

U.S. House of Representatives
Antitrust, Commercial, and Administrative Law Subcommittee
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Reviving Competition, Part I: Proposals to Address Gatekeeper Status and Lower Barriers to Entry Online

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Introduction

Digital platforms play an incredibly important role in the U.S. economy. Facebook, Apple, Amazon, and Google are among the most successful businesses in the world.¹ This success has fed their growth, and drawn Congress's attention not just to them, but to digital markets and antitrust reform too. And although we support American antitrust law as it currently stands, we know that others, including members of Congress, disagree.

With that in mind, we offer these comments not to criticize those who see things differently, but to offer additional points for Congress's consideration. Indeed, the stakes are high: antitrust law affects every business in every industry in every state. And it affects the country's advantage (or disadvantage) over foreign competitors.

For that reason, we hope these comments, which address only a few reform ideas, help Congress and the public weigh the pros and cons of antitrust reform.

As always, we appreciate your consideration of our views and stand ready to offer additional resources or further explanation.

Part I. Proposed Reform: Banning "Self-Preferencing"

Summary

Self-preferencing is a new term meant to cast doubt on old concepts: vertical integration and product improvement. Under the consumer welfare standard, vertical integration is blocked only if it harms consumers. Because evidence has shown that vertical integration almost always benefits consumers, critics of the tech industry have had to rebrand digital platforms' vertical-integration practices as "self-preferencing." But whatever term is used to describe vertical integration, Congress should not mistake big for bad.

Digital platforms and marketplaces have benefited consumers time and again. Indeed, under the consumer welfare standard it is an open-and-shut case: Businesses like Amazon, Google, Facebook, and Apple connect third parties, including their competitors, with billions of potential customers. So not only do consumers have more choices to choose from, they also have access to higher-quality products at lower costs. Meanwhile, those third-party businesses get access to new markets and benefit from those platforms' investments.

These benefits are not unique to the digital sphere, however. For decades, brick-and-mortar stores like Costco and Walmart have used vertical integration to cut costs, reduce prices, and attract customers. At the same time, these stores—like their digital competitors—

¹ Kyle Daly, *Big Tech's Power, in 4 Numbers*, Axios (Jul. 27, 2020) <https://wwwaxios.com/big-techs-power-in-4-numbers-de8a5bc3-65b6-4064-a7cb-3466c68b2ea0.html>.

have had to compete on quality. Because of that competitive restraint, neither brick-and-mortar stores nor digital platforms boost their own products or services unless doing so benefits consumers. After all, “preferencing” a product does little good if consumers reject the product and turn elsewhere for better options.

To be sure, vertical integration and so-called “self-preferencing” can be abused. Businesses could engage in anticompetitive exclusive dealing or predatory pricing. But that has not occurred with digital platforms or marketplaces. To the contrary, these businesses have increased competition, improved quality, and cut prices. That truth should not be submerged simply because a populist antitrust movement wants to turn the clock back to 1960.

And even if one disagrees with that, existing antitrust law is well equipped to address and punish such anticompetitive practices.

What is Past is Prologue: Big-is-Bad Gut Instincts

Antitrust laws in the United States are meant to protect the benefits consumers receive from the competitive process.² Businesses that have to compete will usually cut prices while increasing the quality of their products or services.³ Indeed, ever since the Sherman Act became law in 1890, “protecting consumers from monopoly prices” has been ‘the central concern of antitrust.’⁴ Antitrust laws also “stimulate businesses to find new, innovative, and more efficient methods of production,” which also benefits consumers.⁵

But for much of our history, antitrust relied on “confused doctrines that pursued populist notions” that mistook big for bad.⁶ By following these populist appeals, antitrust laws “led to contradictory results that purported to advance a variety of social and political goals at the expense of American consumers.”⁷ In the Sherman Act’s first decade, for example, the Supreme Court held that the law was meant to protect “small dealers and worthy men.”⁸ Decades later, the Court reaffirmed that interpretation, holding that antitrust laws are meant

² DEP’T. OF JUSTICE, *Antitrust Enforcement and the Consumer* (last accessed Mar. 6, 2020), <https://www.justice.gov/atr/file/800691/download>.

³ *Id.*

⁴ *Apple v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (internal citation omitted).

⁵ *Id.*

⁶ Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise & Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294, 299 (May 2019), <http://arizonastatelawjournal.org/wp-content/uploads/2019/05/Wright-et-al.-Final.pdf>.

⁷ *Id.* at 294.

⁸ *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323 (1897).

to protect “viable, small, locally owned business” even when that protection means “higher costs and prices.”⁹

In the 1970s, however, economists were successful in anchoring antitrust analysis in consumer welfare.¹⁰ They were so successful, in fact, that the United States became the first country to root antitrust analysis in economics.¹¹ Under the consumer-welfare model, antitrust uses economic learning and evidence to assess whether a business’s actions benefit or harm consumers.¹² Business decisions that benefit consumer welfare are allowed; those that harm consumer welfare are blocked. Economists, antitrust scholars,¹³ and U.S. courts¹⁴ agree that the consumer-welfare model has succeeded in protecting consumers. That success came only once the government abandoned its big-is-inherently-bad gut instinct and aligned its legal theories of harm with economic theories of anticompetitive harms.¹⁵

But today’s antitrust approach is under attack. Concern about corporate power, income inequality, wage stagnation, and other social ills has sparked calls to “solve” social problems through populist antitrust.¹⁶ This thinking would have the United States abandon, or at least weaken, the consumer-welfare model.

By abandoning the consumer-welfare model, the United States would be following Europe’s lead. European courts have held that the E.U.’s main antitrust law, the Treaty on the Functioning of the European Union (TFEU), “is designed to prevent competition from being distorted to the detriment of the **public interest**, individual undertakings and consumers” so that “the well-being of the European Union” is protected.¹⁷ The broad concept of “the public interest” refers to yet another broad concept, “fairness.” Answering whether something is fair relies on subjective instincts, which is in part why the European Union focuses far less on economic analysis than the United States does.¹⁸

⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 333, 344 (1962).

¹⁰ *Id.*

¹¹ Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2508-09 (2013).

¹² *Id.*

¹³ Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013).

¹⁴ See, e.g., *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438 (2009).

¹⁵ Wright, *supra* note 6, at 305.

¹⁶ *Id.* at 294.

¹⁷ Case C-52/09, 2011 E.C.R. I-00527, ¶¶ 22–23 (emphasis added).

¹⁸ Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2514 (2013), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4889&context=flr>.

It is also why the European Union has far more government intervention in the market.¹⁹ Most recently, that intervention has been in policing “self-preferencing” among U.S.-based technology firms like Google, Amazon, and Facebook.²⁰ According to the European Commission, “dominant tech companies have a special responsibility to avoid favoring their own in-house products and services over competitors.”²¹ So even though consumers may benefit, and even though E.U. competition law does not address self-preferencing directly, the argument goes, self-preferencing is “unfair” and therefore illegal.²²

Similar thinking about self-preferencing is on the rise in the United States. If accepted, it will gut the U.S.’s consumer-focused approach to antitrust and return the country to earlier times, when the courts and federal government put their gut instincts about “fairness” ahead of economic evidence of consumer well-being.

“Self-Preferencing”: Slogan in Search of Consumer Harm

“Self-preferencing” is the latest buzzword that alleges that large digital marketplaces and platforms favor their own products and services over those of competitors and thus justifies “Glass-Steagall for the internet.” In other words, self-preferencing rebrands standard vertical-integration practices,²³ which are widely accepted as good for consumers, to suggest something unseemly is at work and to justify dramatic structural reform. The term also reflects a “general hostility to firm size regardless of its actual impact on competition or consumer welfare.”²⁴

But that hostility is about more than just firm size; it is primarily about firm type. Today’s calls to ban or restrict self-preferencing are targeted almost exclusively at digital platforms like Google and digital marketplaces like Amazon.²⁵ Indeed, despite brick-and-mortar marketplaces engaging in vertical-integration practices for decades, those practices became a problem only once certain politicians and competitors began turning against the technology industry—**even though consumers’ ability to switch digital providers is vastly easier than switching to a different physical store.**

¹⁹ See generally Francesco Russo et al., EUROPEAN COMMISSION DECISIONS ON COMPETITION 113–97 (2010).

²⁰ Valentina Pop & Sam Schechner, *Google Appeals Against EU Antitrust*, WALL ST. J. (last updated Feb. 12, 2020), <https://www.wsj.com/articles/google-starts-appeal-against-eu-antitrust-decisions-11581516872>.

²¹ *Id.*

²² *Id.*

²³ Maurits Dolmans & Tobias Pesch, *Should We Disrupt Antitrust Law?*, Cleary Gottlieb Steen & Hamilton LLP 10 (July 15, 2019), <https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf>.

²⁴ Wright, *supra* note 6, at 341.

²⁵ See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 792–97 (2017).

In fact, similar vertical integrations occur throughout the American economy, such as Gillette “preferring” to include its own replacement blades with its razors or Coca-Cola “preferring” its own beverages in its vending machines. Examples of brick-and-mortar businesses “preferencing” their own products are nearly limitless. Consider:



CVS Health

Gold Emblem

Beauty 360

Kirkland Brand products



Sam's Club

Great Value

Equate

Townhouse

Edwards Coffee

Bel Air Frozen Food

Busy Baker Cookies & Crackers



Vertical integration involves the same practices in online marketplaces as it does in brick-and-mortar marketplaces. But critics of Big Tech want antitrust to be enforced only against Big Tech. So to get around the problem of enforcing antitrust policies equally, critics have invented a new term: self-preferencing. This term allows critics to discriminate against Big Tech discreetly: Brick-and-mortar marketplaces engage in good “vertical integration”; online marketplaces engage in bad “self-preferencing.”

Discrimination Against Digital Platforms & Marketplaces

This dichotomy between the treatment of vertical integration in brick-and-mortar and online markets is unwarranted. To understand why, start by considering big-box stores like Costco and Walmart. Costco is the second-largest retailer in the United States, operates 543 stores here, boasts over 98 million cardholders, and had net sales of over \$149 billion last

year.²⁶ Even more impressive, Walmart is the largest retailer in the United States, operates 4,769 stores here, and netted over \$510 billion last year.²⁷

Both Costco and Walmart own and sell their own brands, too. Costco's Kirkland Signature brought in sales of nearly \$40 billion—about a third of its business—in 2018.²⁸ That \$40 billion was more than JCPenney's and Macy's sales combined, and more than Kellogg's, Hershey's, and Campbell Soup's sales combined.²⁹ Kirkland is so popular among consumers that analysts credit the brand for drawing consumers to Costco's stores, and for convincing them to pay Costco's annual \$60 or \$120 membership fee.³⁰ Walmart's brand, Sam's Choice, is sold in Walmart's brick-and-mortar stores, online, and in Walmart's subsidiary, Sam's Club. Sam's Club is Costco's main competitor.

The screenshot shows the Costco Wholesale website interface. At the top, there is a navigation bar with links for 'View Warehouse Savings', 'Find a Warehouse', and a search icon. Below the navigation is the 'COSTCO WHOLESALE' logo. On the left side, there is a sidebar with options like 'Shop All Departments' (selected), 'Grocery', 'Delivery ZIP Code: 20877' (with a 'Change' link), 'Lists | Reorder', and buttons for 'Filter Results' and 'Clear All'. The main content area has a search bar containing the word 'syrup'. Below the search bar, a list of products is displayed:

- Kirkland Signature Kirkland Signature Grocery
- Kirkland Signature Organic
- Kirkland Signature Sugar, Syrup & Sweeteners

Below this list are two product cards:

- Log Cabin Syrup, 64 oz., 2-count**
An image of two dark glass bottles of Log Cabin syrup is shown next to the product name.
- Kirkland Signature Organic Pure Maple Syrup, 33.8 oz**
An image of a white plastic jug of Kirkland Signature Organic Pure Maple Syrup is shown next to the product name.

Now consider Amazon—the world's largest online retailer.³¹ Like Costco, Amazon launched in its own private brand, AmazonBasics, and uses that brand to entice consumers to

²⁶ Statista, *Number of Costco Warehouses in 2019, by Country* (last accessed Mar. 6, 2020), <https://www.statista.com/statistics/284431/number-of-costco-warehouses-2013-by-country/>.

²⁷ Statista, *Total Number of Walmart Stores in the U.S. from 2012 to 2019, by Type* (last accessed Mar. 6, 2020), <https://www.statista.com/statistics/269425/total-number-of-walmart-stores-in-the-united-states-by-type/>.

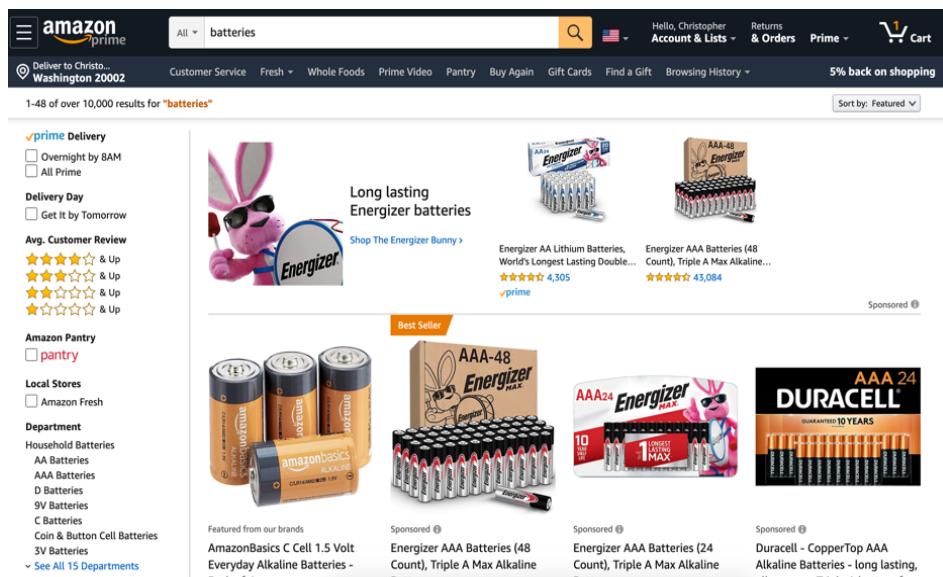
²⁸ Nathaniel Meyersohn, *How Kirkland Signature Powers Costco's Success*, CNN BUSINESS (Jan. 10, 2019), <https://www.cnn.com/2019/01/10/business/costco-kirkland-signature-brand/index.html>.

²⁹ *Id.*

³⁰ *Id.*

³¹ Lauren Debter, *Amazon Surpasses Walmart as the World's Largest Retailer*, FORBES (May 16, 2019), <https://www.forbes.com/sites/laurendebter/2019/05/15/worlds-largest-retailers-2019-amazon-walmart-alibaba/#7243ea774171>.

become Amazon Prime members for an annual cost.³² AmazonBasics got its start selling common household products like batteries.³³ With prices around 30% less than other brands, AmazonBasics was a quick success³⁴ and led to the company's development of more than 140 private brands.³⁵ Like Costco, Amazon sells its own products alongside its competitors' products on Amazon's website. Nonetheless, AmazonBasics constitute only 1% of Amazon's sales.³⁶



When searching for "batteries" at Amazon, the top result is an advertisement and only the first in the series of 4 is AmazonBasics, which is also the least expensive

Although Amazon went from owning one private brand in 2009 to over 140 today, outside sellers saw their share of Amazon's sales grow to 58% last year.³⁷ Despite these increased sales, Amazon's decision to sell its own brands has been cast as anticompetitive. Yet this anticompetitive narrative is contradictory on its face: Amazon's products increase competition by giving consumers more choices.

³² Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. TIMES (June 23, 2018), <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html>.

³³ *Id.*

³⁴ *Id.*

³⁵ Jack Nicas, Karen Weise, and Mike Isaac, *How Each Big Tech Company May Be Targeted by Regulators*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/technology/antitrust-amazon-apple-facebook-google.html>.

³⁶ Jack House, *The Biggest Winner on Amazon Prime Day? Amazon's Own Brands.*, Barron's, (July 12, 2019).

³⁷ *Id.*

But, critics claim, Amazon uses its marketplace to favor its own products over those of its competitors.³⁸ These critics allege that Amazon: (1) uses data collected from its marketplace—consumer search terms, customer reviews; (2) product placement; (3) tags like “best seller” and “Amazon’s Choice”; and (4) Amazon’s Alexa to favor its own brands.³⁹ Even if all this is true, critics have not pointed to any actual consumer harm. Indeed, Amazon’s marketplace is more competitive than ever before, and consumers have more options than ever.

Digital Platforms & Marketplaces Benefit All Consumers

Amazon’s vertical-integration practices have, in other words, benefitted Amazon’s competitors. Amazon’s not alone: Google’s, Apple’s, Facebook’s, and others’ vertical integration have benefitted both competitors and consumers. This result is because, as Senator Mike Lee explained, “platforms, by virtue of their own vertical integration, create an economic ecosystem that enables other businesses to avoid having to vertically integrate themselves.”⁴⁰ The upshot of this ecosystem is that small businesses can use “the various services these platforms provide so that they can focus on their core business.”⁴¹

Another reason: Digital platforms and marketplaces have to compete on quality.⁴² Take Google Search, for example. Launched in the internet’s early years, Google Search originally returned a list of just 10 links—all to external websites.⁴³ These days, Google Search returns lists of countless external links and often answers consumers’ questions itself.⁴⁴

Critics have not explained why Google’s success in answering consumers’ questions is a problem, let alone an antitrust problem. Google Search competes against Microsoft’s search engine, Bing, against Yahoo!’s search engine, and against newcomer DuckDuckGo’s search engine. Google also competes with many vertical search providers, such as Yelp, Expedia, Amazon, and many others. And consumers can now find answers from a growing number of innovations, such as competing digital assistants. So if Google Search’s preference for answering questions directly was not useful, consumers would turn elsewhere. And given the continued user growth for companies like Amazon and Yelp, many users do turn to rivals for their search needs.

³⁸ Creswell, *supra* note 32.

³⁹ *Id.*

⁴⁰ Competition Policy International, *CPI Talks With Senator Mike Lee* (Mar. 1, 2020), <https://www.competitionpolicyinternational.com/cpi-talks-with-senator-mike-lee/>.

⁴¹ *Id.*

⁴² Dolmans, *supra* note 23.

⁴³ Nicas, *supra* note 35.

⁴⁴ *Id.*

That Google Search is most consumers' go-to choice for many online searches reflects the platform's quality and most consumers' preferences. But that success does not mean Google Search is without competition—far from it. Yelp's user numbers have steadily increased despite its complaints to regulators, most recently boasting that it serves almost 100 million local search users.⁴⁵ In a July 2019 interview, when asked about his company's complaints about Google, Yelp's Senior Vice President of National Sales stated that:

On the sales side, I feel we can fight the fair fight and compete on our merits. I'm not an expert in public policy.

We grew 22% from Q1 2018 to Q1 2019. As an example, we've identified 250 strategic accounts we're really focused on and have entered in 60 of them. We're seeing growth, and we have years of runway ahead of us in terms of enterprise opportunity. We hold our own performance-wise.⁴⁶

Although analysis of vertical integration analysis focuses on benefits or harms to consumers, not competitors, the lack of harm by Google Search's results to even Yelp is a telling sign of robust digital competition.

Apple, too, has been accused of self-preferencing at competitors' and consumers' expense.⁴⁷ But like Amazon's and Google's practices, Apple's vertical integration benefits both groups. First, consider the allegation: Because Apple makes the iPhone, and because the iPhone's App Store is tightly controlled by Apple, and because Apple offers its own apps and services on the App Store, this must mean that Apple kneecaps its competitors.⁴⁸ Spotify, a digital music platform, for example, advanced this argument in the European Union, claiming that Apple's 30% commission fee to use the App Store harms competition because Apple Music, a competing music platform, is available on the App Store and Apple does not have to pay a fee to use its own App Store.⁴⁹

⁴⁵ Yelp, *Investor Presentation* (Feb. 2020), https://s24.q4cdn.com/521204325/files/doc_financials/2019/q4/Yelp-Investor-Presentation_February-2020.pdf.

⁴⁶ Sarah Sluis, *After Conquering Local Ads, Yelp Eyes National Sales* (July 10, 2019), <https://www.adexchanger.com/the-sell-sider/after-conquering-local-ads-yelp-eyes-national-sales/#more-124407>.

⁴⁷ Nicas, *supra* note 35.

⁴⁸ *Id.*

⁴⁹ Thomas Ricker, *Apple to be Formally Investigated Over Spotify's Antitrust Complaint, says Report*, The Verge (May 6, 2019), <https://www.theverge.com/2019/5/6/18530894/apple-music-monopoly-spotify-app-store-europe>.

Common sense undercuts this argument. First, Apple's development of Apple Music gives consumers another choice for streaming music. Second, Apple owns the App Store, which means Apple pays for the platform's employees and funds its research and development. Third, Apple charges a 30% commission **only if** a developer uses the App Store to gain user subscriptions. So if a consumer subscribes to Spotify on Spotify's own website, Spotify pays nothing when that consumer then downloads its app from Apple. With this in mind, Spotify's argument is that it should benefit from Apple's development of the App Store, which reaches millions, for free, even when it gains subscribers through the App Store and even though Apple Music is a competitor.

What common sense suggests, empirical evidence confirms: Apple's vertical integration benefits competitors and consumers. Over 84% of those who use the App Store pay nothing and share *none* of the revenue generated by the App Store with Apple.⁵⁰ And, like Amazon and Google, the App Store allows developers to reach millions of consumers that they otherwise would not be able to reach without creating their own device, platform, service—or all three. So for a 30% fee, Spotify is able to access the 45% of smartphone users—over 100 million people—in the United States who use an iPhone.⁵¹ Even for those who pay the 30% fee, Apple's App Store still benefits competitors. Apple reinvests the fee into improving its App Store and developing free tools for developers to use.⁵²

To date, Apple's App Store has generated over \$120 billion for other businesses.⁵³ Another benefit: Consumers who use Apple's App Store also spend more on average than do consumers who use other app platforms.⁵⁴ As for Spotify in particular, Apple received a commission on just 680,000 of Spotify's 100 million subscriptions.⁵⁵

"Self-Preferencing": A Backdoor to a Duty to Deal

Critics of "self-preferencing" want to impose a duty to deal on technology firms—a radical departure from antitrust precedent.⁵⁶ Over a century ago, the Supreme Court held

⁵⁰ Apple, *App Store: Dedicated to the Best Store Experience for Everyone* (last accessed Mar. 6, 2020), <https://www.apple.com/ios/app-store/principles-practices/>.

⁵¹ Statista, *Share of Smartphone Users that Use an Apple iPhone in the U.S. from 2014 to 2021* (last accessed Mar. 6, 2020), <https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/>.

⁵² Apple, *supra* note 50.

⁵³ *Id.*

⁵⁴ Sarah Perez, *App Store Generated 93% More Revenue than Google Play in Q3*, TECHCRUNCH (Oct. 11, 2018), <https://techcrunch.com/2018/10/11/app-store-generated-93-more-revenue-than-google-play-in-q3/>.

⁵⁵ Chris Crooke, *Apple Says Spotify has Exaggerated the Impact of its App Store Fees*, COMPLETE MUSIC UPDATE (June 25, 2019), <https://completemusicupdate.com/article/apple-says-spotify-has-exaggerated-the-impact-of-its-app-store-fees/>.

⁵⁶ Dolmans, *supra* note 23.

that “[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] 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.”⁵⁷ Nearly nine decades later, the Court reaffirmed that principle.⁵⁸

But this principle is not absolute. As the Court explained: “Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2” of the Sherman Act.⁵⁹ Even in these “certain circumstances,” however, there must be some “anticompetitive conduct” that harms consumers. To date, critics of self-preferencing have not shown that it harms consumers—indeed, as this testimony explains below, self-preferencing benefits both competitors and consumers.

Despite the lack of harm and ample evidence of consumer benefit, critics of self-preferencing still want to impose a duty to deal on tech firms. They want these firms to treat their competitors’ businesses the same way they treat their own business. The critics’ argument can be summed up as: because tech firms are large and because they are digital, they should not be able to prefer their own products or services, even if doing so benefits competitors, consumers, and the economy more broadly.

Embracing New-And-Innovative Business Practices

Procompetitive and exclusionary conduct are often brewed in the same barrel: conduct that benefits consumers also tends to exclude competitors. 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. “Self-preferencing” is simply an old business tactic that tech platforms have adapted for the digital realm. It’s also helped platforms develop innovative products. The problem, then, is that critics don’t seem to connect innovation in products with innovation in business practices.

So without such practices, product innovation will slow. 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.

⁵⁷ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁵⁸ *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

⁵⁹ *Id.*

Or take an industry that remains relatively old school: credit cards. Even here, innovative practices that look 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, the government should celebrate the market's innovations.

And if the concern is that American tech platforms are "hurting innovation," as some claim, consider that tech spends more on research and development and has higher capital expenditures than almost every other industry in the country:

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

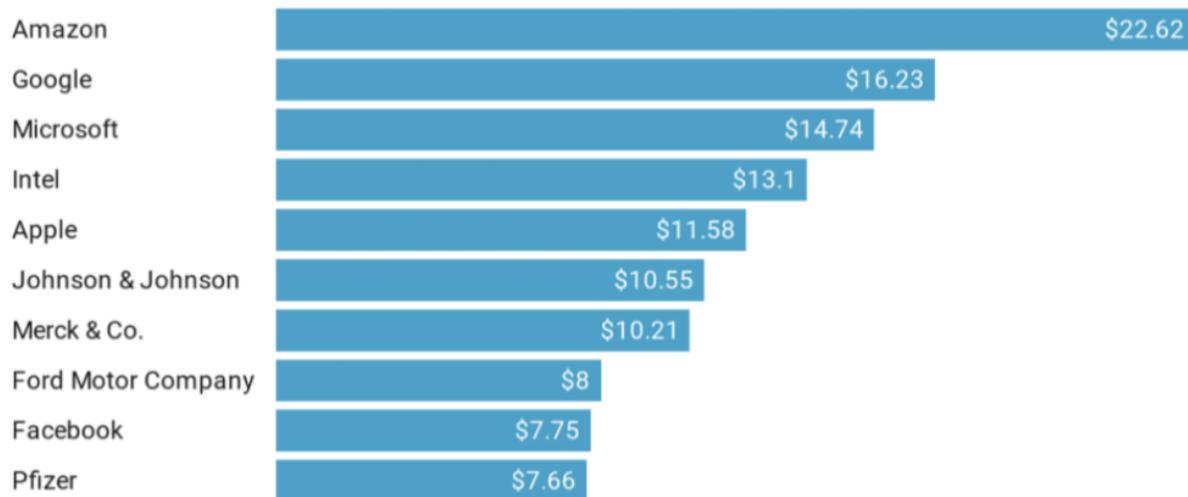


Chart: Alec Stapp (PPI) • Source: ideatovalue.com • Created with Datawrapper

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	11,469
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

Bottom Line

Whether a business operates brick-and-mortar stores, digital marketplaces, or both, vertical integration benefits consumers. But digital platforms like Google Search and Apple’s App Store benefit both consumers *and* their competitors. Today, consumers use digital app platforms and marketplaces with increasingly regularity—and those platforms support entrepreneurship like never before. Thanks to these platforms, small businesses can opt to own brick-and-mortar stores, sell online, or do both. This means local businesses can reach beyond their local communities. It also means consumers are not limited to their geographic region.

Digital platforms and marketplaces are also driving investment in the U.S. economy and its workers. The Progressive Policy Institute’s U.S. Investment Heroes Report, for example, cites the top three industries for investment as technology-related.⁶⁰ What’s more: firms like Alphabet (Google), Amazon, Microsoft, and Facebook are among the top ten

⁶⁰ Michael Mandel & Elliott Long, *Investment Heroes 2019: Boosting U.S. Growth* (Dec. 2019), https://www.progressivepolicy.org/wp-content/uploads/2019/12/PPI_InvestmentHeroes2019_V4.pdf.

companies investing in the United States.⁶¹ Their investments totaled more than \$60 billion last year alone.⁶²

All these benefits—lower prices, higher-quality products and services, greater competition, more entrepreneurship—are made possible by the consumer-welfare model. Tweaking antitrust doctrine to cast self-preferencing as an anticompetitive practice will return the United States to its 1960s’ understanding of antitrust. And it’ll ensure these benefits are reduced.

Part II. Barriers to Entry Related to Data

One of the core areas of focus when it comes to barriers to entry in digital markets is around data and how the collection and use of data by dominant platforms can keep new entrants out of the market. Data certainly plays an important role when it comes to digital markets. It strengthens the ability of online businesses to provide high-quality goods and services to consumers at an affordable price. However, contrary to popular claims data is not actually a barrier to entry and referring to it as such makes meaningful discussion around actual barriers to entry far more difficult.

While the proper use of data unquestionably offers significant benefits for both businesses and consumers, many are beginning to argue that data can also serve as a barrier to entry into digital markets, insulating dominant firms from the threat of emerging competition and further entrenching their sizeable market share. In fact, the House Judiciary Committee’s report on competition in digital markets from October of last year explicitly states that “[t]he accumulation of data can serve as another powerful barrier to entry for firms in the digital economy.”⁶³

Unfortunately, this is a sign of how the term “barrier to entry” has been consistently misused and broadened to the point of being virtually meaningless in policy discussions. It has become synonymous with the concept of a competitive advantage and is now used to mean literally anything it would take to dethrone the currently dominant competitor in a given market. The truth is, data accumulation and many of the other things commonly listed under this moniker are not actually barriers to entry, they are competitive advantages rightly earned by existing platforms to create better products and services for consumers.

A barrier to entry is something that prevents a new firm from entering the market and offering their product to consumers, not something that prevents a firm from taking over the market. Not everything that gives one firm an advantage over their competitors is a barrier to

⁶¹ *Id.* at P8.

⁶² *Id.*

⁶³ U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 42 (2020).

entry. Data may be incredibly valuable for online businesses, but it does not keep new entrants out of the market or insulate them from meaningful competition. In fact, the reason data is valuable is because it helps businesses improve their offerings and provide better products and services to consumers, something that is at the heart of the beneficial nature of the competitive process.

This is not just a matter of technical semantics. The improper use of the term holds real and profound significance for policy discussions in this highly politicized and incredibly important area of law. Ease of entry is a fundamental component of antitrust analysis and greatly impacts the court's view of whether a given defendant has violated our nation's competition laws. When entering a market is relatively easy, a court is much less likely to find an antitrust violation as the potential for new entry can greatly offset the perceived threat of any anticompetitive effects. However, when entering a market is harder, the court is much more likely to find that the potential for entry will not offset the harm that can result from anticompetitive conduct. The difficulty of entering a market is often the difference between guilt and innocence in antitrust cases.

By misconstruing the term to mean anything that prevents a new entrant from overtaking the dominant player in a market, we make meaningful discussion of actual barriers to entry impossible and threaten to increase the chances a court will find anticompetitive harm where it does not actually exist. By misusing the term, we actually risk harming consumers, the very group we are hoping to protect through antitrust enforcement.

However, even if data was a barrier to entry, it does not follow that we should automatically adopt many of the solutions being proposed to address the issue. While there may be some room for movement when it comes to regulating the use of data in digital markets, any action taken should be done thoughtfully and with care as to the potential unintended consequences it may produce.

Part III. Proposed Reform: Data Portability

One set of proposals currently being discussed center around increasing data portability. Data portability is when a website or online platform allows users to download various forms of content so that they can access that content and use it elsewhere with relative ease. While proposals in this area have the potential to increase competition by giving users greater control over their content thus making it easier for a user to switch platforms without losing too much in the transition process, they also raise concerns surrounding privacy.

There will need to be discussions surrounding who owns specific types of data and whether a user can port information that another user may want to remain on one platform. There are also questions of administrability. Some platforms use real-name verification, others allow for anonymous submissions. Some provide for long-form content, others short. Further, by creating a digital infrastructure that makes it easier for users to export their data, platforms risk creating a less secure environment with greater potential for abuse by

malicious third parties. By building portability options into the system, data extraction becomes a much easier process for both users and bad actors.

However, increasing data portability is certainly a worthwhile goal and provides a much clearer and less dangerous regulatory option than several of the other alternatives being discussed. It can keep a user from feeling as though they are locked into a particular platform, putting greater pressure on businesses to innovation and improve their services. In fact, many of the major platforms already offer robust data portability options to their users as a matter of convenience and have even collaborated on a project to provide better, more user-friendly portability options across multiple platforms throughout the industry.⁶⁴ As such, it may be appropriate to consider whether we should impose a requirement that platforms have some base option for data portability or establish a series of best practices for businesses operating in this area.

That said, we should be careful not to make portability requirements overly specific or burdensome. Compliance costs are highest for smaller competitors and up-and-coming businesses. Requirements that are too rigid or imposing could actually serve to further entrench many of the currently dominant competitors. The more prescriptive the rules, the more difficult it will be for a new entrant to emerge and compete effectively against the larger platforms that are better equipped to deal with complicated and expensive compliance issues. Further, overly specific requirements could shift the focus of platforms from customer demand to rote compliance. Websites would focus their time and resources on meeting the legal requirements rather than providing portability services that their users actually want. This would lead to less innovation in the area and, somewhat ironically, worse portability options in the long-term. Any legal or regulatory requirements should be general in nature and provide for nothing more than a baseline portability option for consumers.

Part IV. Proposed Reform: Forced Interoperability

Far more concerning than data portability are the proposals surrounding interoperability. Unlike data portability where a business is able to offer downloadable content to their users on their own volition, data interoperability requirements force a business to work with other businesses to provide for greater integration between their products. This raises tremendous privacy concerns as it greatly limits the ability of a platform to control their online ecosystem and ensure their products are safe and secure. The more you are forced to allow third parties to access and alter your system, the less you are able to mitigate against potential privacy concerns or data breaches.

There is a direct tradeoff between greater interoperability and more robust privacy protections. Aggressive interoperability requirements set a hard ceiling on the ability of a business to protect user's privacy. If you require near-universal interoperability where

⁶⁴ Data Transfer Project, *Data Transfer Project Overview and Fundamentals* (Jul. 20, 2018) <https://datatransferproject.dev/dtp-overview.pdf>.

platforms are very limited in their ability to pick and choose which services they integrate with, it will be difficult to prevent malicious third-party actors from gaming the system and taking advantage of these requirements to the detriment of consumers, the platforms in question, and society more broadly. However, there are also concerns on the other side of the coin. If you allow websites to pick and choose which services they integrate with, you raise antitrust concerns surrounding collusion. A few dominant actors could get together and decide to only increase interoperability with each other while excluding disfavored firms and smaller competitors. As such, interoperability options should be approached carefully and left to the market, not imposed proscriptively by the government.

Part V. Proposed Reform: Non-Integrated App Stores

Summary

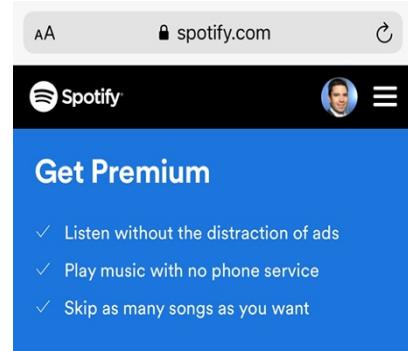
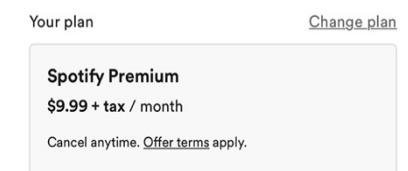
As part of this ongoing effort to promote “fairness” in digital markets, many are calling for a fundamental restructuring of app store offerings and the way they interact with third-party app developers. Current proposals range from limitations on the fees that app store providers can charge third-party developers to prohibitions on contractual requirements where developers agree to use the app stores’ payments processing infrastructure.

These proposals act as a blatant form of corporate welfare for large app developers where the government interferes with private contracts for the purpose of picking winners and losers in the market. Contract disputes should be handled by voluntary interaction between private parties, not heavy-handed government intervention.

Interference with private contracts

Suppose someone decides to build a shopping mall. They build the structure. They build the roads. They advertise the existence of the mall to potential customers. And rather than charging a monthly rental for space in the mall, they enter into a service fee agreement where the mall collects a percentage of each sale. If the business has no sales or gives away its wares, the mall makes no money. If the business makes lots of sales the mall earns its percentage.

We would balk if the government decided to interfere with this private agreement between a mall and the businesses within. But some reforms proposed to do just that—the only difference is that that mall is virtual. Not only is this antithetical to our system of private property and limited government, but it is also ultimately harmful to consumers.

A screenshot of the Spotify website's 'Get Premium' page. At the top, there are settings (AA), a lock icon for security, and a refresh button. The Spotify logo is on the left, and a user profile picture is on the right. Below the header, the text 'Get Premium' is prominently displayed. Underneath, there is a list of three benefits with checkmarks: 'Listen without the distraction of ads', 'Play music with no phone service', and 'Skip as many songs as you want'. The background of this section is blue.A screenshot of the Spotify website showing the 'Your plan' section. It shows the 'Spotify Premium' plan selected, with a price of '\$9.99 + tax / month'. Below this, a note says 'Cancel anytime. Offer terms apply.' There is a 'Change plan' link at the top right of this box.A screenshot of the Spotify website showing the 'Choose your payment method' section. It has a dropdown menu set to 'Credit or debit card'. Below the menu are icons for VISA, MasterCard, American Express, and Discover.A screenshot of the Spotify website showing a large input field for entering a card number. To the right of the input field is a small lock icon.

Users can signup at Spotify.com on their mobile device and the store never connected to the transaction

Today, app stores on Apple and Android devices are funded by the service fee agreements between the apps and the app stores. These service fees pay for the data storage of the developer's apps. These service fees pay for the internet infrastructure to deliver these apps to the customers. These service fees pay for the advertising to potential customers about the app stores. And these service fees are used to offset the costs of the devices making it easier for more customers to access the app stores.

App distributors earn their revenue primarily by entering into fee-sharing agreements with app developers that give them the right to a portion of the price of the app as well as a portion of any microtransactions offered through the app. As the vast majority of apps are now offered at a price point of zero, distributors make the bulk of their income through microtransactions. App distributors then use this money to improve their services, scan for malware, cover operational costs, engage in marketing, and provide customer service, all of which ultimately benefit the app developers themselves.

Currently, many contracts between these parties have provisions that allow app developers to access these digital marketplaces so long as they use the distributor's payments processing system and share a small portion of the revenue from each transaction. App developers are familiar with this system. In fact, Epic actually launched its own app distributor called Epic Store, which-like other app distributors-charges third-party developers for a percentage of their transactions.

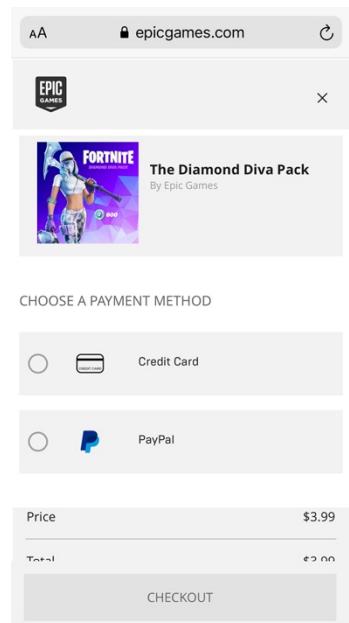
Picking Winners and Losers

Today, these contract issues are being fought in the courts and on the negotiating table between multi-billion-dollar businesses. Some of the chief supporters of the bill represent some of the most well-established app developers like Spotify, Epic Games, and Match Group, owner of Tinder.

These are not small businesses. Spotify, the largest music streaming service, currently has a market cap of over \$58.6 billion. Match Group, parent company of some of the largest online dating services, has a market cap is over \$42 billion. And Epic Games, one of the largest video game companies, made over \$17 billion last year alone.

These are not down-on-their-luck businesses pushing for non-integrated App Stores because they want greater fairness in their fee-sharing agreements, they are powerful players trying to get the state government to enable them to avoid paying the service fees to which they agreed.

This reform is about benefiting these well-established third-party app developers by forcibly preventing digital application distribution platforms like the Apple App store and



Epic Games can do transactions with users on mobile devices without engaging the store's app payment systems

Google Play store from creating contracts that limit the extent to which these app developers can offer their own in-app payments processing systems.

There is a reason why ALEC has multiple resolutions and model policies opposing this type of interference with private agreements because it is better to let the private sector and free market make these choices.

There are multiple payment options for consumers and developers

Despite what billion-dollar companies like Spotify and Epic Games that are pushing HB 2005 say, there are multiple ways for consumers to make purchases without going through the App Stores of Google or Apple.

For example, right on the iPhone's web browser, Spotify users can purchase subscriptions directly from Spotify - without going through the app stores. Users can even listen to music via the Spotify webpage without ever having to install the app.

Likewise, Epic Games makes micro-transitions for Fortnite available without ever having to download the game nor the Epic Store. In fact, users can, once again, go directly to the Epic Store webpage on their mobile device and buy V-Bucks or other microtransactions. At the same time, corporations like Match.com, Spotify and Epic Games make gift cards available for purchase at local drug stores and shopping centers. Here citizens can use essentially whatever payment form they want to buy these gift cards and then redeem them at Match.com, Spotify.com, and EpicGames.com.

This can all be done without any involvement of the Apple and Google stores, so the argument that there is a "monopoly" on payments is false.

Increasing costs to App Developers

Reform would make these contracts illegal, and it would force distributors to allow third-party app developers to create and use their own payments processor. As a result, app developers would be able to collect as much money as they please through in-app microtransactions without sharing any of the revenue with app distributors. Considering that app distributors make a substantial portion of their revenue through microtransactions, this would serve as a major blow.



Consumers can buy Match.com gift cards at local retailers using the payment form they want

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We appreciate your consideration of our views, and please let us know if we can provide further information.

Sincerely,

Carl Szabo
Vice President & General Counsel
NetChoice