I see out there. Apple was not in the market for various reasons. It was Intel-based personal computers, and Microsoft had a monopoly, and its operating system was called, still is, Windows. Now, it had this monopoly, and it turns out that an operating system is not much use, except to run the printers, and so forth. But what's really of use are the applications, as we all know, word processing, financial applications, all those things. They had to interoperate with the operating system. Now, if you're developing one of those applications, you would write it so that it could interoperate with Windows. There was no other operating system to interoperate with. So, but of course, operating systems needed applications to be useful. So, Windows had all these applications written to it. Applications writers had nothing else to write to. So, if you wanted to enter the operating system market with something new, say, "hey, great, I've got a great idea. I've got a new operating system." But where are the applications? Well, no computer software developer would spend the money to write an application to your operating system because nobody else used it. They would be writing to Windows, and so then you couldn't enter. Now, if you didn't enter, no application writer would write to you, and there wouldn't be anything available for you to buy in terms of an application that was compatible, sort of the chicken and egg, as the District Court judge described it. So, this was [what] the government plaintiffs – there the Justice Department, 20 states, and the District of Columbia – described as the applications barrier to entry. This was why it was so hard to break into the operating system market and it was sort of the moat around the castle. You like that analogy? The castle, of course, being Windows, and you couldn't break in.

Now, along comes the Internet and a program called Navigator, owned by a company called Netscape. Navigator offered the possibility of a platform to which application writers could write, not directly to the operating system, but to that platform, and they also offered the possibility [that] the platform could be cross-platform with other operating systems, if they came into the market.[8] There were a few sort of technical ones, maybe more would come, who knows what would happen. And this Bill Gates was worried about. So, Bill Gates, in 1995, writes a famous memo

8. United States v. Microsoft Corp., 87 F. Supp. 2d 30, 39-40 (D.D.C. 2000).

called "The Internet Tidal Wave,"[9] in which he predicts—and it does it seem weird that no one knew how to use the Internet at one time, but that was the case—he predicted what was going to happen, that all computers would be connected to the Internet, and that Netscape might provide this platform which would make operating systems into a commodity. Who cares whether it's Windows, Shmindos, Doors, nobody would care. All they want really is the application.

So, Microsoft set out on what they called "the browser war." Get rid of Netscape. Now, Netscape was barely 6 months old when Bill Gates said, "oh, my God, we gotta do something about this!" And what they decided to do was, they were developing this internet browser called Internet Explorer. Anybody ever use Internet Explorer? They recognized that it was inferior to Navigator. There are emails to that effect. They knew it, but their way of competing was, guess what, we're going to bundle it in with Windows so, if you want Windows, and of course everyone who had a PC had to have Windows, then you get Internet Explorer. Well, at that point you didn't need a second browser. There were other reasons why you wouldn't want one or couldn't get one, and that would exclude Netscape. So, it was this bundling in of Internet Explorer and the Windows operating system that really was the core of the governments' complaint. There was other behavior in which Microsoft engaged, which included pressuring Steve Jobs and Apple—which was almost failing at that point—pressuring Intel, pressuring lots of companies to not do business with Netscape and to push them out of the market.

That's the basic government case. At trial, the District Court judge basically accepted almost all of the governments' complaints.[10] It was a little broader than that, but that's the core of it. The case went to the Court of Appeals, the D.C. Circuit, and it was heard by the full bench at the time, not just a three-judge panel, and that court accepted the core monopolization argument that what Microsoft had done was to willfully maintain its monopoly in the operating system market.[11] Now that court recognized that there might be problems in dealing with high tech. So, the court sort of mused about it. That court said at the beginning of their opinion, well, people say antitrust isn't up to this. Technology moves very

9. Memorandum from Bill Gates, Chief Exec. Officer, Microsoft, to Executive Staff and Direct Reports 1 (May 26, 1995), https://www.justice.gov/sites/default/files/atr/legacy/2006/03/03/20.pdf.

10. *Microsoft Corp.*, 87 F. Supp. 2d 30.

11. *See Microsoft Corp.*, 253 F.3d 34.

fast. There are all sorts of new economics that we're talking about, network effects and so forth. And the court said that's sort of interesting. We'll cite a couple of law review articles. Let's move on. There's no consensus on this, and we can apply standard antitrust principles, and that's what the court ended up doing. So that was one issue.

The second issue is, what was the harm? And this, I think, is an issue that we're going to talk about as we think about how the problems with tech have developed. So, Netscape was at the beginning. This was this Bill Gates's fever dream, you know. Was this really a threat? Was anyone harmed? Did prices go up? Never any proof that prices were affected, or output affected. But the court said, look, quashing nascent competitors is harm enough. And the District Court after trial said, we don't know what would have happened. We don't know that Netscape would have developed into this big cross platform thing that would have displaced Windows. Who knows? We can't make a finding on that. So it was this harm to nascent competition, and I'll read you this quote from the Court of Appeals opinion. "It would be inimical to the purpose of the Sherman Act to allow monopolists free rein to squash"—like a bug squash—"nascent, albeit unproven, competitors at will, particularly in the industries marked by rapid technological advance and frequent paradigm shifts."[12] So particularly in high-tech industries, we have to make sure that disruptors are not squashed at the beginning. Use whatever metaphor you like, strangled in the cradle, another awful thing, but before we know for sure they're going to be good competitors. It's enough that that the dominant firm, the monopolist, squashes them and cuts out this disruptive competitor.

Microsoft didn't solve all the problems. Maybe we'll talk about remedy. There were remedy issues, and new issues have come up between then, 25 years ago, basically, and now. But I'll turn it over to our panel to discuss some more of those with *Microsoft* as a little background.

Jonathan Jacobson: Let me dive in. Microsoft did a lot of bad things. There was an email from a fellow by the name of Paul Levitz, saying, let's cut off Netscape's air supply. The principal violations were exclusive dealing agreements with OEMs like Dell, and with internet service providers, and those really succeeded in keeping Netscape out of the market. Now I need to give a disclosure. I represent Google, Twitter, Netflix, all of the companies that we're talking about, except Microsoft. In fact, when I first started representing Google many, many years ago –

12. *See id.* at 79.

2006 – it was to protest Microsoft's violations of the final decree in the *Microsoft* case. So, I've never been friendly to them. I also had a debate with some of their lawyers at a conference where they were talking about why the case should be dropped, because the antitrust is just not able enough to deal with issues in the new economy. And there's an article in your materials that that I wrote saying, basically, BS to that.[13] Antitrust is flexible and supple enough to handle even new economies. There's some really good things in the *Microsoft* opinion. It lays out a structured rule of reason approach to Section 2 analyses that has been widely adopted ever since. At the end of the day, it was a victory for the government in a very important case. It would have been a terrible signal to the business community if [the Department of] Justice had lost such an important case. It would be very difficult for Justice to get back on track.

But, in my judgment, there was material failure in the case. And what was really happening [was] well, Netscape was proving to be a great browser. Internet Explorer was a terrible browser, still is. Actually, it's been deprecated now, so you can't even get it. And what was really happening was the monopolization by Microsoft of a browser market. Unfortunately, the government did not elect to prove the metes and bounds of a of a browser market, and so the D.C. Circuit said, no, we are not going to allow you to proceed on that basis. But to me, the main failure in the case was the remedy. The remedy issued by the District Court would have separated the operating system from the applications and, for the reasons that that Harry gave, that was a very good solution, because the applications were the barrier to entry into the operating system market. So, divesting one or the other, either the apps or the operating system, would have been a major fix to that problem. And the way the D.C. Circuit approached it, particularly rejecting the browser monopolization claim, really sealed the deal on that. And the result was that Internet Explorer continued as basically the only browser that you could use for the next 10 years. It wasn't until Firefox and Chrome came out that you really had competition in browsers, and Microsoft maintained that browser monopoly for many years. Anyway, Spencer.

Spencer Weber Waller: Hi, everybody! It's great to be back at Fordham. Thanks to the *Journal* and Morgan, and the school. You guys have a proud antitrust tradition. It's lovely to be a part of a continuation of that. I have a couple of disclosures I have to make. In addition to my

13. JONATHAN M. JACOBSON, *Do We Need A "New Economy" Exception for Antitrust?*, pp. 89-93, Fall 2001, *available at* https://www.wsgr.com/a/web/180/jacobson_neweconomy.pdf

academic role, I'm on leave from Loyola this year, and I'm serving as a Senior Advisor to the Chair of the Federal Trade Commission. As a government employee, I am compelled to tell you that I am not speaking to you in my FTC hat and speaking to you in my Loyola hat. In addition, obviously I can't talk about any non-public information. And these views are my own. They don't represent those of the Commissioners, the staff, or anyone else associated with the Commission.

Microsoft is publicly available information. We have a record of 20 years, and I've got some thoughts about it. I think it is a well-crafted, but fundamentally conservative, opinion. You had a unanimous and anonymous per curium opinion by the D.C. Circuit. Like the *Alcoa* case[14] in the 1940s, you have a canonical appellate court decision, but it's not a Supreme Court decision. Having spoken to people who clerked on the court in that era, general consensus is that the principal, if not nearly exclusive, author of the opinion, is an antitrust expert by the name of Douglas Ginsburg, who continues as a senior judge on the D.C. Circuit, and as a professor at George Mason.

He was my boss when I was a junior lawyer, and turns out our mothers were friends, so it was a very interesting connection. So I view that this opinion was very well-crafted, but a conservative enterprise. I don't mean in the political sense, but small "c" conservative. It seeks to rationalize and organize all of antitrust around a principle that, I think, is too limited, in particular for the topic we're talking about today, which is the rule of reason. The opinion, as has been mentioned, goes out of its way to say Section 2 is a separate animal, but it is similar to Section 1, and in general we will follow this approach, which is: the plaintiff must show the likelihood of harm. The defendant can rebut that with various types of evidence, the plaintiff can either disprove or show that those justifications are not legally relevant or cognizable, or a pretext. And then, if you get through all of that, theoretically, a court would then balance the likely harm against the likely benefits, although in the real world very few courts, including *Microsoft*, ever actually got to that balancing. So, as our speakers have said, the government won on most, but not all, of the allegations, and Microsoft offered a series of justifications that were largely implausible, or just facially irrelevant legally, or just dumb factually. And so, when you read the opinion, follow the bouncing ball. The government has to show some likelihood of harm. They do most of the time—occasionally they don't, and that part of it is thrown out—and

14. United States v. Alcoa, 148 F.2d 416 (2d Cir. 1945).

the defendant has to say something, and then the government basically says that's impossible, that's ridiculous. And the court agrees 90 percent of the time, which means the Justice Department wins on that stuff. And every once in a while the court says, yeah, that justification is rooted in sort of some technical things about how to make things work and security for the operating system. And so they, Microsoft, got off on those counts.

Part of my concern is that there are lots of parts of the antitrust laws that textually are a reaction against, and different from, the rule of reason. And if you attempt to lump all of antitrust into a rule of reason, you get a balancing in almost every kind of case, even where Congress has said they're not that interested in balancing, and they have other tests – either bright line tests, or things about probability and tendency – rather than a proof of harm.

I think it's a thoughtful case. I think it's well written. You can read it instead of reading a whole case book. You'll get the gist of a lot of antitrust law from reading this long opinion. But I think, as a professor, it's weird to teach three or four different statutes that state different things, and then read a court opinion that basically says, well, all those different words at different times by different congresses trying to accomplish different things all mean the same thing. So it's a little too rule of reason-y for me. But I think it's right on the nose with respect to nascent competition theories.

And just talking about things in the public record – as many of you know, the FTC is currently litigating two merger cases that have substantial nascent competition elements to them. I'm not involved in any of those cases, but you can read about them in the newspaper. The acquisition, some years ago, by Facebook of Instagram and Whatsapp are primarily a nascent competition theory. They saw a potential broad-based general social networking rival out there. And the theory in the case is that they acquired them to keep it in inside the family instead of an outside rival. It's not very different from the series of cases that Professor First has already talked about. And similarly, another challenge the FTC currently has, based on a similar theory, of Microsoft acquiring a virtual reality company that, again, is based substantially on nascent/potential competition.

A couple of other things. What is this notion of justifications? I think the court got it right that the defendants can say various things at different stages of a proceeding. If what they say is legally irrelevant, of course it doesn't count, and they should lose. If what they say is just factually nonsense, they should lose. But even so, I think what *Microsoft* got wrong is this notion that anything you can say with a straight face that has a threat of factual plausibility may be enough to win. I think lower courts have not done a good job when we've shown a substantial likelihood of harm and a little tiny justification. Often times, lower courts jump to the conclusion that that's enough, and the defendant wins at different stages. I don't blame *Microsoft* for that tendency, but it's part of a pattern that that concerns me.

Finally, two things on remedies. One is, it is certainly unusual for a court to order the actual structural break-up of an integrated company. *Standard Oil*[15] goes all the way back to 1911, was mostly a series of acquisitions that you could undo by undoing those acquisitions. Instead of having 11 or seven oil companies, eventually you had one. They were broken up into their constituent parts, for better or for worse.

Alcoa,[16] in 1945, had a monopoly on aluminum production. But guess what? The government owned some aluminum plants because of World War II. They just sold them off to other people, and presto, you've got three competitors instead of one. And when you got rid of the international cartel that kept the Canadian version of *Alcoa* out of our market, you eventually got a fourth competitor.

So the only other major monopolization case of major national import that broke up a company was the settlement in *AT&T*,[17] which was very much along the lines of what would have happened had the government prevailed on that aspect of the remedy in *Microsoft*. They separated the regulated part, the local phone service, from all the unregulated stuff, so that AT&T could not use its legally regulated monopoly to prevent competition in these nascent developing markets, like long distance, and cellular, and all these other things. That was done by agreement and it was a major undertaking that was done first, pursuant to a single district court with a couple of court clerks, and a few extra staff and litigants for 13 years, executing that process until Congress eventually passed the Telecommunications Act of 1996.[18]

The remedy in *Microsoft* was limited to behavioral change. The exclusive dealing clauses were eliminated. Certain bundling was undone in a clumsy way, it's not worth getting into. Who won, who lost? If Microsoft's goal was to do anything in the real world, as long as it didn't

15. Standard Oil Co. N.J. v. United States, 221 U.S. 1 (1911).
16. *Alcoa*, 148 F.2d 416.
17. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).
18. Telecommunications Act of 1996, Pub. L. No. 104-104, sec. 305, 110 Stat. 56 (codified at 47 U.S.C. § 609).

have to break itself up, then it won. On the other hand, being under the antitrust microscope may well have caused Microsoft to be cautious enough with respect to emerging internet competition that companies like Google and others had the breathing room, the space to become more than nascent competitors, to become actual competitors. And if you look at it from that perspective, then indeed it's a great success and a roadmap for cases to come.

Jonathan Jacobson: So let me respond a bit. The balancing test articulated in *Microsoft* does have the potential to be too defense friendly. If as, and I agree [with Spencer], most lower courts have said, "okay, you can fog a mirror on a justification, you win," that's really not good competition policy. But *Microsoft* is helpful in one respect. There were pre-*Microsoft* precedents, a major one being a case called *Oahu Gas*[19] in the Ninth Circuit that said, if there's evidence of justification, that ends the case. And *Microsoft* at least said no, it doesn't end the case. You have to balance the harm against the justification. [I] agree that the lower courts can do a much better job than they have.

Let's talk about nascent competition and potential competition cases. So the antitrust laws do deal with potential competition. There's a potential competition doctrine – actually, two of them – under section 7 of the Clayton Act.[20] But what the Supreme Court did in a case called *Marine Bancorporation*[21] is basically make potential competition cases impossible to bring. You have to show that there are very few potential entrants that the result of the acquisition is to prevent deconcentration that otherwise would have occurred. Just a very, very high burden. And since *Marine Bank* in 1974, there has been a total of one government victory in a potential competition case, a case called *Brunswick Yamaha*,[22] brought by the FTC some years ago. So potential competition has been put in a much too small box, and the look at nascent competition mergers by the agencies has the potential to be helpful. But the agencies need to be careful, because when a company like Apple or Google, my client, or Microsoft buys a small company that really has not done much with its product, and is able to integrate that into its product and provide additional benefits to consumers, that's a good thing. The antitrust laws, historically, at least over the last forty years, have been based on what's good for consumers. There's some nonsense out there that says we only look at

19. Oahu Gas Serv. v. Pac. Res. Inc., 838 F.2d 360, 368 (9th Cir. 1988).
20. Clayton Act § 7, 15 U.S.C. § 18.
21. *See generally* United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974).
22. Yamaha Motor Co., Ltd. v. FTC, 657 F.2d 971 (1981).

price effects. That's just not true. We look at quality and innovation under the rule of reason as well, but the agencies need to be careful. And there's a case that the FTC brought before its administrative law judge, *Illumina Grail*,[23] that involved new technologies in healthcare, and immunology, and the ALJ rejected the case. We'll see what happens to it at the Commission level. The deal's been blocked by Britain's CMA, Competition and Markets Authority, so that that may be the end of it. But I do think there's a danger in pursuing nascent competition mergers too aggressively. I think we need some sense, maybe not a full probability, that the firm is going to have a material positive effect on competition before we block the deal, because the potential benefits of integrating a start up with an established technology company can be enormous, and we should not let those consumer benefits die by the wayside.

Harry First: So let me see if I can pull together some of these threads. What did you say the topic was, how did we get here? You know, not by taking the subway, but how did we get [here]? So I don't know if any of you took a gap year at some point, so antitrust took a gap year. It's 20 years, actually, in monopolization. It sort of took off 20 years, and in merger law it hasn't quite taken off. The Supreme Court has taken a longer gap year when it comes to merger law, they haven't really looked at, reviewed, mergers under Section 7 of the Clayton Act since 1975.[24] We won't compute how long that is. But when Jon says, "oh potential competition is in a smaller box than it should," the case he cites, of course, is from 1974, and who in the world knows exactly where this is going to go, and who knows exactly how the courts today are going to deal with *Microsoft*. I think that is an interesting question to think about, and for that I think we have to think about how the tech problem, in a way, has evolved since *Microsoft* and the kinds of challenges that the courts now face. And it does tie in a little bit to our discussion of nascent competition, but it also ties in to why, all of a sudden. have we revived interest in this area of the law. Now, as a semi-footnote—academics love footnotes, as do law reviews—the cases that I think are going to be discussed in the second panel against Google and Facebook are not surprisingly brought in the D.C. Circuit. Why? Because of *Microsoft*. It's the most friendly case to government plaintiffs you could find, because there haven't been a lot, and the government won. So that was a good spot. One of the

23. *See generally* FTC v. Illumina, Inc., No. 21-cv-873, 2021 U.S. Dist. LEXIS 75172 (D.D.C. Apr. 20, 2021).

24. Clayton Act § 7, 15 U.S.C. § 18.

problems that's sort of an ongoing problem is that it was not friendly on remedy. And we'll see how this works. But when the Court of Appeals got around in 2004 to reviewing – it's very complicated procedurally – but, basically, reviewing the remedy, the court stressed that the remedy had to be tailored to fit the wrong. So the remedy that Jon liked and I liked—I forgot my disclaimer. I was head of the New York State Antitrust Bureau for part of the *Microsoft* litigation. Everyone should have a disclaimer, right? And so I was not involved in the trial, but in some of the appeal stuff.

In any event, the remedy that the government plaintiffs sought, splitting Microsoft in two, was never adopted, and the Court of Appeals was actually pretty negative towards this sort of remedy given the record that the government had produced at trial. So a notion of tailoring to fit the wrong, whereas if you look at other Supreme Court opinions on remedy, they're generally pretty broad – you're supposed to bring competition to the market. That's what the judge is supposed to do. So we have yet to see how that will play out. But getting back to how things may have developed, and the question about nascency. Of course it is correct that the big tech companies are not completely evil, so I'll accept that from Jon, and that some of the acquisitions, they make a lot of acquisitions, and certainly a lot are good. The question is, which ones do we have to be worried about? Now over time, in the stretch between the *Microsoft* case and now, one of the big things that's happened is our economy has changed.

So, although *Microsoft* was important, if you look at the five largest U.S. firms by market cap in 2006, it was General Electric, Exxon Mobil, Citibank, another bank, oh, and I'm sorry—Microsoft. That's 2006. Go forward a decade, 2016. What are the top firms? Apple, Google, Facebook, Amazon. Oh, and Microsoft. If you look at the top firms by market cap today, the only one of that group that's not there is Facebook. But Microsoft is second. So what does this tell you exactly about remedy? And Microsoft was forced to compete. So Steve Jobs, by the way, met with the head of the Antitrust Division in 2000 and said look, just keep them tied up in litigation, Microsoft, you keep them tied up in litigation. We'll just innovate around them. That's all we want. And I don't know what the other side of that conversation was. This was in Walter Isaacson's biography of Steve Jobs. Just keep him tied up in litigation. And then Steve Jobs comes out with a turquoise computer, and it's all history. So that's one approach to remedy. But Microsoft has not exactly vanished, and one of the most profitable divisions, not quite the most profitable, but one of the most profitable divisions, is Windows.

What are we going to achieve? I hope you'll ask the people in the second panel what's going to happen with this litigation. But in the years between 1998, when the *Microsoft* case was filed, and 2020 when these cases were filed, there's really been a structural change in our economy, from the manufacturing economy to the economy that was starting then, which was called the "New Economy." Now it can hardly be new, I don't know, the high-tech economy, big tech platforms. The world in which we live in, a world in which big tech seems ubiquitous. As you all know, hard to run your daily life without running into these companies, so this may explain our interest, our fascination, with big tech, why we're going after it. There's another aspect of how things have changed, or maybe it's not changed, but it relates to this nascency issue. So people have observed that these major companies, and this is a difference from Microsoft, have grown through acquisitions. So if Microsoft were today, Microsoft wouldn't have squashed Netscape, they would have acquired them. Hey, end of problem. In fact they tried to run some sort of a semi-acquisition with them, which Netscape turned down.

The FTC did a study in 2021 of acquisitions by the big five, the GAFAM, Google, Apple, Facebook, Amazon, and Microsoft.[25] Acquisitions that were not notified to the government because they were too small, they fell under the thresholds. So they found, in a ten-year period, about 600+ acquisitions were not notified.[26] And this was not, this excluded acquisitions just for the talent, you know, where you acquire someone's company just because you want the people.

Jonathan Jacobson: Well, most of those deals, though, are just that.

Harry First: No, no, no. The 627, according to the FTC study, it's not acquiring for talent. I mean, it's not just that. Of course you are acquiring talent, but there may be other things.

Jonathan Jacobson: Right, so we've done most of those acquisitions, we've done hundreds of them, and I can tell you that most of them are for talent.

Harry First: So, this is just Google or all of the five?

Jonathan Jacobson: Google and Twitter.

Harry First: Twitter is not in this.

Jonathan Jacobson: And neither is Netflix.

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25. FTC, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010-2019: AN FTC STUDY (2021).

26. *Id.*

Harry First: No, this is just GAFAM,[27] because the idea was to see, well how many aren't we seeing? So that was the first thing. There are other studies which seem to indicate that the pattern of acquisition is in adjacent markets, not in your own market. So this is consistent with ecosystems, a word that just started to surface in the *Microsoft* era, but is now the word we love. Metaverse is coming. That's the next word we love. But now, ecosystems. So adjacent markets, smaller acquisitions, and young firms. So also, one study shows that, as opposed to other acquirers, GAFAM acquires firms that are newer. So this obviously makes a problem for the law in predicting. You acquire a young, small firm, not in the market, not a competitor. What tools do you have under antitrust to say that's anti-competitive? This is a challenge. The reason why it's a challenge for these industries is this ecosystem effect, which you all know, right? So Amazon's acquiring iRobot. What does [iRobot] have to do with Amazon? Well, everything, if you believe in the Amazon ecosystem. Nothing, if you believe in separate markets as antitrust has. So this is the issue, and it does come to the case that you reference, the Within case.[28] How many of you do virtual reality? How many of you have those headsets? Oh, you're ahead of the Metaverse. How many of you know what the metaverse is? Well, good. I was listening to a webinar yesterday, and the first thing they said is, you know, we really have to define the Metaverse. Because it was an hour, and everyone said, we have no idea what the Metaverse is. So, you should have been on to answer that exactly. But we have this company now called Meta. You know what it is, even if they're not making any money at the Metaverse. So they acquire this company, called Within, which is a virtual reality fitness app that you subscribe to. Meta, formerly known as Prince, no, formerly known as Facebook, is not in this market, so there's no loss of competition there.

Jonathan Jacobson: Well, they have Oculus.

Harry First: Well, they have the headsets, but they're not in the market. So that's like saying, If you own the telephone – telephones? Who has telephones? If you own the handset that you're in the search market. Anyway, I have to think that one through, but they're not directly in the market—

Spencer Weber Waller: Maybe you're the operating system, and it's an application.

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27. GAFAM is an acronym for five popular U.S. tech companies: Google (Alphabet), Apple, Facebook (Meta), Amazon, and Microsoft.

28. FTC v. Meta Platforms, Inc., No. 22-CV-04325 (D.C.C. filed Aug. 19, 2021).

Harry First: Well, so yeah, Netscape. So, great – to bring us back to *Microsoft*, because that was not an acquisition, and it was the theory, at least one of the theories, put aside the browser market, was that it was protecting the operating system market. So here they're not protecting any market. They are extending the ecosystem and, in the complaint – I'll read, one of the lines in the complaint where they plead. Let's see, I have this here sort of as a throwaway: "It would bring Meta one step closer to its ultimate goal of owning the entire metaverse," since, of course, experts don't know what the Metaverse is, or how buying a fitness app is going to do this. But this is in the FTC's complaint, which they filed in the federal district court over this acquisition in a market in which they don't compete now. But the FTC says it's potential competition. Maybe they would have entered, or maybe there was fear that they would have entered, so they had some effect on it, trying to use the potential competition doctrines from 1974. But, if they really stick with that, they're going to have a lot of trouble. But I don't want to argue the case itself so much as the problem. So, we've come from a fairly well-defined competition problem and a well-defined, in a sense, "market" to a much more expansive world where we have these platforms that have ecosystems around them, maybe at some point Metaverses around them. And how do we think about those? This is the progression from *Microsoft* to today. So how did we get here?

Jonathan Jacobson: So let me interject a bit, and then I think we need to move on to *Amex*, we're fairly late in discussing it. My issue with the assault, and it is an assault, on tech. It's coming from the Justice Department, coming from the FTC It's coming from at least one side of the aisle, maybe both sides, in Congress. My issue is that, if you put aside the promotion of Donald Trump's tweets, and all of the silly stuff that's out there on Twitter and Facebook that is potentially really damaging to our democracy, I want to put that aside for just one minute. What else has tech done that is bad? Is search bad? Can you not find things using Google? Do you feel that you have to switch to Bing, a worse search engine? Same thing with most of the tech companies. With Apple—has Apple done bad things with IOS? Is the Mac a bad computer? Is the iPhone a bad thing?

Think of all the advances that tech has brought to us that make our lives so much better. And the easiest way to do this to go back and play a movie from 1997. You will see the world is completely different. Any time before the iPhone is a completely different world than we have today, and I will express my personal view, since I have one in my pocket, that the introduction of the iPhone and the advances that the big tech companies have made, social media aside, have been tremendously beneficial to the public, and that if we proceed against them on a mere theory of "big is bad," which really, when you get down to it, is what is going on at the FTC, the DOJ, and the House report on New Tech and antitrust. If you just, you know, dive down into it, tech has produced wonderful benefits to our economy and our society, and we are at grave risk if we prevent those benefits from coming to bear in the future. Do I think something needs to be done with content moderation on the internet? Absolutely. But that's a different issue than the antitrust issues.

Now, one of the things we're supposed to talk about, and I'll do it briefly, is *American Express*.[29] *American Express* does a number of things. Number one, it lays out under Section 1, a structured rule of reason consistent with the *Microsoft* case. It also says that the evidence of justification can be important, but what it also does, it says in the credit card context, the market can't be your dealings with merchants. It can't be your dealings with customers. It has to be both. And why is that? Because ultimately what Visa, Mastercard, Discover, and Amex are providing is the ability to consummate a transaction, and that requires the simultaneous participation of the merchant and the simultaneous participation of the card holder. And what the credit card companies do, ultimately, is connect those. So, the issue in *Amex* was that, if you lower the rewards to consumers, you're going to have less use of the card. If you increase the price to the merchant, you're going to have merchants who don't want to accept the card. So, how do you balance this? And the Supreme Court says, well, you have to look at both sides of the market in this context. Now, there's been a hue and cry from a lot of people that this will give big tech immunity. That's simply not the case. There are very few markets that are like the market in *Amex*, that are transaction markets where you have to have the simultaneous participation of both sides for a transaction to occur. So, most of the proceedings against the tech companies are going to be validly based on one-sided markets. I think most of these challenges are unfounded. But I don't think *Amex* is going to be the big wall of defense that that people think.

Morgan Hagenbuch: If anyone has anything to add on that, feel free.

Spencer Weber Waller: I think Jon and I approach this similarly. I'm a little more skeptical of that decision. It's a five-to-four decision.

29. Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

You should read it. It's complicated. I think they got sold a bill of goods by the defendants. But I can see theoretically what the court is talking about. The real danger is companies trying to argue, with a straight face, and with the help of an economist who's comfortable making testimony under oath, that non-tech markets somehow fit within the two-sided mark. And I can tell you what the problem is, and why they're so eager to do it.

One is—and I'm not claiming anyone specifically made this argument, but an argument would be and it's a terrible argument—that a supermarket is a two-sided market, because it unites manufacturers of food with people who buy food, and in return the supermarket takes a percentage in the form of its profits and certain other fees, and that's just nonsense. It's just a market. The other harm is, there's a debate within antitrust as to whether countervailing benefits or justifications, as we've been talking about, whether or not these things count. Or, if they're outside the market where the problem is. So I can give you an example. It was an old Supreme Court case from the sixties, where a couple of very large Philadelphia banks merged, and the government sued.[30] And the Supreme Court back then, much more antitrust friendly, said there's a presumption of harm. The market shares are above thirty percent, and there are other reasons to be worried about this. And the defendant said, "oh, you don't understand. We did this to, in part, be able to compete with even bigger banks in New York, and when you think about the checking services and small business, the market is really local, at least it was at the time. So there's a Philadelphia banking market, a Chicago, and a New York one. They basically said, we have to just get big, so we can compete for the super gigantic loans. The Supreme Court said the government has shown harm in the Philly market, and you're trying to say it's justified by some arguable benefit in another market. Nope, you can't do that. And the trick with two-sided markets, particularly if other things get sucked in that are of the kind that Jon is talking about, is that the move will be a defendant, saying, "oh, no, no, no, I'm not arguing that it's an out of market benefit. I'm arguing that the nature of this market is [such that] you have to balance the pros and cons of the different parties in a market." And that's a really complicated thing. You can imagine a merger or other situation where some proposed transaction or some way of doing business does create a harm for one party, and benefits for another. It could be that labor gets screwed in a merger, and consumers save a few pennies, because the factories are slightly more efficient after the merger than

30. *See generally* United States v. Phila. Nat'l Bank, 374 U.S. 32 (1963).

before. Something like that. And I think the case law says a harm of any reasonably likely tendency, harm to any party is sufficient, and I am concerned that both *Amex* will be misapplied, and be that opening wedge to argue that all asserted countervailing benefits and justifications, no matter who they help versus separate groups being hurt, will somehow start to leak in more than the current case law allows.

Jonathan Jacobson: So I think you've identified, really, what is the critical issue underlying *Amex*, which is out-of-market effects, and I come out somewhat differently. I think *Philadelphia National Bank* needs to be narrowed for the reasons we were talking about earlier. We don't want to have a rule of reason case where there's a trivial justification, and a large anti-competitive effect. And you go, "oh, well, there's a justification, case is over." So we don't want to do that. But, for the same reason, we don't want to say if there's a trivial, harmful effect in one market with major competitive benefits outside that market. That's a deal that, ultimately, we should allow, and law, I think, needs to be flexible in that regard. And I think the real message of *Amex*, as we go forward in the future, is going to be consideration of those effects. There's nothing in the opinion to support that, absolutely nothing. But I think that's the way that we're going.

Spencer Weber Waller: Harry, can you break the tie?

Harry First: So *Amex* is one of the worst opinions ever written by the Supreme Court. I have no further comments. No, it's hard. It's hard to support that case. And I won't try to criticize it. There are a lot of reasons to criticize it, including the fact that it was just factually untrue. Amex raised their fees to merchants by quite a lot – billions – and never passed a penny on to consumers on the "other side," so it didn't seem to disturb the court which is disturbing. So the question that *Amex* does raise, and which Jon raises, is the discussion of out of market [effects]. Of course, you should realize this is a construct that antitrust has imposed based on how economists have thought about competition in markets. So, it's out of market because we've defined markets in a certain way. And *Amex* defined them differently, so it wasn't out of market. Oh, great! Then we don't have to deal with that issue. The Europeans, on the other hand, aren't bothered particularly when they see economically that there are businesses where there's some sort of two-sidedness. They try to take account of it in some way, without getting caught up on either end. So maybe that's, in a sense, where you were going with that, Jon.

Jonathan Jacobson: Before changing law firms, Amex asked me whether they could do those price increases that you're talking about, which were still going to put them on par with the increases that Visa was making, and I said it's okay. Because Amex had 24 percent of the market at that point in time and didn't really have market power. But the reason that Amex imposed this rule that you can't discriminate at the point of sale was that Visa had a campaign years ago to basically drive American Express out of business, and to persuade merchants to reject the American Express card because of the high discount rate. Now that is competition, but Amex imposed, and started to enforce, this rule in its merchant agreements, to defend itself from being put out of business by Visa. And in the mid 1990s, that was actually a serious risk for American Express. So I thought they had a good defense on the basis of self-defense, basically, and my advice was not given on the basis that the market is two-sided.

Harry First: Interesting. So, this is a good lesson to everyone. Think of many different approaches. Seriously. There's not just one theory. In the end, the two-sided market theory gets accepted by the Court. But the question I want to raise, though, and that is lingering is, what's the impact of *Amex* going forward. So Jon has taken what I think many antitrust lawyers take, because everyone hates the case, that it's just limited to clearly transaction platforms. A categorization that the court gleaned from one paper, and [one] that was not exactly well accepted in the economics profession. But okay, there's some intuition behind it.

Jonathan Jacobson: That's not right. There was stuff by Ben Klein, by David Evans, by Dick Schmalensee. There were a couple, David Evans even, I mean he—

Harry First: He would talk about two-sided platforms, but not two-sided markets. But let's not get fully into the weeds on this. The question is, is it confined as I would like it to be and, as Jon suggests it should be? Or will it have application to the cases that are now pending, which all involve platforms and which involve consumer-facing behavior and business-facing behavior on advertising and the blessed search engine that we all love? Although of course you use DuckDuckGo because there's much better privacy. Okay. But not Bing. Bing is Microsoft. So, anyway, the question is, will it have application there? And so far it doesn't seem to have. Well, we have raised—

Jonathan Jacobson: But some of the markets are going to be found to be two-sided. There are some transaction platforms in these cases. I don't want to get into it, but there will be some two-sided.

Morgan Hagenbuch: Okay, I actually want to turn our attention a little bit to a different question. We only have about 10 or so minutes left, and there is one thing I want to touch on that is sort of related. And you mentioned Europe. We are, of course, today talking primarily about U.S. cases. This is U.S. antitrust law, but it's always worth taking a look around the globe, since these are global companies. The U.S. has occasionally been criticized for its "lax" antitrust approach, which has lagged behind our international counterparts. And I want to ask Professor Waller, as I know he's written a bit about this, do you think that we should be looking to keep up with our international counterparts? Or do we think there is some benefit to sticking with our long-running approach?

Spencer Weber Waller: So I have been as forceful an advocate as I can for the notion that, if we are looking for tools to deal with the unilateral abuse of economic power of different kinds – whether it be in tech or someplace else. Unfortunately, for Section 2 of the Sherman Act, the cupboard is mostly bare in the United States, and the rest of the world has developed a series of tools that I think would be helpful for us to understand and apply in various contexts, and in most cases have to be applied in a specific case. You've got a theme that I just want to draw together, which is: if you're looking to implement lasting progressive change in antitrust in the United States, right now the biggest barrier is going to be first, the current composition of the United States Supreme Court. I don't even mean this, particularly as a political comment. A bunch of these cases that have restricted the scope of Section 2 that have come from the Supreme Court, and other things they've said that have narrowed antitrust, have not been on Republican/Democrat or Conservative/Liberal. As much as there's many things to admire about Justice Ginsburg and Justice Breyer, they often were on the majority side of cases that restricted different antitrust theories, one of which is the 2004 case called *Trinko*,[31] which I think is actually much, much worse than *Amex*. It has to be one of the worst cases of all time, because the case basically says monopoly is good. It provides the incentives to do cool things. Therefore, according to the Court, why would we want to apply it to a company that's clearly breaking the law, even though it also has certain regulatory requirements. The rest of the world has come to antitrust somewhat later than we have, and in many cases that has given them an advantage, whether it's the European Union that dates back to the 1950s, or other jurisdictions that are newer that came about following the fall of the Soviet Union or political movements in their country. And so the United States has spent a lot of time lecturing other countries do it our way. And I'm not sure how persuasive those arguments are anymore,

31. Verizon Commc'ns Inc. v. Law Offs. Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

and I think it is useful for the United States to listen and learn and make change.

And so, if you want one example of the isolation of U.S. law, particularly with respect to monopolization, it's that we have an 1890 statute that bars monopolization, attempted monopolization, and conspiracies to monopolize. Most of the rest of the world has tools to deal with anti-competitive agreements, like we do in Section 1, unilateral conduct like Section 2, and mergers.

But for unilateral conduct they tend to prohibit the abuse of a dominant position. And obviously there's a lot of cases that you've read, if you've taken antitrust, that really define each of those words in the US law and their foreign equivalents. But it really, really matters. I will give you one small example, and I've laid out more in some of the materials that are in in the course packet. For example, it is relatively uncontested that Section 2 of the Sherman Act, by itself, does not prohibit high prices or excessive prices. It's why, every time there's an energy spike in prices, the FTC or the Justice Department gets hauled in front of Congress, and they start yelling at the agencies, "what are you going to do about this?" and the answer is, there's not much they can do about it if there's only a high price.

The abuse of a dominant position, in the text of Article 102 of the European treaties and the various international countries that have adopted something similar, generally speaking has a textual provision that talks about unfair and abusive pricing. And that can be either predatory pricing, where you price low to knock out a competitor, and it's easier to recover under foreign law (it is almost impossible [in the U.S.] under a 1990s case) or excessive pricing, where *Trinko*, among other cases, says you can't do it under the U.S. antitrust laws.

In my submissions to the House Committee on Big Tech, I laid out the difference on a bunch of different theories, and so we are isolated from the world community, and others can disagree as to whether a specific thing that is done somewhere else is good in the American context. But again, I think we are talking about companies that are global in nature, and already have figured out how to do business in countries in big jurisdictions like the EU and China (which has a vibrant antitrust law), where the rules are a little bit higher, and I'd like to see more attention to that. I'm not saying rewrite those words into U.S. law. I personally favor it. But I think that would open the door and enrich our toolkit. I just want to close with: we live in a world – and I think Harry brought this up – where this one merger, involving Illumina and Grail was ultimately abandoned, not because the U.S. did anything about it. It was abandoned because the Competition and Markets Authority of the United Kingdom found it to be a violation of their – now that they're not part of the EU – national competition law.

And that's heavy stuff. That's not something that U.S. businesses really had to deal with before the 1990s, and it's increasingly part of the landscape. And I'll close my remarks, as I know time is no longer our ally, but it might be a bridge to the next panel, which is a slightly different theme. When you're looking at this, think about any particular problem, whether it's big tech or some other industry. You think there's a problem. What is the remedy that, if you're right, if you can find the legal theory, what's the remedy you want? If you think the problem is, there's a company that has strong positions in two different, related markets, and it's using its dominance in one to favor itself in another, something like that. If you think the solution is structural separation – you can own the pipeline, or you can own the oil, you just can't own both – maybe Section 2 isn't the right tool to get that, given our history. Maybe you want legislation. Maybe you want something like the Digital Markets Act[32] that Europe has, or other things in different countries. If you think the problem is, for example, just to take a non-tech thing, if you think the problem is hearing aids are too expensive, then the solution is actually get the FDA to take them off of prescription and have them be available over the counter. So all I'm suggesting is, when you look around the world and you look at the problems that we're analyzing today, expand your horizon outside the United States, but also think about the remedy. If the if the goal is [to] get consumers compensation for bad things that have happened to them, then your goal in the United States has to be support private enforcement, not government action, because that generally doesn't put money back in the hands of consumers. So I hope you just, again, look at both of those broader perspectives as you think about our panel, and what I understand you're going to be doing in the next panel.

AUDIENCE QUESTIONS

Morgan Hagenbuch: Yes, that is a perfect segue. I did have a concluding question, but that so perfectly segue to our next panel, and with time being what it is, I think it's actually a good time to turn to Q&A. I know we have a question on Zoom. Could our mic runners run the mic

32. Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), 2020 O.J. (COM 2020) 842.

to Nicole up here in the front. She's right here on the front row. She's got the Zoom questions.

Audience Question One: With respect to the point made by a panelist that the tech world having brought major innovations is a good thing, and hence should be allowed to grow big and bigger and essentially swallow up newer entrants in the field. Can the same argument have been made with respect to the development of a well-functioning phone system throughout the US, referencing, for example, *AT&T* antitrust case, or the development of quality mainframe computers and the development of personal computers, for example, the IBM antitrust case?

Jonathan Jacobson: My point is not that because big tech produces great benefits for society, that they should be immune from standard antitrust principles. I completely would reject that proposition. I wanted to respond a bit to Spencer, but I'll hold my fire. That's an easy question. The answer is basically no.

Audience Question Two: Yeah, thank you for being here. Professor First, you talked a little bit about this earlier, but so while Facebook's stablecoin project, Libra, was unsuccessful, it highlights how big tech is expanding into virtually all industries. What are some potential antitrust concerns with big tech entering a new market like, for example, banking and payments?

Harry First: So what a typical antitrust answer would be, unless they were thinking of entering those markets, or were in those markets, no concern. They could actually bring competition to markets that could very well use them. So that may be one approach and may be very valid. We're never going to go after all mergers that all of these companies do. Life is short and the budgets of the enforcement agencies are shorter, and may end up being shorter, depending on who wins the next election. So no, not every one. The challenge is that we haven't fully developed a good way of looking at what are basically multi-product firms, spread out in a number of different industries, that then appear to be wherever you turn. It's in certain particular fields. Speak to your car. Oh, it's Google responding. Or walk along the street and speak, and your heart is beating. And oh, it's Google counting. That sort of concern. We don't really have a good handle on it. There was a famous old cartoon from 1899 of the octopus spreading its tentacles.[33] So that was republished in the New York

33. George Luks, *The Menace of the Hour, Anti-Monopoly Cartoon*, VERDICT MAG. (1899), https://www.gettyimages.com/detail/news-photo/the-menace-of-the-hour-anti-monopoly-cartoon-george-luks-news-photo/629446167.

Times in 2016.[34] In 1899, it was the gas monopoly and the electrical monopoly. Today it's more difficult to think about. So it is still a challenge for us. Is this a competition problem, or is it as, in effect Jon sort of hinted at, are we really just concerned about size and ubiquity, for which maybe we just need a different statute? I don't really have an answer to that. I think that's the problem we're facing. From an antitrust point of view, you would want to look at, if you're looking at one of these nascent acquisitions, what is it? Is it a squash-em acquisition? Is it a disruptor acquisition? I'm going to come in and disrupt a market. That's what we like. A squash-em is what we don't like, to prevent a disruptor. That may depend on, let's look at the emails. People say the darnedest things on email. Look at the complaint in Facebook with regard to Instagram and Whatsapp.[35] These were not, "oh, we would love to be in this market." No, these were "we've done really crappy in this market, and we better acquire these, or else they're going to beat us to death."

Jonathan Jacobson: Or Twitter will buy them.

Harry First: Or Twitter will buy them. That's another thing. We're playing keep away. Let's keep it away from the other platform. And this is another thing that we don't fully have the tools developed yet. So, it's a challenge.

Spencer Weber Waller: I would say it's a broader question. It's a broad way of framing the question. It isn't is a company bad? Or is this practice bad? The question is: compared to what? Do you want a company growing internally and doing innovative things that consumers like? Sure, of course. But the question is compared to what? We have an aging, not particularly innovative, product that we'd like to protect and milk for as long as possible. So therefore, we're going to do A, B, and C, and acquire D, E, and F, and you know put the price up and down to make sure that we keep the moat around the castle. It's not what they're doing. It's a version of compared to what? Jon was asking you to watch a movie from the late 90s. I wanted to suggest a movie from around 2001 that I don't exactly recommend. But if you like bad movies, there's a 2001 movie called Antitrust[36] that turns out not to really be about antitrust at all. Tim

34. Jonathan Taplin, *Is it Time to Break Up Google?*, N.Y. TIMES (April 22, 2017), https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html [https://archive.ph/ytxzA].

35. Compliant for Injunctive Relief and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021).

36. ANTITRUST (Industry Entertainment, Hyde Park Entertainment, & Metro–Goldwyn–Mayer 2001).

Robbins, the actor who was married to Susan Sarandon, does an uncanny Bill Gates impersonation throughout this whole film, and I take away from it that if you steal the intellectual property of your rivals and then kill them, that's bad.

Jonathan Jacobson: So, Morgan, I want to steal a minute and a half to talk about the European approach to antitrust. I have no problem with the concept of an abuse of dominance position. I have a big problem with how Europe interprets it, which is the protection of competitors, not consumers. They will deny this, but it is undeniably true. And one example is the search case against Google.[37] Remember, I'm biased, so take this with the appropriate carload of salt. So Google gets default on Apple, on Chrome, on Mozilla, which, by the way, was the remedy in the *Microsoft* case. That's now being challenged as an antitrust violation. In *Microsoft*, the remedy was, you can have Internet Explorer as the default, but you have to be able to change it to Netscape or some other browser. But in Europe, they go, no, we're going to say the defaults are illegal. And what's the remedy going to be? Well, let's have a choice screen, which lists all the competitors, simply designed to give those competitors prominence that they would not otherwise have had. But what happened with the remedy? Google had about a 91 percent, 92 percent share before the choice screens. With the choice screens, 95 percent to 96 percent of the people chose Google, anyway. How is that a remedy? And how is that wrong?

Harry First: Status quo bias, say the behavioral economists, or it's a better product, says Google.

Jonathan Jacobson: Says 95 percent of Europeans.

Harry First: Just to amplify that, remedy is the challenge. And, on that, Jon is clearly right.

Morgan Hagenbuch: So, with that, I will go ahead and conclude this panel. I want to thank our wonderful panelists for joining us in person today. Thank you so much. We will take a short break

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37. Case T-604/18, Google LLC v. Comm'n, ECLI:EU:T:2022:541 (Sept. 14, 2022), https://curia.europa.eu/juris/document/document.jsf?text=&docid=265421&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=162401.

KEYNOTE ADDRESS

THE NEW ANTITRUST PARADOX

Morgan Hagenbuch: Ok, everyone, we're going to get started in just a moment. If the live audience could take their seats, that would be great. Thanks, everyone, for rejoining us.

We are so excited that Maureen Ohlhausen has agreed to give the Symposium's Keynote Address: Maureen chairs Baker Botts' Global Antitrust and Competition practice and, prior to joining Baker Botts, she served as a commissioner at the Federal Trade Commission and, from 2017 to 2018, she served as acting FTC Chairman. In addition to having extensive experience as a practitioner, Maureen is a recognized thought leader, having published dozens of articles on antitrust, privacy, IP, and other issues. We are thrilled to have her providing today's keynote address. As with both panels, we will allot some time at the end, and Maureen has graciously agreed to take some Q&A. We will run mics in the live room and/or read questions from the Zoom. With that, I will go ahead and turn it over to Maureen.

Maureen Ohlhausen: Thank you so much. I'm delighted to be here. I've enjoyed many opportunities speaking at Fordham, and sorry I'm not there in person, but thanks so much for making the time for me on a Friday afternoon.

So, what does the new antitrust policy mean? What are some of the implications for it? It's clear that the Neo-Brandeisians are in control at the White House, the Federal Trade Commission and the Department of Justice Antitrust Division, raising barriers to mergers is in, and concern about the impact of over-enforcement is out.

The classic working antitrust paradox, which is that certain misguided forms of antitrust enforcement can be counter-productive to the goal of increasing competition, is out of vogue, and frequently maligned in public discourse. It's been a little over a year since the Biden Executive order on competition,[38] and I think it's helpful to take stock of the administration's policy on mergers, and whether it risks falling into the original power paradox of counter-productive antitrust enforcement.

What's the policy that I'm talking about? Public statements from President Biden, FTC Chair Lina Khan, and Assistant Attorney General for Antitrust Jonathan Kanter have all sounded the call that antitrust

38. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

enforcers should be discouraging or blocking more mergers.[39] The Biden Executive Order on competition prompted a joint FTC/DOJ statement, expressing skepticism that the merger guidelines accurately reflect current economic realities and calling for a "hard look to determine whether they are overly permissive."[40] Tim Wu, Adviser to President Biden for Competition Policy, has advocated for the agencies to dispense with merger review in favor of bright line rules,[41] and Chair Khan has made moves to "deter" companies from "proposing anticompetitive transactions in the first place."[42] Some legislators have proposed presuming that mergers are anticompetitive until merging companies show otherwise.[43]

39. *See id.* (calling on the DOJ and FTC to "enforce the antitrust laws vigorously" and "challenge prior bad mergers that past Administrations did not previously challenge" amidst a Biden Administration policy of "greater scrutiny of mergers"); Remarks of Lina M. Khan Regarding Non-HSR Reported Acquisitions by Select Technology Platforms, Commission File No. P201201 (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596332/remarks_of_chair_lina_m_khan_regarding_non-hsr_reported_acquisitions_by_select_technology_platforms.pdf (highlighting the number of technology firms with non-HSR reportable acquisitions as a basis for re-working the merger review process); Remarks of Lina M. Khan Regarding the Request for Information on Merger Enforcement, Docket No. FTC-2022-0003, at 1-2 (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf ("This inquiry comes against the backdrop of a broader reassessment of the effects of mergers across the U.S. economy. Evidence suggests that decades of mergers have been a key driver of consolidation across industries, with this latest merger wave threatening to concentrate; our markets further yet."); Remarks of Jonathan Kanter at 2022 Spring Enforcers Summit (Apr. 4, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (advocating for more forceful scrutiny of mergers and a renewed emphasis on litigation in favor of settlements).

40. Remarks of Lina M. Khan & Richard A. Powers on Competition Executive Order (July 9, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/07/statement-ftc-chair-lina-m-khan-antitrust-division-acting-assistant-attorney-general-richard-powers.

41. *See* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (recommending a "simple but *per se* ban on mergers that reduce the number of major firms to less than four").

42. Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to Brian Deese, Director, National Economic Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

43. Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (July 2017), https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf.

Now, an important part of the deterrence policy seems to broadcast that the agencies are not amenable to merger remedies. In the summer of 2021, Chair Khan engaged in several public letter exchanges that announced her skepticism that agencies could identify and address isolated anti-competitive aspects of a merger. She said, "While structural remedies generally have a stronger track record than behavioral remedies, studies show that divestitures, too, may prove inadequate in the face of an unlawful merger. In light of this, I believe the antitrust agencies should more frequently consider opposing problematic deals outright."[44] Chair Khan also embraced the scholarship of Professor John Kwoka, who has asserted that merger remedies are frequently ineffective.[45] More recently, advocated for a "fix it or forget it" policy, where agencies should not consider remedies fashioned as part of the response to the merger review investigation.[46] After this article came out, Chair Khan hired Professor Kwoka as an economic advisor to her, and subsequently the agencies issued their Request for Information on Merger Enforcement, which explicitly asked whether the merger guidelines "should adopt a formal process and deadlines for remedy proposals."[47]

AAG Kanter has expressed similar sentiments, and the Antitrust Division has broadcast skepticism of merger remedies in recent public

44. *See* Letter from Lina Khan, Chair, Fed. Trade Comm'n, to Elizabeth Warren, Senator, U.S. Congress (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf.

45. *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (1st ed. 2014) (analyzing "retrospective" academic studies of consummated mergers to argue federal enforcement policies are ineffective insofar as they accept remedies); Letter from Lina M. Khan, Chair, Fed. Trade Comm'n to The Honorable Elizabeth Warren (Aug. 6, 2021), https://www.warren.senate.gov/imo/media/doc/chair_khan_response_on_behavioral_remedies.pdf. For a summary of the criticisms of Professor Kwoka's retrospective merger study, see Pallavi Guniganti & Charles McConnell, *FTC Economist Criticizes Kwoka Merger Study*, GLOB. COMPETITION REV., (July 18, 2017), https://globalcompetitionreview.com/gcr-usa/article/ftc-economist-criticises-kwoka-merger-study.

46. John Kwoka & Spencer Weber Waller, *Fix it or Forget It: A "No Remedies" Policy for Merger Enforcement*, COMPETITION POL'Y INT'L (Aug. 17, 2021), https://www.competitionpolicyinternational.com/fix-it-or-forget-it-a-no-remedies-policy-for-merger-enforcement/.

47. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

speaking appearances.[48] Deputy Assistant Attorney General Andrew Forman recently warned, "[i]t will be a high bar to convince us we should be comfortable enough to make the filing in federal court that [a] settlement is in the public interest"[49] which, of course, the DOJ has to do under the Tunney Act.[50] This posture matches the refrain that the DOJ would prefer to litigate to block mergers outright rather than settle cases where they have concerns.[51]

Now, the Neo-Brandeisian policy goes beyond just speeches and signals, however. The agencies are also erecting administrative hurdles to mergers. At the FTC, Chair Khan and the majority have – so here's an example of a few things – suspended indefinitely the practice of early termination by which parties can close their transactions without delay if the agency's inquiry reveals there's no competitive concern;[52] kept open some merger investigations despite the HSR waiting period expiring; and issued "close at your own risk letters" so as to free the agencies from the review timeline and to clarify that the party should remain uncertain about the antitrust risk from closing their deal.[53] At the FTC, they also

48. *See* Remarks of Jonathan Kanter for Georgetown Antitrust Law Symposium (Sept. 13, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust (advocating for a structural presumption for coordinated effects and for a presumption against mergers where there is direct evidence of "head to head competition").

49. Andrew Forman, Remarks to the ABA M&A Committee at the Business Law Section Annual Meeting (Sept. 17, 2022), https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-andrew-forman-antitrust-division-delivers-remarks-aba.

50. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 221, 118 Stat. 661, 668-69 (codified as amended at 15 U.S.C. § 16).

51. *See Kanter Remarks*, 2022 Spring Enforcers Summit, *supra* note 39 (advocating for more forceful scrutiny of mergers and a renewed emphasis on litigation in favor of settlements); *see also* Bryan Koenig, *DOJ Willing to Challenge Mergers Before Investigations End*, LAW360 (Apr. 6, 2022), https://www.law360.com/articles/1481559/doj-willing-to-challenge-mergers-before-investigations-end.

52. Press Release, Fed. Trade Comm'n, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination (Feb. 4, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early-termination.

53. Press Release, Fed. Trade Comm'n, FTC Adjusts its Merger Review Process to Deal with Increase in Merger Filings (Aug. 3, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/08/ftc-adjusts-its-merger-review-process-deal-increase-merger-filings; *see also* Statement of Commissioner Christine Wilson Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021),

consolidated investigatory powers in the Chair, including for all mergers of all kinds,[54] and, according to Congressional testimony by former Commissioner Noah Phillips, the resolution means less oversight by the bipartisan Commission, and he believes it will result in "more real red tape on American business."[55] The FTC has withdrawn from the Vertical Merger Guidelines in order to clearly indicate that the FTC does not recognize efficiencies from a merger as relevant to the legal question of whether the merger will substantially lessen competition.[56] And the FTC has required going forward "all merging parties subject to a Commission order to obtain prior approval from the FTC before closing any future transaction affecting each relevant market for which a violation was alleged," and they also extended significant similar prior approval requirements on divestiture buyers, too.[57]

So, all of these administrative hurdles undergird a policy of chilling larger activity generally, and these moves may be a prelude to a major substantive overhaul of the merger guidelines, if that is the result of the agency's Request for Information on merger enforcement.[58]

The text of the RFI, along with the statements of Chair Khan and AAG Kanter accompanying the release of the RFI, suggests that the agencies are looking for ways to classify more mergers as illegal on theories that have not been relied upon since the 1970s. And indeed, Neo-Brandeisian groups

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https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf.

54. Press Release, Fed. Trade Comm'n, Federal Trade Commission Authorizes Three New Compulsory Process Resolutions for Investigations (Aug. 26, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-authorizes-three-new-compulsory-process-resolutions investigations.

55. *See* Prepared Oral Statement of Commissioner Noah Phillips Before House Committee on Energy and Commerce, Subcommittee on Consumer Protection and Commerce, Hearing on "Transforming the FTC: Legislation to Modernize Consumer Protection" (July 28, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592981/prepared_statement_0728_house_ec_hearing_72821_for_posting.pdf/.

56. Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines-commentary.

57. Fed. Trade Comm'n, Statement of the Commission on Use of Prior Approval Provisions in Merger Orders (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

58. U.S. Dep't of Justice & Fed. Trade Comm'n, Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.regulations.gov/document/FTC-2022-0003-0001.

have expressly argued that the agency should follow the approach set out in the 1968 Merger Guidelines,[59] and they argue that the strict market share-based thresholds for horizontal and vertical mergers in that set of guidelines "reflect the Clayton Act's purpose 'to preserve and promote market structures conducive to competition.'"[60] Chair Khan and the FTC majority reflected those same goals when they pulled the FTC out of the 2020 Vertical Merger Guidelines. So overall, the goal is to identify more mergers that are "presumptively anti-competitive."[61]

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59. Open Mkts. Inst. & Am. Econ. Liberties Project, The Federal Trade Commission and the Department of Justice Should Abandon the Proposed Vertical Merger Guidelines and Embrace the Framework of the 1968 Guidelines, 21 (Feb. 2020), https://www.ftc.gov/system/files/attachments/798-draft-vertical-merger-guidelines/comment_to_ftc-doj_re_vertical_merger_guidelines.pdf [hereinafter Comment to the FTC & DOJ Vertical Merger Guidelines]; *see also* Press Release, Open Markets Inst., Open Markets Institute Files Comment to FTC & DOJ on Merger Enforcement, et al., (Apr. 21, 2022), https://www.openmarketsinstitute.org/publications/response-by-the-open-markets-institute-to-the-request-by-the-federal-trade-commission-and-the-antitrust-division-of-the-department-of-justice-for-information-on-merger-enforcement.

60. Open Markets Inst. & Am. Econ. Liberties Project, Comment to the FTC & DOJ Vertical Merger Guidelines, *supra* note 59, at 22 (quoting U.S. Dep't of Justice, 1968 Merger Guidelines §2) (emphasis supplied); Open Markets Inst., The Failure and Potential Redemption of Federal Merger Policy 2 (Aug. 20, 2018), https://www.openmarketsinstitute.org/publications/open-markets-submits-comments-federal-trade-commission-upcoming-hearings-competition-consumer-protection-21st-century ("The FTC, along with the DOJ, must develop new guidelines on horizontal and vertical mergers. The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal."); Sandeep Vaheesan, *Two-and-a-Half Cheers for 1960s Merger Policy*, HLS ANTITRUST ASS'N (Dec. 12, 2019), https://orgs.law.harvard.edu/antitrust/2019/12/12/two-and-a-half-cheers-for-1960s-merger-policy/ (praising 1968 guidelines, though taking issue that they did not do more on conglomerate effects) ("1960s merger policy, as embodied in the 1968 Guidelines, should be treated as a template. Strong rules, tied to market share and firm size, against all types of mergers are critical for controlling corporate power.").

61. Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, & Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission, Commission File No. P810034, at 5, (Sept. 15, 2021), https://www.ftc.gov/system/files/documents/public_statements/1596396/statement_of_chair_lina_m_khan_commissioner_rohit_chopra_and_commissioner_rebecca_kelly_slaughter_on.pdf.

Likewise, AAG Kanter's remarks demonstrated an interest in classifying additional mergers as unlawful under the little-used "tends to create a monopoly" prong of Section 7.[62] And shortly after announcing the merger guidelines RFI, AAG Kanter explained that he is worried about acquisitions, even if the deal rationale is to compete more vigorously on the merits. He explained, "As enforcers, if we focus only on acquisitions of firms already set to enter a market, we miss acquisitions that allow digital platforms to strengthen their moats through innovation."[63]

Now these comments, all taken together, show that both Chair Khan and AAG Kanter are especially concerned about M&A activity of what they call "dominant" firms, and under this theory, already large companies should be barred from acquiring additional resources for growth, because the primary concern is not facilitating or protecting competition on the merits, but rather preserving certain "structural" outcomes. The Neo-Brandeisians point to a Senate report that the aim of Section 7 is "to cope with monopolistic tendencies in their incipiency and well before they have attained such effects."[64] The main target for these concerns are companies that are highly capitalized and have a large number of users.

The U.S. House of Representatives conducted an investigation[65] into a number of large platform companies, culminating in a 2020 report that was co-authored by Chair Khan when she was working in the House and cited by her now that she's at the FTC.[66] The legislative proposals coming out of this report, including one banning mergers, targeted companies

62. Jonathan Kanter, Modern Competition Challenges Require Modern Merger Guidelines, Remarks at FTC Press Conference Announcing Call for Public Comment (Jan. 18, 2022), https://www.justice.gov/opa/speech/file/1463546/download.

63. Jonathan Kanter Delivers Keynote at CRA Conference (Mar. 31, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-cra-conference.

64. *Id.* (quoting S. Rep. No. 1775, 81st Cong., 2d Sess. 4-5 (1950)).

65. Press Release, Judiciary Committee Publishes Final Report on Competition in the Digital Marketplace (July 19, 2022), https://cicilline.house.gov/press-release/judiciary-committee-publishes-final-report-on-competition-in-the-digital-marketplace.

66. *See* Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines Commission, *supra* note 61, at 8, n.42 (citing MAJORITY STAFF OF H. COMM. ON JUDICIARY, SUBCOMM. ON ANTITRUST COMM. AND ADMIN. LAW, 116TH CONG., REPORT ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 406-31 (2020) https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519).

based on their market capitalization and number of online users,[67] and the implication is that acquisitions by these very large companies are almost always competitively harmful. But this policy of chilling mergers in general, and acquisitions by large companies in particular, should be closely examined before it's adopted in the merger guidelines, where, if it is headed in the wrong direction, it will take years of litigation to undo.

So, what's the paradox here? What do I think the paradox is? First of all, there's no agreement on a single optimal structure for a competitive and innovative market,[68] and chilling mergers across the board on the presumption that maintaining a less-concentrated market is always superior could hamper one of the economy's engines for innovation and competition. The paradox of the Neo-Brandeisian policy is that its targets, which are highly capitalized companies and companies with a strong reputation, or a large number of users in an adjacent product market, may often be the best candidates to reposition into consolidated markets, where innovation and competition are most needed. Restricting the best-qualified companies, in particular, from acquiring the resources that would facilitate successful entry in concentrated markets is a policy that may itself lessen competition.

Business and antitrust scholars alike agree that some consolidated markets are most likely to see entry and real competition only from other highly capitalized competitors. Digital market experts frequently observe that the most powerful competitive forces are coming from large platforms competing against each other,[69] and this makes sense where there are huge benefits to operating at scale. A company that already benefits from network effects or other size advantages may, in many instances, only be threatened by the prospect that another company could get to a similarly large efficient operating size.

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67. *See, e.g.*, Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021).

68. *See, e.g.*, Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?*, *in* THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 361-404 (2011), https://faculty.haas.berkeley.edu/shapiro/arrow.pdf (describing the continuing Arrow-Schumpeter debate on the relationship between market structure and innovation).

69. *The New Rules of Competition in the Technology Industry*, ECONOMIST (Feb. 27, 2021), https://www.economist.com/business/2021/02/27/the-new-rules-of-competition-in-the-technology-industry; Ben Thompson, *First, Do No Harm*, STRATECHERY (Feb. 12, 2020), https://stratechery.com/2020/first-do-no-harm/ (for instance, preventing Snap from acquiring technologies that enable new features would stunt one of the most effective competitive forces in Meta's market).

For many companies, including innovative startups, entry at that sort of size is out of reach. But two realistic methods of successful entry could be accomplished by large companies not currently in the market: they could cross-sell a large number of already existing customers in an adjacent market, or they can invest large amounts of capital to “buy” new customers through introductory offers and other methods of attracting customers on the merits. Maintaining the threat of potential competition thus depends in part on creating a regulatory environment where highly capitalized companies, or companies with a lot of customers in an adjacent market, have all the available tools for entry at their disposal.

Now, I want to give a few examples of where we’ve seen this type of competition take place. This phenomenon is on display in the so-called “streaming wars.”[70] For those of you who may have been following this for the past few years, you may remember the acronym FAANG,[71] referring to the supposedly moat-protected tech companies at the time, and the N in FAANG was for Netflix. Now, highly capitalized companies have launched streaming services in direct competition with Netflix, betting that they can finance growth with low-priced introductory subscription offers, and massive investments in unique “tentpole” content. These highly-capitalized companies – Apple, Amazon, and Disney, which were the first, fifth, and forty-second largest companies by market cap in the world, at least recently, I know there’s been a lot of shifting around – they are investing heavily to grow their streaming platforms.[72] They may also get a jump by cross-selling to their existing customers: Amazon to its Prime subscribers and Apple to its hardware-owning, installed base. The

70. *See* Ramon Lobato & Amanda Lotz, *Beyond Streaming Wars: Rethinking Competition in Video Services*, 8 MEDIA INDUS., no. 1, 2021 (describing the history of the “streaming wars” cultural narrative and the metrics along on which video content services compete); *see also* Joe Flint, *The War for Talent in the Age of Netflix,* WALL ST. J. (Sept. 21, 2019), https://www.wsj.com/articles/the-war-for-talent-in-the-age-of-netflix-11569038435.

71. FAANG is an acronym that refers to the stocks of five prominent American technology companies: Meta (formerly known as Facebook), Amazon, Apple, Netflix, and Alphabet (formerly known as Google).

72. Lauren Forristal, *Report: Top Streaming Companies Will Spend $140.5 Billion on Content in 2022,* STREAMABLE (Jan. 18, 2022), https://thestreamable.com/news/new-data-shows-top-9-media-and-tech-companies-will-spend-140-5-billion-on-content-in-2022; Sergei Klebnikov, *Streaming Wars Continue: Here’s How Much Netflix, Amazon, Disney+ and Their Rivals Are Spending on New Content*, FORBES (May 22, 2020), https://www.forbes.com/sites/sergeiklebnikov/2020/05/22/streaming-wars-continue-heres-how-much-netflix-amazon-disney-and-their-rivals-are-spending-on-new-content/?sh=7be68657623b.

hope is that this will result in the same sort of economies of scale that Netflix enjoys, and these economies are critical for any competitor that provides high fixed cost content at low marginal cost to digital subscribers. And the strategy is working to create competition so fierce that it is regularly denominated a "war".

Now, other digital market commentators have observed a similar dynamic in the fierce rivalry between Apple and Meta, where Apple is moving into advertising, while Meta is moving into hardware, making them each a dangerous rival for the other.[73] This type of competition has also played out in the Chinese digital economy in the past ten years: Alibaba's e-commerce dominance peaked at 62 percent in 2013 and has receded to about 50 percent since then. Its fiercest competition has been from digital rival Tencent, which made important investments in e-commerce, and more recently, in another core Alibaba market: cloud computing.[74] These investments have challenged Alibaba in its core areas of market leadership, even though they are adjacent to Tencent's core competencies in social media and gaming. *The Economist* has summarized this economy-wide trend among the largest U.S. tech companies as follows: the share of total revenue that substantively overlaps with the revenue earned by other big tech firms grew by nearly 20 percentage points from 2015 to 2020.[75] So you can see they are entering and competing in each other's core areas.

The U.S. antitrust agencies, too, have previously acknowledged that not all firms can be viable potential entrants in consolidated markets, and there is a special type of firm that "could use its pre-existing operations to facilitate entry" into a market.[76] In the 2020 Vertical Merger Guidelines, the agencies explaind the conditions for entry into a special type of consolidated market: one where a vertically integrated company controls an input that other firms need to compete downstream. In this scenario, the vertically integrated firm will face competitive pressure only if there is a credible threat that a rival can enter at *both* levels of the market. As the

73. Brett Ryder, *Apple's Duel with Facebook Is a New Form of Big-Tech Rivalry*, ECONOMIST (Feb. 27, 2021), https://www.economist.com/business/2021/02/27/apples-duel-with-facebook-is-a-new-form-of-big-tech-rivalry; Mark Gurman, *Apple Finds Its Next Big Business: Showing Ads on Your iPhone*, BLOOMBERG (Aug. 14, 2022), https://www.bloomberg.com/news/newsletters/2022-08-14/apple-aapl-set-to-expand-advertising-bringing-ads-to-maps-tv-and-books-apps-l6tdqqmg.

74. *The New Rules of Competition in the Technology Industry*, *supra* note 69.

75. *Id.*

76. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, VERTICAL MERGER GUIDELINES 1 (June 30, 2020), https://www.justice.gov/atr/page/file/1290686/download.

agencies explained, "This two-level entry may be more costly and riskier than entering the relevant market alone, and thus may deter [potential competitors] from entering." Highly capitalized companies are in a much better position to make these sorts of costly and risky investments to establish a new source of upstream input. Additionally, firms with a large presence in an adjacent market may be able to utilize aspects of that existing business model to recreate the needed upstream input.

As an example, let's return for a moment to the head-to-head competition in China. Alibaba, as an e-commerce company first, had a natural advantage in creating a third-party mobile payment market, because it already had access to users' wallets when they paid for Alibaba transactions.[77] But Tencent was able to leverage an adjacent market to recreate this critical input. Tencent introduced a peer-to-peer payment function as part of its chat service. Its existing competency in connecting people was closely enough related to third-party payments that it was able to establish access to consumers' wallets in order to build the downstream payments business. The two companies are now fierce competitors in this downstream market, despite Alibaba's early lead.[78]

So, granting that some large firms may be the best potential entrants into consolidated markets, the question remains: why allow them to enter by acquisition? Is there any reason to suspect that they will be more successful as entrants if they are allowed to buy rather than being forced to build the operational capabilities they need in the consolidated market? There are several reasons why the answer is yes.

The first reason is the relative length of time it takes to build rather than buy. In in the very markets that Neo-Brandeisians are most worried about—digital markets prone to network effects and tipping—time to market is of the essence. The sooner a rival can enter, the sooner it can compete for contested users and get to a minimum efficient scale. If the incoming goes unchallenged for long enough, it may absorb so much of the addressable market that there would not be enough users left over for the challenger to reach minimum efficient scale.

The second reason to allow an acquisition that would facilitate entry is because, when the antitrust agencies are reviewing such a transaction, the

77. Liyan Chen, *Red Envelope War: How Alibaba and Tencent Fight Over Chinese New Year*, FORBES (Feb. 19, 2015), https://www.forbes.com/sites/liyanchen/2015/02/19/red-envelope-war-how-alibaba-and-tencent-fight-over-chinese-new-year/?sh=3ecbea8bcddd.

78. Eva Xiao, *How WeChat Pay Became Alipay's Largest Rival*, TECH IN ASIA (Apr. 20, 2017), https://www.techinasia.com/wechat-pay-vs-alipay.

directors and officers of the company have already assessed the relative costs and benefits of the build-versus-buy question and decided it would be strategically advantageous to buy rather than build.[79] Business management scholarship suggests a couple reasons why this might be the case.[80] First, the acquired firm has resources that the purchasing firm needs to achieve an operational efficiency, for example, matching a product to a distribution network or a unique combination of engineering resources that can solve a design problem. Or, the acquired firm's business model is transformative, and the purchasing firm sees the need to adapt.

We see examples from the digital revolution that both of these strategies are utilized by highly capitalized companies and support entry into markets where the incumbent players are already large. For example, Apple purchased chip designer P.A. Semi in 2008, whose engineering resources allowed Apple to solve the specific design problem of optimizing power consumption for mobile devices.[81] This resource play allowed Apple to enter and compete against entrenched incumbents like Nokia, Motorola and Samsung in the mobile device market.

Now, outside this area, another highly capitalized company, Walmart Inc., bought Jet.com in 2016 to acquire its unique business model: Jet.com had e-commerce strength in a niche urban market.[82] E-commerce was a disruptive threat to Walmart's traditional brick and mortar business, and with the rise of Amazon.com, Walmart recognized that it would need to adapt in order to stay competitive. As business theorists instruct, it was

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79. Indeed, the FTC's model Second Request includes a question designed to elicit the build-versus-buy comparative analysis performed as part of the decision to do the deal under review. *See* Question 21, FTC Model Second Request (Oct. 2021), https://www.ftc.gov/system/files/attachments/hsr-resources/model_second_request_-_final_-_october_2021.pdf ("Describe in detail, quantify (if possible), and submit all documents relating to the benefits, costs, and risks anticipated as a result of the Proposed Transaction, including . . . an explanation of why the Company could not achieve each benefit, cost saving, economy, or other efficiency without the Proposed Transaction . . . .").

80. *See* Clayton M. Christensen et al., *The Big Idea: The New M&A Playbook*, HARV. BUS. REV. (Mar. 2011), https://hbr.org/2011/03/the-big-idea-the-new-ma-playbook. There is also the influence of opportunity costs, where internal resources that would be used to build a capability might be directed to an even more productive use.

81. *Id.*

82. Dennis Green, *Walmart's $3.3 Billion Acquisition of Jet.com Is Still the Foundation on Which All of Its E-Commerce Dreams Are Built*, BUS. INSIDER (June 13, 2019), https://www.businessinsider.com/walmart-acquisition-of-jet-gave-ecommerce-boost-2019-6.

critical that Walmart, buy, rather than attempt to build, every aspect of the disruptive business model on its own Walmart.com site. And that's how Walmart, with Jet.com, could enter and really compete directly against Amazon, with features like two-day and next-day delivery in an e-commerce business that was unlike its traditional business model.[83]

Walmart and Apple are success stories of entry through acquisition, providing new competition and spurring transformative innovations that benefited consumers. So surely antitrust enforcers should not want to chill acquisitions of these kinds, where buying resources, or transforming a business model through acquisition, provides the best chance of successful entry. And yet that is exactly what the Neo-Brandeisian merger policy risks doing. They often justify this policy by suggesting that over-enforcement is preferable to under-enforcement. Perhaps they'll erroneously block an Apple/P.A. Semi or a Walmart/Jet.com here and there, but they believe, on balance, the negative effect is justified by preventing "killer acquisitions" and other problematic mergers through a general policy of chilling mergers by highly capitalized or highly popular companies.

But I do question where is the evidence of a great number of "killer acquisitions" or other problematic mergers that need chilling? The FTC recently conducted a 6(b)-study looking back at 10 years of non-reportable acquisitions by Google/Alphabet, Apple, Facebook/Meta, Amazon, and Microsoft.[84] They did a 2021 Staff Report summarizing those acquisitions, but it points out no evidence that the antitrust agencies missed any problematic mergers, and it suggests no industry or market-wide practices over the longitudinal period that could reasonably suggest systematic or systemic under-enforcement.[85] Now, in fact, when researchers took an independent look at the same S&P 500 data that the FTC used in its 6(b) study, they found that the tech company acquisitions were rarely in the same market, and tended to be correlated with the future increase in other

83. *Id.*

84. FED. TRADE COMM'N, NON-HSR REPORTED ACQUISITIONS BY SELECT TECHNOLOGY PLATFORMS, 2010–2019: AN FTC STUDY (2021) [hereinafter FTC 6(B) REPORT], https://www.ftc.gov/system/files/documents/reports/non-hsr-reported-acquisitions-select-technology-platforms-2010-2019-ftc-study/p201201technologyplatformstudy2021.pdf.

85. Press Release, FTC Staff Presents Report on Nearly a Decade of Unreported Acquisitions by the Biggest Technology Companies (Sept. 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/09/ftc-staff-presents-report-nearly-decade-unreported-acquisitions-biggest-technology-companies.

companies, acquiring in that same market.[86] So, far from supporting a "killer acquisition" or "kill zone" hypothesis, the data was instead consistent with the hypothesis that tech companies are investing in and trying to forge new business offerings in the same "greenfield" space where lots of other firms see room to grow.

Moreover, the fact that tech companies do not go back to the same area to buy additional companies tends to support the two deal rationales found in the business management literature discussed above: the data looks more consistent with the thesis that the companies were buying rather than building when they wanted to sponsor competitive entry and needed some new resource or wanted to bet on a new niche—and perhaps disruptive—business model to see whether it would transform the industry. If entry was the rationale, it would make sense to make one capability-enhancing acquisition in a particular area, and then move along to build other capabilities or place other bets.

So, regardless of whether the past ten years of large tech company acquisitions can be explained by any single strategy, there is certainly no indication that the retrospective proved the Neo-Brandeisians' thesis of systemic under-enforcement. Without this evidentiary underpinning, their policy just may not produce the desired results. At best, they may waste resources, challenging individual mergers that are procompetitive or competitively neutral. But at worst, they could undermine their own goal of deconcentrating markets by systematically chilling mergers that would have been important sources of entry.

So, just to conclude, if the Neo-Brandeisians are serious about increasing market competition—which I really think they are - they should consider whether they need to recalibrate their policy. They should take a case-by-case approach in understanding deal rationales and specific market conditions and avoid using administrative burdens to raise costs for acquisitions by large companies across the board. The merger guidelines review will be an important test of which path the DOJ and the FTC will take and whether they will be the authors of a measured policy refinement or, perhaps, stumble into the next antitrust paradox.

Thank you for listening, and I'd be happy to take questions.

86. FTC 6(B) REPORT, *supra* note 84.

AUDIENCE QUESTIONS

Morgan Hagenbuch: Thank you so much, Maureen. We have a few minutes for questions. I have one, but I would like to turn it to the audience if they have any.

So one thing I wanted to ask, and you sort of touched on it right at the end, is these killer acquisitions. This was a sort of a major point of debate in our first panel today, particularly [on] the reports that you mentioned, about whether killer acquisitions are actually taking place with a lot of frequency, such that they should be a major concern. Assuming, for the sake of argument–and of course these reports suggest that they are not–that they are, do you have any thoughts on the best way to regulate them? I know that's a very open question.

Maureen Ohlhausen: I believe that killer acquisitions can take place. But I also think that they are not happening so frequently that we need to change the standards or change the reporting obligation. For example, when I was the acting Chairman, we brought a killer acquisition case to challenge the CDK Global-Auto/Mate merger. The parties did abandon the deal, so I'm not saying that it can never happen, but I think that we have the tools, in current law, to challenge it.

The other thing is just because there are a lot of acquisitions of small players by large companies doesn't mean that there is a whole lot of killer acquisition behavior going on. I think the more frequent explanation for that is that there is this continued innovation and attempts to try new things – to enter new markets, to improve products. And so merely because a big company is buying a small company, I don't think that inherently raises the specter that it's a killer acquisition. That theory really came up in a pharmaceutical market where the pipeline of drugs – where the future competition will be coming from – is so much easier to predict, versus a lot of these tech markets where things are changing all the time. Netflix is no longer named as one of the companies, now it's GAAFM, but it was, back then, and what we've seen is how new forms of competition have arisen. And so, even if you're buying something, it's a little hard to predict that "aha! That's what's going to be the giant killer," versus in the pharma area, where the pipeline of drugs, and the way the approval process and the uses that they're approved for is just much more predictable.

Morgan Hagenbuch: Awesome. Thank you. Does anyone have a question? I'm going to give it a minute. I know we're right up on time. Alright, well, thank you so much, Maureen, that was a really wonderful address. We really appreciate it.

Okay, I'm just going to have a few closing remarks. Thank you again for a wonderful keynote address. Before concluding today's event. I would just like to say a few quick thanks. First, thank you to all of our panelists, and of course, to Maureen for contributing to such a significant and timely discussion. Thank you to Professor Gentile and Professor Sean Griffith, who have been just immensely helpful in the entire process of putting this event together. The *Journal* is very grateful to have such dedicated faculty. We certainly could not put this event on without them. A huge thank you to Shanelle Holly and Morgan Benedit and their team for so much of this program. They do so much behind the scenes, and even in front of the scenes, that I just want to make sure they really get recognized for how much effort they put into events like these. And then, finally, I'd like to thank the *Journal*'s Symposium Committee for their assistance in coordinating and a special thank you to Justin for moderating our second panel.

On behalf of the entire *Journal*, thank you all for participating and attending today's event. For those in person, please feel free to step next door and enjoy the reception, and for everyone else have a wonderful evening.