AGGRESSIVE COMPETITION IN DIGITAL MARKETS:

PROOF OUR ANTITRUST LAWS WORK

NetChoice

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INTRODUCTION

ANTITRUST & DIGITAL MARKETS

Earlier this summer, the CEOs of Amazon, Apple, Facebook, and Google testified before the House of Representatives about the products and business practices that have brought their companies so much success. Their testimony was needed, lawmakers claimed, to help them make sense of competition in digital markets—does it exist? is it at risk? does antitrust law need overhauling?

As it turns out, lawmakers didn't quite need their testimony after all. Even with four of the market's five most valuable tech rivals before them (conspicuously missing was Microsoft, the third, sometimes second most valuable tech company), lawmakers had already answered their own questions: there is no competition because each company is a monopoly; yes, competition is at risk, because each destroys potential competitors; and yes, absolutely, Congress must reform antitrust law before it's too late. Too late for what? "Democratic society," said Judiciary Committee Chair Jerrold Nadler. How so? Without change, explained Antitrust Subcommittee Chair David Cicilline, "we['ll] bow before the emperors of the online economy," shaming "our founders [,who] would not bow before a king."

Even with the stakes so seemingly high, and even with five related hearings and more than 1 million documents supplied by the companies, lawmakers showed neither that these companies are monopolies nor that they engage in anticompetitive business practices. In search of a problem, the Subcommittee came up short.

But perhaps that's the Subcommittee's point. How could it be legal, lawmakers seemed to wonder, for these companies to be so big? If they haven't broken the law, maybe the real culprit is the law itself. Is it too outdated? too accommodating of business interests?

The answer to those questions is no. Amazon, Apple, Facebook, and Google are big and they're very successful. And although none enjoys monopoly status, all are product leaders in at least one market.

But far from being symptoms of an outdated antitrust regime, tech companies are proof that the country is getting antitrust right.

For starters, even as the Digital Revolution continues to disrupt and displace traditional markets, competition in digital markets is alive and growing. And even as digital markets mature, innovation shows no signs of slowing down.

But these companies aren't invincible. Like the market leaders before them—Kodak, Microsoft, MySpace, Yahoo, Blockbuster—they aren't immune to creative destruction. No matter how great their products and services are today, things change. This is especially true in digital markets, where tech companies must keep pace with markets that keep integrating and creating new markets. So much so that no one really knows what tomorrow's markets will look like.

Unlike their predecessors, however, Amazon, Apple, Facebook, and Google seem to understand this. Rather than rest on their laurels, they keep innovating. As they well know, markets don't stay the same for long so the more they rest, the more vulnerable they become.

Not that could take it easy anyhow. Even today they face stiff competition from all directions, including from each other. Amazon, Facebook, and Google, for example, compete for advertising revenue and for e-commerce sales. Apple and Google compete for smartphone users. All make their own smart assistants. And all compete for content distribution, with Amazon and Apple also making their own content directly. From outside the United States, Chinese companies like Huawei, TikTok, Alibaba, Tencent, and Weibo keep them on their toes.

So invincible they are not. But they remain competitive because our antitrust regime gives them breathing room to try out new business models and practices. Although the law sometimes requires them to get a permission slip before merging, it generally trusts that markets will make better decisions than the government in allocating resources and delivering consumer benefits.

Tech's critics want to change that. To them, tech's size is too much to tolerate: Big Tech, they exclaim, is just too big, too powerful, too menacing. In their eyes, Big tech is guilty because it's, well, big. To be sure, some critics have sought to explain why big is bad, spilling considerable ink advancing novel theories of how consumer harm flows from tech's bigness. But without actual evidence, their novel theories remain just that: novel theories.

By contrast, market realities show that consumers benefit immensely from their products, services, and business models. Those benefits are likely to keep flowing too. Just last month, for example, Walmart announced a new partnership with Instacart that seeks to use Amazon's own business model against it. And Google just announced that it's starting a new certification program to break the biggest barrier to economic success: college education. Given Google's track record of disrupting markets, it stands a real chance of helping more Americans enter the workforce and earn good money without getting a college degree.

None of this is to say that tech is above criticism. With cyber threats ranked as the number one risk to U.S. national security every year since 2014, it's entirely appropriate for lawmakers to demand companies prioritize the security of Americans' data. It's also appropriate for lawmakers to inquire into how companies use that data. But data collection, use, and security are not antitrust problems.

And just as data is not an antitrust problem, neither is tech's size. As explained in this paper, Amazon, Apple, Facebook, and Google aren't monopolies. Even if they were, they don't engage in anticompetitive practices. Instead, they are symbols of antitrust's success: By prioritizing consumer welfare, our antitrust regime has given these companies the freedom to innovate—and innovate they have.

This paper also explains why lawmakers should not be hostile to new business practices. As tech has proved, new business models bring big rewards.

That is why, instead of reflexively preferring the comfort of the tried-and-true, lawmakers should embrace the new-and-better. Our antitrust laws should too—as they currently do.

TABLE OF CONTENTS

SUMMARY

READER'S DIGEST VERSION OF REPORT

July's antitrust hearing captured the media's attention. It even got Americans interested in a subject that, for most of its history, has taken a backseat to other national issues. Even so, the blockbuster hearing covered no new ground. Despite receiving over a million documents and holding six hearings on digital markets, the Subcommittee unearthed no evidence showing that any of the companies is a monopoly or engaged in unlawful business practices.

It did, however, find evidence of what market realities already show: Amazon, Apple, Facebook, and Google compete aggressively in digital markets. According to tech's critics, though, this aggressive competition is anticompetitive because its hurts rivals. But even if that were true, the Sherman Act stomachs—even celebrates—cut-throat competition. This is so because aggressive competition benefits consumers. And tech, it cannot be denied, has benefitted consumers.

With the Subcommittee poised to overhaul the country's antitrust regime to condemn the very business practices responsible for all the benefits digital markets have delivered, it's worth diving into market realities. That dive reveals that:

- **No company has monopoly power. Even using market definitions narrower than reality calls for, no company reaches the 75% market share threshold informally set by the Supreme Court, or the above-66% threshold outlined by the Department of Justice.**

- **Even under some lawmakers' extremely narrow market definitions, no company has had a durable market share above those thresholds. In fact, looking at the past decade, most have lost ground to competitors.**

The business practices the Subcommittee condemns aren't just legal, they're pro-consumer and commonly used. To take but a few examples:

- Like Quidsi—the very company Amazon is criticized for competing against and later acquiring—Amazon treated diapers as a "loss leader." By offering a product at a loss, retailers try to attract customers and keep them coming back. The idea is that overtime consumers will buy more and more of that product from the retailer, thereby increasing quantity (and thus revenue).

- Apple charges app developers who make money from its App Store a commission fee. That fee—30% of whatever the app earned through the store—applies to an increasingly small number of developers (about 15%). Unlike some of its competitors, though, Apple's App Store is integrated with its hardware. This means Apple's App Store is specifically designed to work well with its iPhone and other handheld devices. Critics claim this is exclusionary—Apple gets to demand a high cost of entry, they say. But that misses two points: First, Apple wants to attract app developers so as to keep its App Store competitive. And second, Apple exercises control over its App Store because its business model has long prioritized giving consumers a superior experience, which it does by setting standards for app developers to meet.

- Facebook, like its competitors, integrated complementary products, spurred innovation across its services, and delivered superior products to consumers. Facebook's acquisition of Instagram, for example, benefitted consumers: before the acquisition, Instagram had no revenue streams, no plans for revenue streams, only 20 million users, and a growing spam problem that it could not tackle; today it makes nearly $20 billion in ad revenue, is enjoyed by over 1 billion users, has spam blockers, and connects millions of small American businesses with potential consumers.

- Like Facebook, Google relies on digital advertising for revenue. Its business model—unsurprisingly—thus focuses on improving not just its ad tools but also its platforms. An early adopter of ad technology, Google has created an entire ad product suite. Critics say that this gives Google too much control over the price of digital ads. But since 2010, digital ad prices have dropped 40%. And thanks to Google's massive investment in research and development—$26 billion—it's constantly upgrading Google Search to give users the best, most useful search engine possible.

These business practices have brought tech companies success. But more importantly, they've benefitted consumers. Tech's critics focus on their size, not their benefits. That's a shame because these innovative business practices have disrupted markets, lowered prices, improved quality, and created new markets that integrate services from across markets. These hybrid markets aren't just innovative, they're the future of digital tech. But that future will be in jeopardy if Congress outlaws innovative business practices.

PART 1

THE SHERMAN ACT

Far from being a relic of the Smokestack Era, the law protects consumers and encourages innovation in today's markets.[1]

SHERMAN ACT OVERVIEW

In passing the Sherman Act in 1890, Congress sought to enshrine national values like free enterprise and economic competition. Those values usually go hand in hand[2], but sometimes market realities make them seem like the odd couple[3]. On the one hand, the presence of a monopoly signals a lack of competition; on the other hand, striving for monopoly power "is an important element of the free-market system."[4] This apparent tension, however, merely reflects that competition and free enterprise are like a double helix: "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place," and that in turn "induces risk taking that produces innovation and economic growth."[5]

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[1] A substantially similar version of section also appears in a forthcoming article in the George Mason Law Review. The author thanks the Law Review's editors for their help in polishing it for publication in that medium. *See* Christopher Marchese, *Debunking the "Big is Bad" Boogeyman: How Facebook Benefits Consumers*, GEO. MASON L. REV. (July 2020), http://georgemasonlawreview.org/wp-content/uploads/2020/08/Marchese_Final_Web3.pdf.

[2] See, e.g., United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.").

[3] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 415-16 (2004) ("The Sherman Act is indeed the 'Magna Carter of free enterprise,' . . . but it does not give judges *carte blanche* to insist that a monopolist alter its ways of doing business whenever some other approach might yield greater competition.").

[4] *Id.* at 407.

[5] *Id.*

Potentially earning monopoly profits is thus like potentially winning the lottery—remote though it may be, the mere possibility is temptation enough to try. But if that chance all but disappears, so too will the pool of eager risk-takers. And if taking first place means being treated guilty until proven innocent, then there's little sense in even trying. Because that would dampen the competition our antitrust laws are meant to encourage, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[6]

For that reason, the Sherman Act doesn't outlaw all monopolies. Instead, it prohibits only those that are "accompanied by an element of anticompetitive conduct."[7]

SECTION 2 LEGAL REQUIREMENTS

To prove a monopoly is unlawful, plaintiffs must prove the monopolist "harm[ed] the competitive process and thereby harm[ed] consumers."[8] It's not enough, in other words, that competitors were hurt—that's to be expected because "[c]ompetition is a ruthless process."[9] Indeed, it spares no business, not even big ones. In our own time, it has reduced to ruins former market giants like Blockbuster, Borders, Circuit City, and Radio Shack. Once ever-present, these companies have since closed up shop or filed for bankruptcy. And competition seems poised to shutter shopping mall staples like Victoria's Secret, GameStop, GNC, and JC Penny next.

[6] United States v. Aluminum Co. of America (ALCOA), 148 F.2d 416, 430 (2d Cir. 1945).

[7] Trinko, 540 U.S. at 407.

[8] *See, e.g.*, United States v. Microsoft Corp., 253 F.3d 34, 58–59 (D.C. Cir. 2001); *see* Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1437 (7th Cir. 1986) ("The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency."); Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986) ("[T]he emphasis of antitrust policy shifted from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency . . . .").

[9] Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986).

But the Sherman Act stomachs[10]—even cheers—this ruthless competition because "[a]ggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers."[11] Harder to digest, however, is "[a]ggressive, exclusionary conduct [that] is deleterious to consumers."[12] This is the sort of conduct that softens the market's sharp edges and relieves pressure on a company to innovate.[13] This behavior often signals that the offending company is shielded from "competition on the merits."[14]

But procompetitive and exclusionary conduct are often brewed in the same barrel: conduct that benefits consumers also tends to exclude competitors.[15] So even with an eye toward consumer welfare, spotting the difference can be difficult. This is especially true in multi-sided markets—like those Amazon, Apple, Facebook, and Google compete in—where a platform's conduct may benefit one group of consumers, while seemingly harming another.[16] For these reasons, a claim of anticompetitive conduct must be "judged against the realities" of the supposed monopolist's relevant market.[17]

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10 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 (1984).

11 Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345 (2003).

12 *Id.*

13 *See, e.g.*, Microsoft Corp., 253 F.3d at 58–59.

14 Aspen Skiing Co. v. Aspen Highlands Skiing Co., 472 U.S. 585, 605 n.32 (1985).

15 *See* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458–59 (1993).

16 *See* Ohio v. American Express Co., 138 S.Ct. 2274, 2286 (2018) ("Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services.").

17 Brooke Group Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230 (1993).

PART 2

MARKET COMPETITION

No company is a monopoly; each faces fierce competition—from each other and other small and large rivals. That competition is likely to increase even more in the coming years.

Market realities show that Amazon, Apple, Facebook, and Google are not monopolies. In fact, competition in digital markets is strong and growing stronger. Even so, the success these companies have earned has so gripped the public's imagination that we now use them as shorthand for specific products. Take Google Search. It's become so synonymous with internet searches that "Google" is now defined in the dictionary as a verb to that effect.

It is thus unremarkable that some see individual companies as representing most or even all of a market. And so, as Alec Stapp of the Progressive Policy Institution points out, it's unremarkable that many Americans use the word "monopoly" interchangeably with "large." Most times, precision doesn't matter. But when it comes to antitrust law, it matters a lot.

MONOPOLY REQUIREMENT

For starters, Section 2 punishes a business for anticompetitive conduct only if that business is a monopoly. And it outlaws only monopolies that result from anticompetitive conduct. In practical terms, this means most business decisions are not subject to antitrust review. If the opposite were true, antitrust enforcement would itself erect barriers to entry: only profitable businesses would be able to afford the litigation expenses.

So when does a business have monopoly power? According to the Supreme Court, monopoly power is "the power to control prices or exclude competition" in the relevant market. [18] Refining that definition, the Department of Justice finds monopoly power when a business maintains "a market share in excess of two-thirds for a significant period and market conditions (for example, barriers to entry) are such that the firm's market share is unlikely to be eroded in the near future."[19] Even when found, monopoly power won't trigger antitrust enforcement unless it is durable.[20]

Those definitions sound straightforward enough. But the real work is done in defining the relevant market. Plaintiffs have an incentive to define the relevant market as narrowly as possible: the narrower it is, the fewer competitors, the higher the defendant's market share. Defendants, the opposite.

The Supreme Court and DOJ have tried to bring order to this open-ended inquiry. Under longstanding precedent, the Court defines the relevant market as including the product at issue and all those that are "reasonably interchangeable" with it.[21] The DOJ explains that other products are reasonably interchangeable when customers have the "ability and willingness" to turn to them following a price increase or "non-price change such as a reduction in product quality or service."[22] Market definition is thus "focuse[d] solely on demand substitution factors."[23]

TECH'S MARKET SHARE

Applying these standards to Amazon, Apple, Facebook, and Google, we see that none has a monopoly. And none has durable market power. This is so even though the companies are large and even though they are popular. Consider that:

- Amazon's share of the retail market is a mere **4%**. Amazon's share of the arbitrarily narrow e-commerce market in the United States—as defined by its critics—is about **38%**. Since coronavirus, it's actually lost ground to Walmart, Target, and BestBuy. If it had durable monopoly power that would not be the case.

[18] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

[19] U.S. Dep't of Justice & FTC, Horizontal Mergers Guidelines (2010).

[20] *Id.*

[21] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

[22] DOJ, *supra* note 18.

[23] *Id.*

- Apple's share of the smartphone market is **49%**. In 2017, its share was only **29%**; in 2018, it hit **47%** only to decrease to **39%** in in early 2019. If Apple were a monopoly, it would not see these drastic changes in market share so close in time.

- Facebook's share of the digital advertising market is **23%**. Since June 2020, major advertisers like Nike have been boycotting advertising on Facebook. If Facebook were a monopoly, companies would have no choice but to advertise with Facebook.

- Google's share of the digital advertising market is **29%**. Even under an arbitrarily narrow market definition–digital search ads–Google has only **58.5%**. Google has also seen both market shares decline since Amazon's entrance into the digital ads market. Again, that's not something that would happen if Google were a monopoly.

OTHER MARKET CONSIDERATIONS

Even when a business has a dominant market share, that "is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share," as the DOJ points out. For that reason, courts "will draw an inference of monopoly power only after full consideration of the relationship between market share and other relevant characteristics." For example, when demand is elastic, a dominant business is often "unable to raise prices without losing so many sales that it will prove to be an unprofitable strategy." And "[i]n markets characterized by rapid technological change," dominant market share "may be consistent with the presence of robust competition over time rather than a sign of monopoly power." In fact, "'market structure may be a series of temporary monopolies' in a dynamically competitive market."

All of those considerations apply to American tech companies. First, demand is elastic. As shown in the previous section, each company's market share has fluctuated in recent years. If Facebook raised prices for digital ads, for example, advertisers would simply switch to Amazon or Google. And second, digital markets are infused with rapid technological changes.

NARROW MARKET DEFINITIONS RISK HURTING INNOVATION

With products as its reference point, market definition looks to the past to make decisions about the future. For that reason, it works best in traditional markets that innovate slowly. Take the automobile industry. Even with car manufacturers on the cusp of nailing self-driving cars, the industry hasn't changed all that much since Henry Ford invented the Model T. So in an antitrust case against Ford's F150, for example, the litigants may quibble over the scope of the market—is it all cars or just pick-up trucks?—but they'd at least agree that the product is an automobile.

But in markets marked by innovation, market definition's usefulness can wear thin quickly. For starters, it suggests that products can't be competitors if they have meaningful differences. And it assumes that tomorrow's products must largely resemble today's. Neither assumption is sound and both risk discounting current and future competition.

Start with the first assumption. Under antitrust doctrine, businesses are said to be competitors when their products are substitutes for each other. So, for instance, if Heinz sells less ketchup after jacking up prices and Hunts sees a rise in demand for its ketchup, we know the two are likely competitors. Same, too, in the case of fast food. If McDonald's raised its prices significantly and saw a decline in demand while Chick-fil-A saw a rise in demand, we'd know they compete against one another.

These examples are pretty straightforward, but they reveal a key insight: products can be competitors when they're largely indistinguishable and when they're different. Hamburgers dominate McDonald's menu and chicken dominates Chick-fil-A's; McDonald's also serves chicken but Chick-fil-A doesn't serve hamburgers; McDonald's is a legacy player and nearly everywhere, Chick-fil-A is newer and in fewer locations. Those differences make no difference, though: The two compete against each other.

When it comes to tech, however, critics insist that differences—small or large—mean products can't be competitors. According to the United Kingdom's Competition and Markets Authority, for example, Facebook and YouTube aren't competitors because consumers use Facebook to communicate and YouTube to watch videos. Even setting aside the CMA's arbitrary distinction between communication and content, its argument does not hold up to common sense. Because both platforms are free (although YouTube has a premium version), they rely on advertising for revenue. Like newspapers and television shows, their value to advertisers increases when viewership increases.

In other words, YouTube and Facebook compete for a user's attention. With just 24 hours in a day, Americans have a maximum budget that can be reallocated but never increased. Even then, the budget is stretched thin by stubborn fixed costs like time for sleeping, commuting, working, learning, and commuting some more. And unlike in other markets, here consumers can't buy now and pay later. Time, it turns out, can't be borrowed.

Bottom line, like a magnifying glass held too close to its subject, market definition can't be so narrow that a distorted picture emerges. And because market definition is an inherently retrospective exercise—it captures a screenshot of where an industry once was, not necessarily where it's going—even greater care must be taken not to discount competition. Unfortunately, tech's critics have thrown caution aside and focused on narrowly defined markets, discounting present competition and downplaying future competition. But even under their narrow market definitions, no company is a monopoly. Consider:

COMPANY	BROAD MARKET DEFINITION	MAIN COMPETITORS
amazon	Retail Shopping	Same + Big Box Stores
Apple	App Stores	Google Play, Microsoft Store, Amazon App Store, Samsung Galaxy Apps
Facebook	Advertising	Same + Traditional Advertising (TV, Print, Etc.)
Google	Advertising	Same + Traditional Advertising (TV, Print, Etc.)

COMPANY	NARROW MARKET DEFINITION	MAIN COMPETITORS
amazon	E-Commerce	Walmart Online, eBay, Target Online
Apple	Smartphone Operating Systems	Google's Android
Facebook	Digital Advertising	Google, Amazon, Adobe, AT&T, Comcast, Rubicon Project, The Trade Desk, Twitter, Snapchat, & Verizon
Google	Digital Advertising	Facebook, Amazon, Adobe, AT&T, Comcast, Rubicon Project, The Trade Desk, Twitter, Snapchat, & Verizon

INNOVATIVE BUSINESS PRACTICES

PART 3

COMPETITION & INNOVATION

Each company's success comes from innovative products and innovative business models, not unlawful conduct.

Pittsburgh once stood at the center of global steel production. These days it's a hub of the service economy, focusing on technology, banking, and medicine. Chicago, once known for its meatpacking industry, is now known for its finance and insurance industries. And Buffalo, New York, which for decades was associated with manufacturing, now has 700 high-tech companies. Their transformation from manufacturing powerhouses to service providers reflects the country's ever-increasing move toward an Information Economy.

As today's politics suggest, this move hasn't always been smooth sailing. It's disrupted established industries and felled household names like Sear's. And while Americans often welcome change, they also worry about what that change means for them. This tension—between the comfort the tried-and-true brings and the enjoyment new-and-innovative products offer—undergirds much of the national discourse about tech. On the one hand, Americas undeniably benefit from Amazon, Apple, Facebook, and Google. On the other, these companies are so innovative and so good at what they do that they force their competitors to change or collapse. As Judge Frank Easterbrook once put it, "[t]he gale of creative destruction produces victims before it produces economic theories and proof of what is beneficial."[24]

These companies have succeed largely because they adapt quicker and are more innovative than many of their established competitors. In other words, they practice exactly what antitrust preaches. Even so, their new business practices in relatively new markets raise red flags for some. Critics think that, like their innovative predecessors in other markets, tech companies don't seem to play by the rules. How could they be so successful otherwise?

24 Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 5 (1984).

That's true—and it's a good thing. Consumers benefit when companies shake up markets, create new markets, and raise the bar for an entire industry. If tech companies had to follow the same business models and practices as their less-successful competitors, then we'd never have the products or services we have now.

For this reason, lawmakers should be wary of changing the country's antitrust laws to prohibit or limit the types of business models companies can pursue. Indeed, as the economy grows more integrated, all companies—small or large, tech or otherwise—must have the flexibility and incentive to experiment with new practices.

Skeptical readers may think: Innovative business practices are all well and good, but we have documents showing anticompetitive behavior and that behavior deserves punishment. But that's simply not the case. The practices discussed at July's hearing aren't just legal, they reflect sound business judgment. And when viewed in context, they make perfect sense. To be sure, tech competes aggressively against its rivals. So much so that sometimes those rivals close up shop. But tech's business practices have benefitted consumers and that's what matters.

INTENT IN ANTITRUST

For the most part, antitrust is a discipline rooted in empirical evidence and objective data. That's not to say there's no subjectivity or theory involved. Nor is it to say that antitrust boils down to just crunching numbers. As the sheer volume of academic papers makes clear, antitrust is a rigorously debated field. But it has a clear preference for evidence that can be measured.

This is why inferring "intent" from business documents is not useful. Not only is intent often subjective but also it is impossible to infer economic effects from business documents alone. Still, because procompetitive and anticompetitive behavior look alike, plaintiffs in monopoly cases sometimes try to use business documents to clarify which is which.[25] Like the documents cited in the Subcommittee's hearing, business documents tend to show "both greed-driven desire to succeed and glee at a rival's predicament."[26] The documents may even show that a company plotted ways to drive its competitors out of the market.

[25] Geoffrey A. Manne & E. Marcellus Williamson, "Hot Docs. v. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication," 47 Ariz. L. Rev. 609, 646 (2005).

[26] *Id.* (citing A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989)).

That raises the question: so what? The Sherman Act is meant to encourage aggressive competition. So "a desire to extinguish one's rivals is entirely consistent with, and often is the motive behind competition."[27] Even when a defendant acts on that desire, the Sherman Act still prefers objective evidence: did the defendant's actions harm consumers? If not, then there is no violation.

In other words, a judge can infer intent from a defendant's words—sometimes they're even so explicit he needn't infer. But he cannot infer economic effects from words alone.[28] And when evidence shows the opposite—that consumers benefitted—then that trumps any intent to harm competitors, no matter how clearly expressed.

TECH'S INTERNAL DOCUMENTS

The same is true here. Although the Subcommittee made much of internal documents that reportedly showed an intent to drive rivals out of the market, or to snatch them up before they became rivals, the documents underscore that documents are a poor proxy for empirical evidence. If anything, the documents actually undermine the Subcommittee's argument that the companies are monopolies: they show companies well aware of their weaknesses, their competitors, and their need to keep improving and innovating.

Take the emails between Facebook CEO Mark Zuckerberg and his employees. The Subcommittee contends that they prove Facebook acted anticompetitively in buying Instagram because Zuckerberg acknowledged reality: Instagram was a potential competitor (so were the other companies that he mentioned and that Facebook didn't buy), Facebook could afford to buy startups, and that if acquired, Instagram could be integrated with Facebook to improve both products. Are we to ignore the benefits Facebook's acquisition had merely because Zuckerberg said the quiet part out loud—that Instagram was a potential rival and that Facebook could afford to buy it?

If we are, then that risks chilling procompetitive conduct across all markets. Think about it. If acknowledging reality means risking antitrust enforcement, then there's an incentive not to speak candidly within a firm. Without that frank conversation, companies are unlikely to make the best business decisions. That, in turn, likely means more unrealized market efficiencies and less consumer welfare.

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[27] *Id.*

[28] *Id.* at 649.

THE GOVERNMENT RELIES ON CANDID CONVERSATION TOO

This principle is not new. Even the government relies on candid, closed-door conversations to mull over next steps. Indeed, even as the Supreme Court forced President Nixon's hand in turning over the Watergate tapes it still recognized that executive privilege was key to protecting the president's access to frank advice from advisers. This same principle plays out across the board—from a prosecutor's office and a judge's chambers to a Member of Congress's inbox.

To be sure, private businesses neither enjoy nor deserve the same privileges and immunities afforded the government. Just like every other American, private businesses have to comply with valid legal service. But if certain buzzwords can trump empirical evidence, then companies will have every incentive to speak in euphemisms or codes. They'll also have every incentive not to loop in more than a few employees. That risks companies making poor business decisions—and for no good reason. At the end of the day what matters is empirical evidence.

WHAT THE DOCUMENTS ACTUALLY REVEAL

The Subcommittee's trove of documents—over 1 million—contains no smoking gun. But the documents do show that Amazon, Apple, Facebook, and Google compete aggressively. And they reveal that each is constantly monitoring for competitive threats and profitable opportunities. In other words, they reveal that tech is no different from any other business: it keeps tabs on the world around it. That said, some sentences plucked from the documents and blown up for display at the hearing are admittedly inflammatory.

That was, one guesses, the point. Ripped from context and seeming to confirm what critics have long maintained about tech, the quotations are fodder for the press. As understandable as that may be, the Subcommittee is considering whether to overhaul the country's antitrust laws. Antitrust enforcement is an extraordinary remedy for an extraordinary problem. So it does little good for Congress to weigh subjective evidence more heavily than, and at the expense of, objective evidence.

And truth be told, the documents themselves aren't even damning. Yes, they show aggressive business tactics. But remember, the Sherman Act encourages aggressive competition. And when put in context, the documents reveal that each company not only acted lawfully but did so in ways trumpeted by the law itself.

To show why that is, the following sections put the documents in context of each company's larger business model and effects on consumers.

PART 4

AMAZON

Amazon's batch of documents reveal internal communications about the company's acquisition of Quidsi and Ring. As Amazon's CEO Jeff Bezos explained in his testimony, these acquisitions reflect the company's aggressive efforts to compete. That's certainly true. And it's also true that Amazon's efforts benefitted consumers even though Amazon's competitors may resent the company's ruthlessness.

DIAPERS.COM

The story begins in 2005 when New Jersey entrepreneurs Marc Lore and Vinit Bharara started Diapers.com. Later renamed Quidsi, Diapers.com got its start selling diapers and other baby products, eventually expanding into soaps (Soap.com) and beauty products (Beautybar.com).

When Quidsi emerged as a successful niche marketplace, Amazon took notice. Its benchmarking team—basically scouts that compare Amazon's products and services to its competitors—reported that Quidsi was Amazon's "largest and fastest growing competitor in the on-line diaper and baby care space."

In 2009, Amazon offered to buy the company, but Lore and Bharara rejected the offer. So Amazon tried a different tactic: it launched a plan to "undercut[] the core diapers business for diapers.com." In doing so, the company hoped that it would "slow the adoption of soap.com." Amazon's "plan to win" included offering new moms a free Amazon Prime Account and a special "Amazon Mom" program. It also included "match[ing] pricing on these guys no matter the cost." Amazon meant what it said: it lost around $200 million in a single quarter.

Quidsi couldn't beat Amazon's prices, so it went in search of buyers. That search turned up Amazon and Amazon's main competitor, Walmart. Although Walmart made a higher bid, Quidsi went with Amazon's offer of $545 million. After the FTC blessed the deal, Amazon chose to run Quidsi as an independent business with Quidsi's founders remaining with the company. After several unprofitable years—competition from other companies remained stiff—Amazon shuttered Quidsi in 2017.

Once their non-compete clauses expired, the founders met with Bain Capital and pitched an idea for a new e-commerce site to compete with Amazon. Bain liked what it saw and invested $250 million in the new venture called Jet.com. Within a year of Jet's launch, it was sold to Walmart for $3.3 billion. Today, Lore runs Walmart's e-commerce division. (And yes, Walmart's e-commerce site sells diapers.)

LOSS LEADERS

So what's the antitrust problem? According to critics, Amazon uses profits from some products to cover losses it incurs from intentionally pricing other products below-cost so as to drive competitors out of the market. In this case, Amazon stands accused of pricing its diapers below-cost intentionally to drive Quidsi out of business. Known as "predatory pricing," this practice has traditionally been seen as anticompetitive because the company is thought likely to raise prices above market-level once competitors are gone.

Experience, however, shows that below-cost pricing is often procompetitive, especially in the retail industry. After all, at its core, below-cost pricing means consumers pay less for a product. And although that price cut can be temporary—as traditional theory predicts—market realities reveal that that's rarely the case. Instead, retailers like Amazon rely on "loss leaders" to attract consumers and to keep them returning. Overtime the consumer buys more and more of the product from the retailer, which in turn increases output and thus sales revenue.

This tactic is so common that Quidsi used it when it first launched diapers.com. In a 2012 interview, Lore said: "[W]e started with selling the loss leader product to basically build a relationship with mom. And once they had the passion for the brand and they were shopping with us on a weekly or a monthly basis that they'd start to fall in love with that brand. We were losing money on every box of diapers we sold."

In sum, Amazon copied its competitor's business model. But Amazon did not eliminate competition—parents continue to buy diapers from their brick-and-mortar retailers and Walmart keeps Amazon on its toes. And, in fact, Amazon inadvertently helped launch its largest rival, which underscores that digital markets are hard to predict.

RING DOORBELL

The second story is about Amazon's purchase of Ring, the video doorbell system. Amazon's senior management team identified Ring as a potential competitor in the smart-home market and advised the company "pay for market position as it's hard to catch the leader." By this, the team apparently meant that once Ring was established as the market's dominant smart-home provider, Amazon wouldn't be able to play catch-up. Bezos agreed, writing that the acquisition would mean "buying market position—not technology. And that market position and momentum is very valuable."

This exchange represents perfectly why business documents are not useful in evaluating claims of anticompetitive conduct. On their face, the emails reveal that rather than develop its own technology to compete, Amazon would just buy "market position." Although even that isn't unlawful, it doesn't capture what Amazon actually did with the company. Far from just entering the smart-home market, Amazon improved Ring by integrating it with its voice assistant, Alexa. That integration means users can now control their doorbells with their voices.

OTHER CRITICISM

Aside from those acquisitions, Amazon was also criticized for allegedly using data about third-party sellers to identify product markets it should enter with its own product line. Put simply, Amazon stands accused of observing the market. (It did.) The criticism is that Amazon has a conflict of interest: it uses its marketplace to push its own brand at the expense of its competitors (often called "self-preferencing"). This practice is no different from how physical retail stores operate. Macy's, for example, owns its own brands, which it sells alongside competitor brands in stores that Macy's owns. Same too with Costco and its Kirkland line of products. Ditto Target, BestBuy, Home Depot, Walmart, and just about every other major retailer.

So not only is this a common business practice, but also critics have failed to allege any competitive harm from it. In fact, since Amazon's brands are, on average, cheaper than its competitors, Amazon helps consumers by putting lower-priced items in front of them.

DOCUMENT	CLAIM OF ANTICOMPETITIVE EFFECT	REALITY OF PROCOMPETITIVE EFFECT
Quidsi Emails Re: Competition Plan	Predatory Pricing	Loss Leader
Quidsi Emails Re: Acquisition	Killer Acquisition	Product Integration; Rise of New Competitor
Ring Emails Re: Acquisition	Monopolization	Entry into New Market; Product Integration
Amazon Brand Emails Re: What Consumers Want	Market Dominance	Increase Product Competition; Decrease Prices

PART 5

APPLE

Apple's founder and former CEO Steve Jobs was known for being a perfectionist. This trait usually resulted in Apple developing exceptional products—from the Mac to the iPod to the iPhone. His perfectionism extended to the user experience too. As Oracle's CEO recounted, Jobs "wanted to control every aspect," even "[i]ncluding how you pay for an item in a store. Or what it looked like in a box."

INTEGRATION IS IN APPLE'S DNA

Today, most everyone agrees that Apple's builds high-quality products. But some also bemoan the key ingredient behind the company's success —its obsessive focus on perfecting the user experience. Unlike many of its competitors, Apple's first instinct is to make and integrate most parts of its products, and to perfect how those products are used. Its critics claim that these principles create "closed systems" that stifle competition. Chief among their complaints is Apple's App Store, which they claim forces app developers to get Apple's permission to compete on iPhones and thus to pay whatever Apple asks for access.

Jobs saw things differently. In an earnings call to investors a decade ago, Jobs told investors that the "[o]pen versus closed [dichotomy] is a smokescreen." The real difference between Apple's iOS and Google's Android, he explained, was "integrated versus fragmented." So the real question was "[w]hat is best for the customer—integrated versus fragmented?"

As it so often did, Apple answered integrated. Jobs summed it up this way: "When selling to people who want their devices to just work, we think integrated wins every time. We are committed to the integrated approach."

Apple stuck with this approach when it invented the App Store. Jobs originally did not want app developers to build native apps for iOS; he expected that they'd build WebApps that could instead run on Apple's Safari internet browser. In part, Jobs feared that Apple lacked the bandwidth to police third-party app developers. But after hearing an uproar from developers, Jobs compromised: Apple would release developer tools that allowed others to create apps that, after inspection, could then be downloaded from the App Store.

This move paved the way for developers. Before the App Store, wireless carriers like AT&T and Verizon called the shots, determining which apps were on phones they sold. But Apple's "iPhone was the first phone where we said you worry about the network, we'll worry about the phone."

Just as personal computers are sold with their own operating systems, including mail, web, and calendar apps, pre-installed, smartphones and tablets are sold with mobile operating systems pre-installed. In Apple's case, it integrated its iOS into its iPhones by default. By contrast, original equipment manufacturers like Samsung and Motorola select which OS to install. Most choose to license Google's Android OS, which is free.

All in all, Apple hasn't changed its App Store strategy since its launch a decade ago. Even so, critics claim that the App Store is anticompetitive because Apple acts as gatekeeper—it decides which apps are available—and because it demands payment, through its payment system, when those apps make money through the App Store. In other words, Apple stands accused of anticompetitive behavior that dates to the App Store's launch—back when Apple was brand new to the market and had no market share to boast of.

That raises the question: Is it appropriate to hold a company liable for conduct that far predates its current market share? The answer should be no. For starters, Apple doesn't have monopoly power in the smartphone market. But even if it did, Apple has charged app developers the same price—30% commission—since the very beginning. If Apple were a monopolist, that price would increase without any change in quantity.

Instead, the price has stayed the same and has been and is now in line with what competitors charge on smartphone and comparable app markets offered by companies like Microsoft and Epic Games. Critics maintain that internal emails show that Apple knows it can extract more from app developers—that it's "leaving money on the table." But given that Apple hasn't changed its rate, it seems the company doesn't mind. And that makes sense: Apple wants as many app developers that meet its standards to join the App Store as possible. If it charged commissions above the market rate—even if it could theoretically extract more money from existing apps—it would hurt itself in the long run.

Critics also maintain that Apple's integrated App Store is a "walled garden" that extracts unnecessarily high fees for access. In their mind, the App Store should be free for all developers, or Apple should allow competition stores to operate on its handheld devices. These arguments miss the mark. First, as the chart below shows, it's common for app stores to charge commission—it's a way for them to raise money to invest in and improve those stores. Second, Apple's business model has long focused on integration. By decoupling the App Store from handheld devices like the iPhone, Apple would betray that business model.

Indeed, if Apple did that, competition would actually be hurt. That is, consumers would lose Apple's approach. And even if most consumers don't buy phones for their app stores, it's true that many consumers do buy Apple's products because of the company's reputation for excellence. That, in part, stems from what Jobs recognized a decade ago: integrated products allow the company to set standards that improve the consumer experience. Without such control, the company's brand would inevitably be tarnished. Indeed, consumers would likely blame Apple for "making" harmful apps available in the first place, even though such apps come from a non-Apple app store.

The same is true of the App Store's payment system. Many consumers are understandably wary of sharing their credit card information. By using Apple's payment system, the App Store reduces externality costs associated with payment: consumers trust Apple with their information, which benefits the app developers.

Plus, the vast majority of app developers—around 85%—pay nothing to be on the App Store. That means they benefit from Apple's reach and reputation for nothing. In many cases, these app developers are able to develop a following by using Apple's App Store. That is, instead of having to develop and maintain their own app platforms, these app developers use Apple's. In that way, the App Store is like a shopping mall—except it's better because most pay no rent whatsoever.

DOCUMENT	CLAIM OF ANTICOMPETITIVE EFFECT	REALITY OF PROCOMPETITIVE EFFECT
App Stores Emails Re: Extraction	Monopoly Rents	Still Charges Market Rate; Most Pay Nothing

PART 6

FACEBOOK

Facebook had much to celebrate in early 2012. It began the year with over 800 million users and analysts predicted it would reach a billion by year's end (it did). With sustained growth in the United States and rapid growth abroad, Facebook had never been so popular. Even so, Facebook knew it had to stay innovative. Even after surpassing once-dominant MySpace only a few years earlier, the company continued to face aggressive competition from a growing set of new and evolved competitors. It knew better than to take its success for granted.

PRODUCT INNOVATION & IMPROVEMENT DEFINES FACEBOOK'S SUCCESS

And like other tech companies, Facebook took note of changing trends in consumer preferences. Chief among those changes was the transition from using desktop computers to using cell phones. With more and more consumers using mobile apps, Facebook began a two-track approach to innovation. It improved its platform—for example, it redesigned its newsfeed to better curate content for users—and looked for ways to compete in the mobile apps market. From the beginning, the company wanted to integrate its full platform with its mobile offerings so that consumers had access to a seamless and innovative service whether on their computers or phones.

Facebook also saw that photo-editing and photo-sharing services were growing more popular with users. Indeed, Facebook became the first platform that let consumers upload multiple photos at the same time. That change, something we all take for granted today, was revolutionary a decade ago. And in 2012, Facebook launched Facebook Camera, a mobile app that let users edit and share photos. It was designed to complement Facebook's other services.

Facebook wasn't alone. Hundreds of photo-editing and photo-sharing apps sprang up around that time. They included familiar names like Hipstamatic, Instagram and once-familiar names like VSCO Cam. Even apps like Foursquare even began integrating photo-sharing services into their platforms as well. Although most see the value of photo-sharing apps today, few at that time appreciated that they'd be the next big thing.

Facebook recognized this important shift to mobile and photo-sharing apps and began planning how to meet this growing demand with superior products. Facebook's documents show that it followed the developments of Twitter, Instagram, FourSquare, Google+, Pinterest, and Tumblr—and many others.

Most relevant here is Instagram. At the time, the app had only 20 million users—a mere 2.5% of Facebook's size. But it offered consumers a simple way of uploading photos, applying filters to those photos, and sharing the end product. Facebook's CEO Mark Zuckerberg recognized that the app could also be a good complement to Facebook. And because it had features that rivaled Facebook Camera's, it could be integrated with Facebook to deliver the best possible experience to users.

Not everyone agreed with Zuckerberg. Some Facebook employees thought that Instagram's filters were too amateurish, that the app would fade in popularity. After all, the app's core service centered only on photos and slanted toward "asymmetric sharing" (sharing photos with unknown "followers"); Facebook, by contrast, offered many other services and centered around users sharing content with their family and friends.

Zuckerberg saw Instagram's potential as a complement to Facebook's offerings, even as he also acknowledged that Instagram was a potential competitor in some ways. Lawmakers made much of internal documents that acknowledged as much, but in doing so, they missed two key points: First, Instagram offered features that were both competitive and complementary to Facebook's. And second, there was nothing to suggest Instagram in 2012 would become the Instagram we know today absent Facebook's substantial investment in the app's growth and its integration of the app's features with Facebook's to create a superior product for users.

In 2012, Instagram had only 13 employees, no revenue streams, and no plans for revenue. The app stayed afloat through investment capital alone. That business model was unsustainable. Underscoring that was Instagram's repeated rebuffing of investors' advice that it find a path to scalable monetization. To be sure, some companies—like Uber and even Amazon—have gone years without turning a profit. But they had revenue streams. Further, Instagram was showing signs of distress: it was plagued by spam and lacked the resources and plans to effectively combat it.

AFTER FACEBOOK BOUGHT INSTAGRAM

Instagram was valued at $500 million; Facebook paid $1 billion. Although the FTC vetted and—unanimously—signed off on the deal, critics today believe that because Facebook seemingly overpaid, it must've been desperate to take out a competitor. In reality, Facebook had business insights and expertise that the rest of us, including many in the press at the time (Forbes even ran "Instagram Acquisition Affirms, Facebook Is a Bad Investment"), lacked. It saw an opportunity to integrate Facebook and Instagram in a way that would be (and still is) popular with and beneficial to consumers.

It's all too tempting to look at the success of acquired companies today and assume they would've gotten there on their own. But without Facebook's acquisition, it's unclear how Instagram would've developed revenue streams to stay in business, let alone to keep innovating and improving. This is underscored by Instagram's growing integrity and spam problems at the time, and its inability to effectively combat them. Absent Facebook's investment, it is very likely that consumers, turned off by the spam, would have abandoned the platform in due time.

Had Instagram failed, consumers would have been harmed. Instead, Instagram succeeded. Under Facebook's ownership, over 1 billion people enjoy Instagram, it generates roughly $20 billion in revenue, and it developed from being a niche photo-sharing app into a free and widely used app for creating, sharing, and interacting with content that users love. And thanks to Facebook's investments, it now uses spam blockers and Facebook's other technology to protect users from harmful content.

Instagram also continues to innovate and to increase market competition. Recently, for example, it launched a new feature called "Reels," which lets users create, share, and find short video snippets. Reels is expected to compete heavily with ByteDance's TikTok app.

It's also worth mentioning that Facebook's tools benefitted consumers in ways many forget. Most importantly, Facebook opened the door for consumers to discover and connect with small businesses, allowing them to more easily and efficiently discover products that fit their needs. By using Facebook's ad-auctioning system, Instagram gives advertisers of all sizes and budges the power to reach new audiences all of the world. Indeed, Instagram has been a boon to independent business owners and local businesses looking to grow their brands.

This is no small feat. Compared to broadcast, print, and other advertising markets, digital advertising gives advertisers far more bang for their buck. Indeed, Facebook's auction-based advertising model gives small businesses and entrepreneurs the same chance as larger brands to compete. So not only do they pay less, they are more likely to reach their target audiences. In broadening Instagram's reach, Facebook also broadened opportunities for more Americans to benefit from Instagram. In other words, not only is Instagram a competitive alternative to other forms of advertising, it has spurred competition in other markets by helping connect consumers with lesser-known brands for everything from mattresses to home exercise equipment.

As Instagram shows, acquisitions often have procompetitive effects. First, it has increased output—to the tune of a billion. Second, it improved Instagram's security and user features, and it better connected users to each other and to businesses. And third, given that Instagram had no revenue streams, it very likely could have gone out of business, thereby depriving consumers of the app. Success is never guaranteed—in fact, more often than not, acquisitions fail. Instead, Facebook shared its ad tools with the app and ensured it stayed economically viable. Dismissing acquisitions as predatory and anticompetitive makes little sense in theory and even less sense in practice.

DOCUMENT	CLAIM OF ANTICOMPETITIVE EFFECT	REALITY OF PROCOMPETITIVE EFFECT
Emails Re: Acquisitions in General	Killer Acquisition	Efficient Means of Acquiring Expertise & Innovation
Emails & Chats Re: Acquisition of Instagram	Attempted Monopolization	Integrated Products & Revenue Streams; Improved Quality & Quantity; Kept App Viable

PART 7

GOOGLE

Animated by a desire to "prevent staleness," and not to become "our father's [O]ldsmobile," Google has long sought to stay ahead of the curve. So much so that as far back as 2006 it predicted that "social networking sites will ultimately represent a treat to our search business as people will spend more time on those sites and ultimately may do most searches from the search boxes available there."

Time would later prove Google right. But instead of falling victim to changing market dynamics, Google made three wise decisions early on. First, it entered the social media market by acquiring YouTube. Second, in 2007 it developed and pursued a policy for innovating Google Search. And third, it built out its ad tech services, connecting its social media, search, and advertising products.

ACQUISITION OF YOUTUBE & AD TECH

As mentioned above, Google foresaw social media's potential to transform how people spent their time online. After internal strategizing, the company made the wise call to "own the search box on the entertainment sites" by buying YouTube in 2006. YouTube was particularly attractive to Google because of its "smart team" and its "platform [that Google] could build from." Indeed, Google had the foresight to see that YouTube was a strong product to integrate with, and had an innovative team to absorb into Google.

Google initially offered $200 million, but after YouTube turned down the offer, Google upped the ante to $1.65 billion. That was enough for YouTube to say yes.

With YouTube and Google Search under the same umbrella, Google went to work developing its own ad tech tools. The company's expertise obviously lied outside the ad business, so it looked outside for expertise. And it found it: it acquired DoubleClick and other companies to build out its ad tools.

Today, critics claim that Google has a monopoly in digital advertising because it operates at all levels of the digital-advertising supply chain. In reality, Google's market share is a mere 28%. And they claim that this allows Google to raise prices. But that's simply not true. Since 2010, prices for digital advertising have fallen by over 40% in the United States.

And like Facebook, Google relies on digital advertising to keep most of its products and services free for consumers to use. Thus, it makes perfect sense for Google to conclude that it needed to enter the social-media market (or what it called the "entertainment" market). Just as it makes sense that it bought ad companies for expertise in building out and improving its own ad tools.

GOOGLE SEARCH INNOVATIONS

Even with YouTube joining the Google family, Google still set an aggressive strategy for keeping its main search engine innovative. This came after employees, worried that Google may had "become too conservative and anti-change," pushed it "to be comfortable with reinvention."

To guide this reinvention, employees developed a plan to "set aggressive goals around user experience changes." In particular, the company adopted a plan to "[a]llow users to start … seeing the benefits of Universal Search." By this, the company meant integrating search results from different media sources (links, video, photos), and from services like Google Maps and Google Flights.

In practice, this meant Google vertically integrated. For example, the company integrated YouTube's videos with Google Search so that users could see relevant videos both as links on search engine's main page and under its "Videos" tab. In other words, users no longer have to visit multiple websites to find what they're looking for.

Many of Google's rivals also vertically integrated. As Google employees noted, Microsoft's "Bing has explicitly made improving verticals a key part of [its] strategy to beat Google." To do that, Microsoft "[o]ffer[ed] cashback (shopping), purchased Farecast (flights), partnered with Wikipedia (reference), Wolfram (calculations and facts), and built vertices for events and recipes."

And Google employees viewed—and continue to view—niche search engines as competitors. For example, an internal email reads: "Competition: Many, many strong niche players. Amazon (shopping), Yelp (local), Kayak (flights), Hotels.com (hotels), Edmunds (cars), AllRecipes (recipes)."

In other words, Google and rivals like Microsoft's Bing all moved toward integrating search results to benefit users. By consolidating information in one place, the search engines made it easier for users to get the information they need with as little hassle as possible.

But critics maintain that Google doesn't play fair. Because Google Search relies on third-party content—it crawls the web for information relevant to the user's search request—it uses their content to attract eyeballs. As such, Google shouldn't display that content in the search results itself; instead, it should merely link to the content so that users are sent to an external website, thereby helping drive traffic to that site.

But that's anti-innovation. Google invests billions in research and development, and it makes a thousand or so changes to its search algorithm every few years. It does this because to keep Google Search innovative and responsive to consumer preferences. As mentioned earlier, the Information Economy offers untold sums of information—so much information, in fact, that it's impossible for consumers to navigate it themselves. Google has moved ever more toward giving users what they want with as minimal steps as possible. This is what consumers want. Thus, consumers have benefitted from Google integrating information—with links visibly listed—into its search results directly. And because Google gives only a snippet of information, users are still encouraged to visit the external site when doing so is helpful to them.

And as noted above, Google Search also isn't a monopoly. Google is a general search platform. That was the go-to for all searches in the past. But today, consumers perform specific searches about certain categories of information elsewhere. For example, when consumers want to know about products, 66% of them begin their searches on Amazon. That makes sense: Amazon is a database of side-by-side product comparisons, pricing information, product descriptions, and product reviews. Similarly, users turn to Yelp for reviews about local restaurants and service providers.

Even without those competitors, Google faces competition from other general search engines. Verizon, which owns Yahoo and AOL Search, has about 12% of the search market. Microsoft, which owns Bing, has about 24%. And DuckDuckGo, a relatively new search engine, has seen exponential growth in recent years. DuckDuckGo also promises to protect user privacy better than Google does. That shows that Google must compete not just on search results and advertising but also on non-price factors like privacy.

All of which is to say: Google is large and it's popular. But its business practices all support improving its services, not monopolizing the market. Google wouldn't need to spend so much on research and development and improving its search engine or YouTube if it had monopoly power.

DOCUMENT	CLAIM OF ANTICOMPETITIVE EFFECT	REALITY OF PROCOMPETITIVE EFFECT
Acquisition Emails Re: YouTube	Killer Acquisition	Entry into New Market; Product Integration
Acquisition Emails Re: Ad Tech	Attempted Monopolization	Product Expertise, Innovation & Integration; 40% Lower Prices
Scouting of Rivals Market Share	Attempted Monopolization	Keeping Up with Market Changes; Responding to Consumer Preferences
Emails Re: Use of Third-Party Information/Keeping Users on Google Platforms	Attempted Monopolization	Staying Competitive; Responding to Consumer Search Preferences

PART 8

CAUTIONARY TALES

All of these business practices are innovative. And they are responsible for innovative products. Lawmakers presumably like the products and wish to keep them available to consumers. Indeed, given how popular these products are with consumers, it would be shocking for that not to be the case.

The problem, then, is that critics don't seem to connect innovation in products with innovation in business practices.

Without those practices, product innovation will slow and digital markets will become stale and even less competitive.

Even worse, tech's business strategies, models, and practices benefit both consumers and the economy. And in fact, they are practices that other industries will likely adopt to remain competitive as their markets grow integrated and ever-more digital. Think about the banking industry. Not only is it moving online, it's becoming an entirely digital market for some consumers.

Or take an industry that remains relatively old school: credit cards. Even here, innovative practices that looks anticompetitive are actually good for consumers. For example, Amex requires merchants to abide by its anti-steering requirements, which prohibit merchants from encouraging patrons to use non-Amex credit cards. (Merchants may be tempted to do so because Amex charges them a higher fee than do most other companies.) Although this practice seems anticompetitive, the Supreme Court found that actually it's procompetitive because it supports Amex's rewards program, which is more generous than other companies', including Visa's and Mastercard's.

Rather than condemn the new-and-better, or even the new-and-potentially-better, lawmakers should celebrate the market's innovations. At the very least, lawmakers should keep in mind the following points:

- **Amazon, Apple, Facebook, and Google don't just compete in established markets, they create new ones. Markets aren't meant to be static because consumers benefit from dynamic disruption.**

- **Acquisitions are part and parcel of innovative business models. They are also increase market efficiency and competition. Indeed, they free up capital that can be used to invest in new startups.**

- **Digital markets continue to be highly innovative.**

Consider each point in turn:

Amazon, Apple, Facebook, and Google don't just compete in established markets, they create new ones. Markets aren't meant to be static because consumers benefit from dynamic disruption.

Amazon, Apple, Facebook, and Google differ in their business models, but each excels at disrupting siloed markets and creating new ones. Each has leveraged its expertise in one market to enter, disrupt, and improve others.

IPOD & ITUNES CASE STUDY

For an example of this, consider Apple's foray into the music industry. In 2003, Apple launched the iPod. It quickly became the best-selling MP3 player in the United States and the clear market leader. For a few years it even accounted for nearly 50% of Apple's revenues. It was, in other words, a huge success. But the iPod was a gamble: Apple had no experience building MP3 devices. And just a few years prior, the company had been weeks away from bankruptcy when Steve Jobs returned as CEO, nixed the company's ventures into new markets, and steadied the ship.

Even so, Apple didn't just break into the MP3 market, it jumped. And in the process it disrupted established markets, ultimately creating a new one. First, unlike its rivals, Apple built a music ecosystem that paired the iPod with a music platform, iTunes. Like other platforms, iTunes stored and organized songs ripped from CDs consumers bought. And second, it created the iTunes Store, which let consumers buy most songs for only $0.99. With iTunes, consumers no longer had to buy entire CDs just to listen to their favorite songs.

With the iPod and iTunes, Apple made a big splash. Because it downloaded songs from a user's computer quicker and stored more of them than rivals' devices did, it immediately sparked competition among MP3 manufacturers. And because it let users buy individual songs directly from their computers, it cut into the sales of retail stores like BestBuy. It also threatened the music industry by decoupling individual songs from whole CDs. But the music industry actually welcomed iTunes. Although it worried about Apple disrupting its business model, it worried even more about the growing threat of piracy—Napster gained 80 million users in just three years.

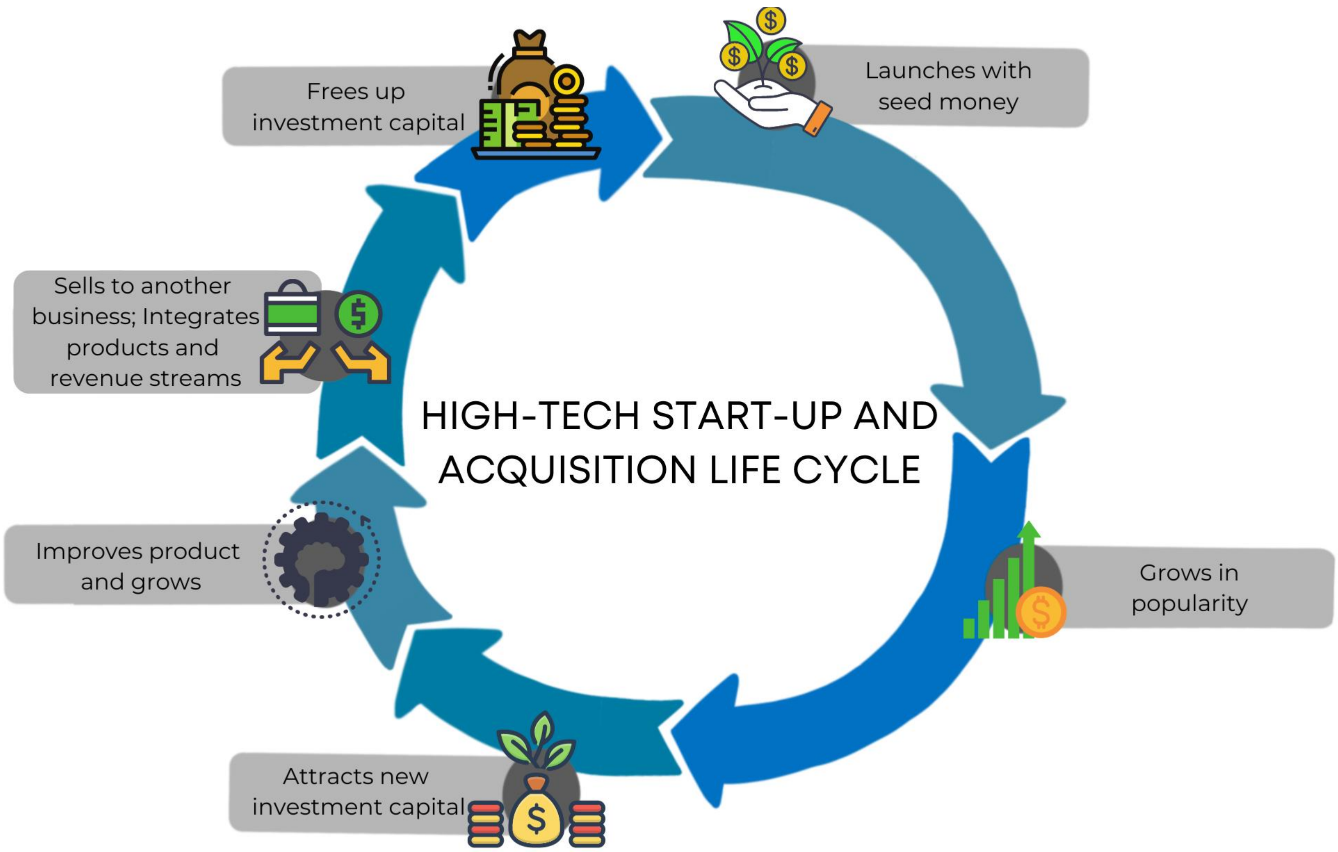
Bottom line: Apple applied its mastery in building personal computers to revolutionize the MP3 market. In doing so, it also created a new market that combined MP3 players with music platforms. And although it disrupted existing industries, it actually benefitted at least one of them.

When tech enters new markets, consumers benefit. Sometimes, even their established competitors do too. But even if they don't, we should welcome the innovation tech brings and the benefits consumers gain.

Acquisitions are part and parcel of innovative business models. They are also increase market efficiency and competition.

Vertical acquisitions—like the ones at issue here—are recognized for their procompetitive effects. The DOJ and FTC have recognized for decades that horizontal mergers can often benefit consumers and reaffirmed just two months ago that vertical mergers do the same. Although it may sound counterintuitive, acquisitions often spur competition.

A common trope today is that Big Tech's acquisitions create a "kill zone"—a market so entrenched that any new idea is quickly squashed through acquisition. But far from being a kill zone, tech is actually a "cultivation zone." As Will Rinehart explains, acquisitions create a startup lifecycle: entrepreneurs earn big bucks early on, which frees them to work on new projects and it free investors to invest in new enterprises, rather than get stuck propping up companies that—like Instagram in 2012—don't have revenue streams.



Digital markets continue to be highly innovative.

It's difficult to measure a market's innovation. But as Alec Stapp explains, one proxy that correlates to innovation is spending on research and development. Another is capital expenditures. And as he recounts, both show that tech spends a lot of money—in some cases, more than any other industry in the United States—on innovation. His charts are reproduced below:

Tech companies lead in R&D spending (billions of USD)

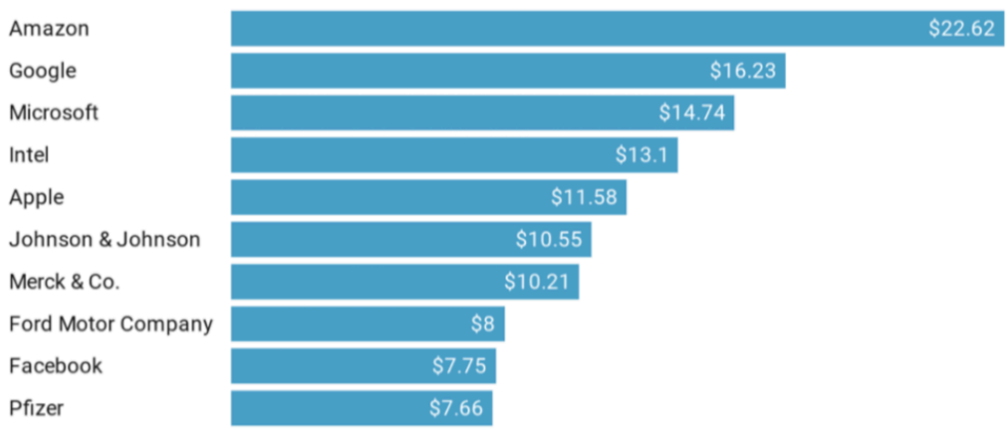


Chart: Alec Stapp (PPI) • Source: ideatovalue.com • Created with Datawrapper

TABLE 5: NON-ENERGY U.S. INVESTMENT HEROES: TOP 25 NONFINANCIAL COMPANIES BY ESTIMATED U.S. CAPITAL EXPENDITURE*

	COMPANY	ESTIMATED 2018 U.S. CAPITAL EXPENDITURES (MILLIONS USD)
1	ALPHABET	20,188
2	AT&T	19,209
3	AMAZON.COM	15,577
4	VERIZON COMMUNICATIONS	14,912
5	MICROSOFT	11469
6	COMCAST	10,890
7	FACEBOOK	10,763
8	CHARTER COMMUNICATIONS	9,125
9	WALMART	7,683
10	INTEL	7,426
11	APPLE	7,129
12	FORD MOTOR	6,513
13	GENERAL MOTORS	5,756
14	FEDEX	5,255
15	DELTA AIR LINES	5,168

PART 9

CONCLUSION

Antitrust laws in the United States work well. In fact, tech's successes show that our antitrust regime works remarkably well. Far from being monopolies, Amazon, Apple, Facebook, and Google all face stiff competition. This is so even as they deliver more and more benefits to consumers. And despite rhetoric to the contrary, none engages in unlawful conduct. Instead, each competes aggressively—precisely what our antitrust laws are designed to promote.

Tweaking or overhauling our antitrust laws risks harming American consumers. It also risks hobbling the country's competitiveness. Consider Europe. Its antitrust regime is far more aggressive than ours. And yet, Europe can claim only one company on a list of top 30 tech companies in the world (Spotify). By contrast, Amazon, Apple, Facebook, and Google are all on the list and all are American. Restricting American tech's ability to compete will ensure foreign competitors—especially those in China—overtake the U.S. as the world leader in tech. As some have written, that also puts national security at risk.

None of that is necessary. American tech companies benefit consumers and competition in digital markets is strong and growing stronger. As the country's economy continues integrating traditional markets with digital ones, tying the hands of the country's most innovative companies is the wrong move.

In sum, today's digital markets are proof that the country's antitrust laws work. Both the laws and the markets should be left alone.