Reform or Regress?

An Assessment of Proposed Antitrust Legislation

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EXECUTIVE SUMMARY

The U.S. Congress is currently considering several legislative proposals that would dramatically transform U.S. antitrust law. These bills would replace the existing consumer welfare standard, which protects competition, with a standard that restricts a company's ability to compete based on arbitrary criteria, such as market capitalization and the number of users.

The problems with these bills are myriad. Many of the bills forbid certain procompetitive conduct, for example by largely banning particular mergers, prohibiting companies from competing in multiple markets, and barring platforms from preferencing their products and others. Some proposals would impose certain marketplace conduct, such as requiring companies to assist their rivals and to share sensitive data with them, likely further discouraging vigorous competition.

Additionally, instead of protecting consumers and the competitive process, these bills focus on harm to rivals, including less-efficient ones. As former long-time Federal Trade Commission (FTC) economist, John Yun, explained: "the claim that harm to rivals, in of itself, constitutes harm to the competitive process is one that was long ago—and property—discarded" by the U.S. Supreme Court and that "... policies favoring competitors over competition turn antitrust policy on its head and impede, rather than protect, the competitive process. The purpose of federal antitrust laws is to safeguard the competitive process—not to dictate market outcomes or protect rivals." The bills risk discouraging vigorous competition, slowing innovation, and diminishing the opportunities available to both consumers and entrepreneurs.

The bills also ignore historical lessons. For example, proposals to impose structural separation and line of business restrictions ignore the bipartisan consensus that led Congress to repeal those regulations. As Federal Trade Commissioner Christine Wilson and Keith Klovers highlighted in a recent article, after deregulation, prices fell, output expanded, and firms innovated. They warn that "[p]roposals to regulate Big Tech [or certain online platforms] today in a similar fashion forget these important lessons. We should know better than to do the same thing again today and expect a different result."

Even more troubling, in a time of already growing inflation, the proposed standards would protect inefficient companies from market forces—a development that could lead to higher prices for consumers. For instance, modern economic studies, including a robust body of empirical literature, indicate that vertical restraints and vertical integration are generally procompetitive or benign. At a minimum, the proposals would reverse decades of U.S. Supreme Court precedent and introduce significant uncertainty through new and untested standards, likely chilling vigorous competition.

Part one of this paper summarizes the various legislative proposals, highlighting the similarities to the European Union (EU) approach. Part two surveys the empirical literature on vertical restraints and mergers and discusses lessons learned from prior, similar regulation. Part three covers the Supreme Court decisions that would be overturned by the legislative proposals. And part four discusses the economic basis for regulation.

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I. The Proposed Legislation: Summaries and Similarities to the EU Approach

Reform proponents contend that current U.S. antitrust laws are harming the economy and workers. Of the various proposals, the two that have advanced out of the U.S. Senate Judiciary Committee are the American Innovation and Choice Online Act (S. 2992) and the Open App Markets Act (S. 2710). Other introduced bills include the Competition and Antitrust Law Enforcement Act, the Prohibiting Anticompetitive Mergers Act, the Trust-Busting for the Twenty-First Century Act, and many others in both the Senate and the U.S. House of Representatives.

In general, these proposals inaccurately assume that the United States has a "monopoly problem." Although some studies purport to show higher economic concentration, more recent studies, including several by former government enforcers on both the left and the right, have debunked those earlier studies. For example, Carl Shapiro, a former Clinton Administration Department of Justice (DOJ) Chief Economist and Obama Administration Member of the Council of Economic Advisors, said that the data on concentration are "not informative regarding the state of competition." In a recent study by Luke Froeb, a former Chief Economist at both the DOJ and FTC, and Greg Werden, a former DOJ economist, the authors explained that the relied-upon data "do not demonstrate increasing concentration of markets, i.e., ranges of economic activity in which competitive processes determine price and quality, and in which the impact of mergers and trade restraints are evaluated in antitrust law." The most recent data contradicts the economic concentration narrative. In a 2022 paper, Dr. Robert Kulick relied on the most recent U.S. Census data to conclude that, since 2007, economic concentration in the United States has actually decreased.

This false concentration narrative is used to support calls for industry-specific regulation, but the identification of a market failure is a necessary, but not a sufficient condition, to justify regulation on economic grounds. The theoretical basis rests on the idea that regulation may serve to improve the allocation of resources in a particular industry. Once a potential market failure has been identified, the proposed regulatory solution must itself survive a rigorous economic cost-benefit analysis — one that factors in the potential for imperfect regulation and unintended consequences as well as the effect of alternative solutions based on private ordering. Here, however, there is no market failure in the first place—the data demonstrates that the U.S. economy remains very competitive and has become more so over time.

Furthermore, a critical component of America's economic engine has been allowing entrepreneurially minded people to find additional ways to offer consumers a better deal, create new markets, and capture the value they create, thereby encouraging innovation, competition, and allowing the United States to achieve global leadership in a number of diverse industries. Antitrust law is as much about product quality as output and price.

Given the lack of a need for more regulation, the push to rewrite antitrust law is all the more surprising. In fact, the various bills would bring U.S. antitrust law more in line with the approach adopted in the EU and, in many cases, impose even lower standards for antitrust liability, likely without economic benefit. EU antitrust law imposes "special responsibilities" upon companies with substantial market power, known as "dominance." In contrast, while there are no such "special duties" under U.S. antitrust law, the conduct that falls under monopolization is already aggressively prohibited. After all, our free-market approach does not tell companies to: "go out, pound the pavement, compete hard, and invest in innovation, yet once you obtain a certain measure of success, you must pull your punches to allow a fair playing field for others." And, importantly, even the EU approach generally limits its "special responsibilities" obligation to conduct effecting equally efficient competitors. For example, in its 2009 Guidance Paper, the European Commission stated that it "will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking."

If adopted here, the European approach risks damaging America's robust innovation ecosystem. According to a 2020 McKinsey & Company study, the EU legislation that governs competition and labor is "complex and can be a deterrent for entrepreneurs. In a recent McKinsey survey, European start-up founders mention the burden of regulation and administration as one of their biggest woes."

Additionally, incentives for venture capital are critical to innovation-led growth. The same McKinsey study found that from 2017 to 2019 there were roughly twice as many venture capitalists in the United States as there were in Europe. From 2017 to 2019, total venture capital in Europe increased from $18 billion to $36 billion. Over the same time in the United States, it increased from $86 billion to $132 billion. When it comes to later stages of financing, the gap is even more dramatic, with $6.7 billion in Europe compared with $39 billion in the United States in 2017. U.S. privately held startups valued at over $1 billion were valued at 46 times their 2019 annual revenue, compared with only 18 times for those founded in Europe. This difference is consistent with investor belief that U.S. companies are poised for far greater growth or profitability.

Of greatest significance is the American Innovation and Choice Online Act (S. 2992) ("AICOA"), which has passed out of the Senate Judiciary Committee and has a broad reach. This bill would make 10 categories of conduct unlawful when practiced by a "covered platform," which is defined as an "online platform" with (1) a sufficient number of active users, (2) sufficiently large annual sales or market capitalization, and (3) sufficient positioning to meet the definition of a "critical trading partner." A "critical trading partner" is defined by the "ability to restrict or materially impede" a business user's ability to serve customers.

The bill requires proof of "material harm to competition" for only three of the 10 categories of conduct: conduct that would "preference," "limit," or "discriminate" in ways that would "materially harm competition." The bill provides "affirmative defenses," under which these three categories of conduct would not constitute violations if "the defendant establishes by a preponderance of the evidence" that the conduct "was narrowly tailored, was nonpretextual, and was necessary to" (A) prevent a violation of law, (B) "protect safety, user privacy, the security of non-public data, or the security of the covered platform," or (C) "maintain or enhance the core functionality of the covered platform."

Another three categories prohibit conduct that would "materially restrict," "impede," or (in one case) "unreasonably delay": (1) business users in accessing or interoperating with the platform or, accessing "data generated on the covered platform"; or (2) platform users in uninstalling software applications" subject to certain qualifications. Material harm to competition is not an element of this offense. Four categories prohibit conduct, such as "condition[ing] access," "us[ing] nonpublic data" that preference a platform operator's own products, or "retaliat[ing] against any business user or covered platform user," without any requirement of showing material harm or effect. With one difference, the same affirmative defenses as set forth above apply to these seven categories of conduct. The one difference is an additional affirmative defense allowing the defendant to establish "by a preponderance of the evidence that the conduct … has not resulted in and would not result in material harm to competition." Since its introduction, the bill has undergone amendments, though the bill's core remains the same.

II. Modern Economic Learnings and Historical Lessons

Legislative proposals like S. 2992 would impose antitrust liability without requiring a finding of monopoly or substantial market power. As the American Bar Association (ABA) Antitrust Law Section recently explained in its comments on S. 2992: "Some degree of market power is a prerequisite to any firm's ability to unilaterally harm the competitive process through its conduct. Prohibiting conduct without regard to market power invites arbitrary enforcement and wasteful disruption of normal competitive processes. The risks of unintended consequences are especially severe in digital markets characterized by multi-sided competition, dynamic complexities, and interdependence."

Most of the proposals have to do with vertical restraints (e.g., tying, bundling, exclusive dealing) and vertical integration (e.g., prohibitions on so-called "self-preferencing" and imposing structural separation and line-of-business restrictions). Take self-preferencing as an example. As Professor Michael Salinger has explained:

> Self-preferencing can arise for a variety of reasons. There might be technological advantages from physical integration of technically separable components. Technological coordination might require the sharing of proprietary knowledge, and a company might not consider contractual promises that limit another firm's use of its intellectual property to provide adequate protection. When a good or service provided by a company is part of a system that can fail, then a company might not want to risk being blamed for a failure that results from another firm's components. Another broad class of cases … concerns cases when competition is imperfect at adjacent stages. In such cases, a firm might prefer to get the margin at all stages rather than at just one.

Yet, despite the importance of understanding the effects of vertical integration, the various proposals seem to ignore the robust body of empirical literature indicating that vertical restraints and integration are generally procompetitive or benign. This section summarizes that literature and addresses recent critiques by advocates of reform.

Let's start with vertical integration. The empirical literature indicates that such integration generally results in significant efficiencies. These can include the elimination of double-marginalization (or double markups in price by separate firms each with market power at different levels in a supply chain); quality improvements and faster and/or better innovation from coordination in product, design, and innovation efforts; elimination of free-riding from harmonization of incentives; and the creation of a maverick (i.e., a firm that plays a disruptive role in the market to the benefit of customers). While there is considerable theoretical work describing potential anticompetitive effects (namely concerns that vertical integration increases incentives for post-merger firms to foreclose rivals, including through raising rivals' costs), there is only limited empirical evidence supporting that finding in real markets.

There are two leading surveys that summarize the empirical literature on vertical integration and, relatedly, vertical contracts.

The first, authored by a group of DOJ and FTC economists, reviews 24 papers published between 1984 and 2005 providing analysis of empirical effects of vertical integration and vertical restraints. The survey offers a careful synthesis of the evidence and observes that "[e]mpirical analyses of vertical integration and control have failed to find compelling evidence that these practices have harmed competition, and numerous studies find otherwise." The authors conclude that, while "[s]ome studies find evidence consistent with both pro- and anticompetitive effects [,] … virtually no studies can claim to have identified instances where vertical practices were likely to have harmed competition."

The second survey, by Professors Francine Lafontaine (FTC Chief Economist, 2014-15) and Margaret Slade, reviews 23 empirical papers, including some of those in the study prepared by the DOJ and FTC economists. Lafontaine and Slade reach a similar conclusion, stating:

> [I]t appears that when manufacturers choose to impose such restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision … The evidence thus supports the conclusion that in these markets, manufacturer and consumer interests are apt to be aligned.

In addition to these two surveys, in 2018, a group of scholars – Judge Douglas Ginsburg (former head of the DOJ's Antitrust Division), Professor Joshua Wright (former FTC Commissioner), Bruce Kobayashi (former FTC Chief Economist), Tad Lipsky (former FTC Acting Director and DOJ Deputy Assistant Attorney General), and John Yun (former FTC Acting Assistant Deputy Director) – released a summary of published research in peer-reviewed journals since 2008 that empirically analyzed the welfare effects of vertical mergers in the United States. Their analysis of papers from 2009 through 2018 supports the earlier conclusions of Lafontaine and Slade and Cooper et al.

Ginsburg et al. note the likelihood that the set of papers examined "is not exhaustive," and thus they consider their summary to be merely a "snapshot of the likely larger empirical literature."[1] They found:

[1] *Id.* at 6.

> Of the thirteen papers examined, we can directly or indirectly infer the welfare effects identified by the authors as a result of vertical integration in eleven of them. Of these eleven, six had results that indicated vertical integration resulted in positive welfare changes; four had results with either no change, a mixed change, or no economically meaningful change in welfare; and only one (and perhaps two) had results that are consistent with a negative impact.

Some advocates of reform, such as Professor Jonathan Baker (a former Director of the FTC's Bureau of Economics), have criticized the meta-studies on the ground that the authors include in their review empirical studies of firms that do not possess market power. In particular, Baker contends that studies of more competitive market structures are not informative about whether oligopolists can use vertical integration to harm competition. This critique is limited in force.

> As I previously explained:
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> Although not all of the markets captured in the studies examined by Lafontaine and Slade involve durable market power at one or both levels – that is, markets likely to result in antitrust scrutiny– - the critics ignore the fact that at least some of those markets do involve market power. Perhaps more importantly, the meta-studies by Lafontaine and others … do not find that vertical integration systematically creates significant anticompetitive effects in any market. The criticism would have greater force if the various meta-analyses found that vertical integration involving firms with market (or, more importantly, monopoly) power was more likely to result in harm than vertical integration involving firms without market (or monopoly) power. But that is not what the surveys find. Rather, these surveys show that the plurality of empirical evidence suggests regarding vertical mergers as generally procompetitive or benign – whether the firms involved have market power or not. If the critics were correct that vertical integration harmed consumers and resulted in anticompetitive effects, these results would surely show up more systematically in the dozens of product markets studied.

Baker also criticizes reliance on these studies on the ground that they are not informative on whether to modify antitrust policy, because they do not control for the possibility that firms are deterred from anticompetitive vertical conduct by the threat of antitrust enforcement. Baker relies on a recent unpublished study in which the authors compared states that retain per se illegality for resale price maintenance (RPM) after the

Supreme Court's decision in *Leegin Creative Leather Products v. PSKS, Inc.* (in which the court held that RPM is subject to the rule of reason) with states in which that practice would be reviewed under the rule of reason. The study purports to demonstrate that, in the years since *Leegin*, price increases for household consumer goods have been larger, and output growth smaller, in rule of reason states than in states retaining the per se rule against minimum RPM. According to Baker, "[t]his study suggests that the rule of reason did not deter anticompetitive uses of resale price maintenance that the per se rule deterred."

However, as Thomas Lambert and Michael Sykuta have explained, the "study is flawed" for several reasons. These include: First, it fails to account for the fact that anticompetitive theories of RPM predict both a reduction in output and an increase in price (only 1.6 percent of the product categories surveyed had both an increase in price and a decrease in quantity in states that shifted to the rule of reason); and second, the study "systematically disregards information on transactions likely to reflect a procompetitive use of minimum RPM."

Additionally, a recent study by former FTC Chairman Tim Muris and former FTC General Counsel Jonathan Nuechterlein found that the "main effect" of pre-1970s U.S. antitrust enforcement on the then-successful A&P grocery chain and other chain stores "was to keep them from obtaining goods at lower wholesale prices than their smaller competitors and thus from passing along the savings to consumers."

This is not to say specific conduct cannot harm competition and consumers, but rather that creating *ex ante* regulation to outright ban or create presumptions of illegality risks sacrificing the pro-consumer benefits of that conduct by imposing potentially rigid rules that lack the flexibility of existing antitrust rule of reason assessments.

III. Overturning Decades of Supreme Court Precedent

The various proposals would effectively overturn decades of Supreme Court precedent, including many unanimous decisions, holding that (1) antitrust law protects consumers and competition, not competitors; (2) courts should review competitive behavior on a case-by-case basis under the "rule of reason," rather than prescribe entire categories of competition; and (3) vigorous price and non-price competition benefit consumers.

This section discusses the key decisions underpinning modern antitrust law that are under attack by the proposed legislation.

[Verizon v. Trinko (2004)]

Ignoring the teachings of this case, AICOA would impose a duty to deal on market participants – thereby deterring vigorous competition, reducing investment and innovation, and harming consumers.

In *Trinko*, a unanimous court relied upon its 1919 decision in *U.S. v. Colgate* to reiterate that, as a general matter, U.S. antitrust law "does not restrict the long-recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." The court explained the dangers of compulsory dealing. First, compelling firms to share the source of their advantage risks lessening incentives "for the monopolist, the rival, or both to invest in those economically beneficial facilities." Second, "[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing role for which they are ill-suited." Third, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."

The court also reiterated its prior holding that monopoly power (i.e., substantial market power) is a necessary, but not sufficient condition for harm to competition. The proposed legislation would explicitly do away with this requirement – one that is critical because, without monopoly power, there is no ability to substantially foreclose competitors and harm competition. Proposed legislation that would allow a finding of monopoly power based upon vague notions of "fairness" would overturn over 50 years of precedent.

[Brooke Group v. Brown & Williamson Tobacco (1993)]

By banning "self-preferencing," AICOA would likely prevent platforms from offering consumers certain benefits, such as Amazon's free shipping, Apple pre-installing apps on their products, or Google's displaying of Maps or YouTube videos when searched. As such, the bill directly contravenes the reasoning of this case.

In *Brooke Group*, the court held that charging low prices, even if it harms rivals, is not unlawful unless: (1) the prices complained of are below an appropriate measure of the firm's costs; and (2) the firm had a "dangerous probability" of recouping its investment in low-cost pricing "in the form of later monopoly profits, more than the losses suffered." Some of the proposed bills would entirely do away with the second requirement.

The court explained that, without recoupment, “predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is, in general, a boon to consumers.” The court went on to say: “That below cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for ‘the protection of competition, not competitors…” and "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition.” In other words, the court rejected a vague and subjective “unfairness” standard.

Ohio v. American Express (2017)

AICOA would deem certain types of competitive conduct as illegal, even though the Supreme Court has stressed that courts should evaluate whether that conduct helps or hurts consumers on a case-by-case basis.

In *American Express* (AmEx), the court relied upon its prior decisions to reiterate that “nearly every” vertical restraint “should be assessed under the rule of reason,” i.e., a full-blown effects analysis. The court instructed that the rule of reason requires courts to conduct a fact-specific assessment “‘…to assess the [restraint]’s actual effect’ on competition.” Proposed legislation would do away with this fact-specific analysis in favor of presumptions of illegality..

The court also addressed the proper antitrust analysis of two-sided platforms. Specifically, the court analyzed the competitive effects of vertical restraints that AmEx imposed upon merchants, which prevented them from steering customers toward other payment media that were less costly to the merchant. The court held that the DOJ failed to satisfy the “first step” of the three-step, burden-shifting framework because it focused on only one side of the two-sided market at issue: “[t]o demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that AmEx’s anti-steering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit card market.” In other words, the court required an integrated competitive-effects analysis of the entire market.

Leegin v. PSKS (2007)

For similar reasons, AICOA would call into question the *Leegin* case, in which the court held that minimum resale price maintenance must be analyzed under a full-blown effects (or “rule of reason”) analysis. The court stated that: “Resort to per se rules is confined to restraints [such as horizontal price fixing] ‘that would always or almost always tend to restrict competition and decrease output.’ To justify a per se prohibition a restraint must have *‘manifestly anticompetitive’* effects, and ‘lack ... any redeeming virtue.’” The court reasoned that to hold otherwise would be contrary to economics, which has shown that both vertical price and non-price restraints come with procompetitive benefits such as stimulating inter-brand competition, eliminating free-riding, and creating more options for consumers.

Continental T.V. v. GTE Sylvania (1977)

Likewise, AICOA’s prescriptive rules would reject Supreme Court rationales that stretch back a half-century. In *Sylvania* and the following cases, the court held that a firm’s decision to restrict the locations where retailers can sell its products must be analyzed under a rule of reason analysis. The court explained that “per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive,” concluding that conduct transgresses the Sherman Act only if it was an unreasonable restraint of trade that would diminish competition and promote inefficiency. Proposed legislation would return America to pre-1977 case law (and economics) by outright banning such conduct.

FTC v. Actavis (2013)

The court reiterated its prior unanimous holding from *California Dental v. FTC* that “abandonment of the ‘rule of reason’ [i.e., a full-blown effects-based analysis] in favor of presumptive rules (or a ‘quick-look’ approach) is appropriate only where ‘an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.’”

Matsushita v. Zenith (1986)

The court established that antitrust claims must make “economic sense,” stating: “If the factual context renders [a plaintiff’s] claim implausible – if the claim is one that simply makes no economic sense – [plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary.”

NYNEX v. Discon (1998)

The court held that, while the evasion of a pricing constraint may hurt consumers, it does not harm the competitive process. The court distinguished the mere breach of a pricing commitment from the unlawful acquisition or exercise of monopoly power by pointing out that, with the former, the "consumer injury flowed … from the exercise of market power that is lawfully in the hands of a monopolist." The court explained that, in antitrust cases, plaintiffs "must allege and prove harm … to the competitive process, i.e., to competition itself." See also *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act, is not to protect businesses from the working of the market; it is to protect the public from the failure of the market"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("[A]ntitrust laws … were enacted for 'the protection of competition, not competitors.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

U.S. v. General Dynamics (1974)

The court affirmed that the merger did not violate Section 7 of the Clayton Act, rejecting the government's reliance on statistics concerning market share and concentration alone. The court reiterated its position in *Brown Shoe v. U.S.* that evidence on market share and concentration alone is "not conclusive indicators of anticompetitive effects." Proposed legislation banning mergers based on annual revenue or market shares would effectively reverse this case law.

IV. The Economic Basis for Regulation

Antitrust law is not regulation. Rather, it is proscriptive and not prescriptive in nature, with a default of legality. This is important because, among other things, creating *ex ante* regulation to prevent certain conduct risks sacrificing the pro-consumer benefits of that conduct by imposing potentially rigid rules that lack the flexibility of existing antitrust rule of reason assessments. One of the main benefits of relying on existing antitrust laws is that they proceed primarily through fact-specific, case-by-case analyses, which are more likely to maximize consumer welfare than *ex ante* regulations.

As discussed previously, there are several problems with contentions that the United States has a market-concentration problem that warrants a regulatory approach. For example, because economy-wide statistics inevitably aggregate economic phenomena across product and geographic lines, they can grossly overstate concentration in properly defined antitrust markets. Indeed, as the aforementioned Froeb and Werden explained, Census Bureau data " do not demonstrate increasing concentration of *markets*, i.e., ranges of economic activity in which competitive processes determine price and quality, and in which the impact of mergers and trade restraints are evaluated in antitrust law." Instead, "[c]ensus data relate to much broader aggregations of economic activity."[2] And, the most recent data Census shows that U.S. economic concentration has declined since 2007.

More importantly, even if the United States had a concentration or competition problem, aggregate statistics are ultimately tangential, or even irrelevant, to the question of whether alleged conduct is actually anticompetitive. Indeed, there is great risk in equating concentration with harm. Fears about concentration ignore its benefits, including economies of scale, self-financing, the ability to take and survive risks, and multilevel integration. As Professor Steve Berry has explained: "[P]roduct quality is going up. That's pushing price up. That pushes margins up. The marginal cost is going down as firms get better logistics and locate closer to their customers. Marginal cost is falling. That's efficiency. But markups go up."

Finally, with respect to online platforms in particular, if it were true that the United States has a systematic underenforcement problem resulting in harm to competition and consumers, we would expect it to show up more systematically in the retrospective and other studies. But that's not what we are seeing. And, even if studies had mixed results, with some finding harm in certain cases but not in others, that would still counsel toward maintaining our current rule of reason, or full-blown effects-based approach.

[2] In analyzing the "issue brief" put out by the Obama Administration's Council of Economic Advisors (CEA) (the principal study relied upon by those claiming the United States has a concentration problem), the DOJ economists concluded that:

> Even the least aggregated Census data can be over 100 times too aggregated, yet the CEA used the most aggregated Census data, principally citing the change in the 50-firm concentration ratio for 13 broad sectors of the U.S. economy, such as retail trade. We agree with Carl Shapiro, a member of the CEA during the Obama administration (2011-12), that these data are "not informative regarding the state of competition."

The economists also found that "[r]eliable data on trends in market concentration are available for only a few sectors of the economy, and for several, market concentration has not increased despite substantial merger activity."

CONCLUSION

Calls to dramatically reform U.S. antitrust law risk sacrificing the benefits to consumers and innovation from beneficial conduct, like vertical integration and vertical restraints. Given the lack of reliable evidence that the United States has a problem of systematic underenforcement of mergers and acquisitions resulting in harm to consumers and competition, it is premature at best to enact sweeping legislation that would create outright bans and presumptions of illegality.

This study was authored by Koren W. Wong-Ervin and commissioned by the American Edge Project.