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Gregory Day

University of Georgia Terry College of Business

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ANTITRUST PRIVACY, REVISITED

*Gregory Day**

When large technology companies, known as “Big Tech,” became prevalent, they engendered tremendous debate in antitrust circles. On one hand, many of the companies seemed to vanquish competition using methods that could hardly be described as fair or meritorious. But the problem with harnessing antitrust enforcement was that most tech markets appear to be innovative, high-quality, and cheaply priced (one could even say “free”). Since anticompetitive conduct must render high prices, diminished innovation, eroded quality, or otherwise harm “consumer welfare” to offend antitrust law, Big Tech was able to dodge antitrust scrutiny—for a while anyway.

Given the seemingly anticompetitive behaviors of Big Tech, yet ability to skirt antitrust liability, commentators, courts, scholars, enforcers, and even Congress sought to reassess antitrust enforcement for the twenty-first century. Perhaps Big Tech was harming consumers in new ways. Front and center to reimagining antitrust law was the theory that privacy entails a facet of consumer welfare. In light of how Big Tech is thought to evade users’ privacy or even manipulate them, the emerging theory was that privacy should constitute a facet of quality and, as a result, form the basis of antitrust lawsuits against Big Tech.

Remarkably, this debate occurring in universities moved to courtrooms, federal agencies, and Congress. After the U.S. Senate held hearings on Big Tech and federal enforcers noted the privacy harms of tech monopolies, the government initiated the first lawsuits against Big Tech predicated, not on high prices, but reduced privacy. These lawsuits have, however, yet to produce success.

*Assistant Professor, University of Georgia Terry College of Business; Courtesy Appointment, University of Georgia School of Law; Visiting Fellow, Yale Law School Information Society Project.

So where do we stand? Was the idea that privacy should play a larger role—or any role—in enforcement a loser? Should it be reworked to spawn another round of lawsuits against Big Tech? Does the empirical record suggest that privacy is a function of competition as scholars and enforcers have proposed? Or has this all been a function of a populist effort to “get” Big Tech despite its lack of threat to consumer welfare?

INTRODUCTION

Digital products have revamped traditional understandings of competition and anticompetitive conduct. Since modern antitrust is an economic body of law, courts and scholars have often asserted that reduced output is critical to an antitrust offense. After all, scarcity lies at the heart of economics in that the typical good increases in value as it becomes harder to obtain.¹ This dynamic allows a monopolist to diminish a good’s output below competitive levels, making it artificially scarce and thereby allowing the monopolist to raise prices to supracompetitive levels.² Antitrust’s concern is thus that a firm may rely on anticompetitive conduct to restrict output and raise prices.

But digital products defy this framework, as firms innovate ways to share products at “free” prices in *unlimited* quantities.³ Consider social media: a user can enjoy Facebook or Instagram in an almost unbounded capacity without paying a dollar amount. At first, to an array of scholars and courts, a firm offering digital products should

¹ Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 461 (2015) (“Economics is based on scarcity. Things are valuable because they are scarce. The more abundant they become, the cheaper they become.”).

² Christopher R. Leslie, *Antitrust Law As Public Interest Law*, 2 UC IRVINE L. REV. 885, 886 (2012) (“Monopolies and cartels distort competitive markets by reducing output in order to create artificial scarcity, which allows sellers to raise prices. As a result, some consumers will not be able to acquire the product or service at all because of the contrived shortages.”).

³ See generally John Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 524-26 (2018) (discussing the economics and difficulty of the term “free”).

either be immune from antitrust law⁴ or would hardly ever violate it because unlimited output and low prices foster consumer welfare.⁵

The sticking point, though, has been that an array of “Big Tech” firms seem to employ unreasonable methods of excluding competition and, as a result, erode consumer welfare—though not necessarily in ways that antitrust courts have traditionally envisioned.⁶ This has led scholars to assert that we must reimagine antitrust and, importantly, what types of harms antitrust is supposed to remedy.⁷ At the root of this debate is how antitrust enforcement should prioritize non-price harms.

When this debate picked up steam around 2018, privacy harms took center stage. On one hand, observers insisted that privacy exceeds antitrust’s scope as a non-economic injury. Others insisted that users do not care about privacy, citing evidence that consumers are willing to forsake privacy in exchange for low prices.⁸ On the other hand, many scholars have argued that digital markets would better protect privacy if competition prevailed.⁹ And this type of inefficiency, they assert, impairs consumer welfare as antitrust conceives it—even though courts have yet to embrace this theory.¹⁰

In a quickly evolving landscape, the chief of the Department of Justice’s Antitrust Division (“DOJ”), Makan Delrahim, took up privacy’s mantle. By 2019, he asserted that privacy reflects a function of quality and, given the novel types of anticompetitive actions and

⁴ John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 160 (2015) (explaining errant approaches taken by antitrust courts and scholars to zero-price products).

⁵ John Newman, *The Output Welfare Fallacy*, __ IOWA L. REV. __, __ (forthcoming) (detailing how some antitrust courts and scholars prioritize output).

⁶ Maurice Stucke, *The Relationship Between Privacy and Antitrust*, __ NOTRE DAME L. REV. __, __ (forthcoming) (tracing a belief that no relationship should exist between antitrust and privacy).

⁷ See, e.g., Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710 (2017) (discussing ways of reimaging antitrust for the challenges of data markets).

⁸ See Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 GEO. WASH. L. REV. 1, 2 (2021) (describing what is known as the “privacy paradox”).

⁹ See, e.g., Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61 (2019).

¹⁰ *Id.* at 65 (“The issue is that, since the courts have yet to recognize privacy as a quality that antitrust may protect, the cheap prices offered by platforms have insulated them from antitrust scrutiny.”).

harms arising from digital markets, enforcement must respond.¹¹ To Delrahim, antitrust can adapt, but must acknowledge that digital markets have altered orthodox notions of competition and anticompetitive behavior.¹² After the Senate held Big Tech hearings during the midst of a pandemic,¹³ something monumental happened: the DOJ and FTC brought antitrust lawsuits against Google and Facebook, respectively.¹⁴ The government alleged, not that users suffer positive-price harms, but qualitative injuries like reduced privacy and innovation occurred. It appeared that enforcers had leaned on scholarship to emphasize privacy and its relationship with competition.

Since we're a half-decade away from the genesis of antitrust's privacy debate, and over a year from the government's lawsuits, the question is whether privacy is a realistic goal of antitrust enforcement? Now that we've accrued experience, does the record suggest that the pro-privacy folks were steering enforcement in the correct direction? Or perhaps the past few years illustrate the futility of promoting privacy

¹¹ Makan Delrahim, Assistant Att'y Gen., Dep't of Just., Antitrust Div., Address at Harvard Law School: "Blind[ing] Me With Science": Antitrust, Data, and Digital Markets 4 (Nov. 8, 2019), <https://www.justice.gov/opa/speech/file/1217071/download>; Speech, Assistant Attorney General Makan Delrahim Delivers Remarks for the Antitrust New Frontiers Conference, Dep't of Justice (Jun. 11, 2019), <https://www.justice.gov/opa/speech/assistant-attorneygeneral-makan-delrahim-delivers-remarks-antitrust-new-frontiers> ("[D]iminished quality is also a type of harm to competition. As an example, privacy can be an important dimension of quality. By protecting competition, we can have an impact on privacy and data protection. Moreover, two companies can compete to expand privacy protections for products or services . . .").

¹² Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Blind[ing] Me With Science, Antitrust, Data, and Digital Markets (Nov. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition>] ("[W]e cannot afford to be overly formalistic in assessing the potential harms that may be attendant to these kinds of business practices. Today, the extraction of monopoly rents may look quite different than it did in the early 20th century.").

¹³ See Ian Bogost, *The Tech Companies Already Won*, THE ATLANTIC (July. 30, 2020), <https://www.theatlantic.com/technology/archive/2020/07/antitrust-hearing-tech-pandemic-inescapable/614749/> ("Antitrust is supposed to do the same thing, except for business: encourage competition by breaking up or regulating companies that grow too large—a demand Representative Cicilline issued. But just as the pandemic's public-health disruption feels endless and out of control, the technology sector's disruptive innovation seems too entrenched to upend easily. In both cases, nothing appears to change, only to persist, even as spectacles like this one demand intervention.").

¹⁴ Complaint, United States v. Google, 1:20-cv-03010 (Oct. 20, 2020, D.D.C.); Complaint, Fed'l Trade Comm'n v. Facebook, Inc., 1:20-cv-03590-JEB (Jan. 13, 2021, D.D.C.).

with antitrust's tools. And given this body of literature, what do we now know about digital competition in general as something different than conventional markets and competition?

This Essay proceeds in three parts. Part I explains antitrust law, the modern consumer welfare standard, and then its putative approach to privacy. The second Part discusses the rise of digital markets, the threats to privacy, and antitrust responses. Then Part III analyzes whether antitrust's privacy revolution may fulfill its promise.

I. THE SHERMAN ACT; CONSUMER WELFARE, AND ANTITRUST INJURIES

This Part discusses modern antitrust law and how we got here. By tracing history, we can understand how antitrust emerged as an economic body of law focused on output. This sets the stage for latter discussions about why, or why not, privacy comports with antitrust's scheme.

A. History of Antitrust Law

Congress enacted the Sherman Act in 1890 to respond to the trusts that had taken control of American industry. While sometimes the issue was a singular monopolist, a trust would often involve several firms that pooled their resources or corporate control into an entity controlled by an actor, board, or trustee.¹⁵ By doing so, the companies could collude rather than compete.¹⁶ So when fears mounted about the political, social, and economic powers amassed by tycoons, magnates, monopolists, and trusts, it inspired Congress to propose a national antitrust law.¹⁷

¹⁵ See SUSAN BERFIELD, *THE HOUR OF FATE: THEODORE ROOSEVELT, J.P. MORGAN, AND THE BATTLE TO TRANSFORM AMERICAN CAPITALISM* 113 (2020) (explaining the trust).

¹⁶ *Id.*

¹⁷ See *id.* at 113 (“The only power that can protect the public from companies that want to control the production of such essentials as sugar, salt, flour, cotton, even oil, Harlan wrote, is national power.”).

An issue was that members of Congress weren't quite sure what types of conducts should be banned.¹⁸ In light of disagreements over antitrust's scope and purpose, Senator Sherman made a couple of points. One was that an antitrust statute wouldn't create new offenses but only codify the common law of competition.¹⁹ He also asserted that Congress wouldn't need to produce a detailed statute but could draft a vaguely worded law in hopes that courts could later define.²⁰

And this is precisely what occurred. The Sherman Act is only a few lines long and prohibits two types of activities in broadly worded terms. Section 1 makes it illegal to restrain any part of trade while Section 2 prevents actors from monopolizing the market.²¹ These edicts are too vague to be literally enforced, prompting the Supreme Court to note that "the Sherman Act cannot mean what it says" because it would ban almost the entire panoply of business activities.²² The courts would have to define antitrust law.

This was no easy task. At first, it seemed that courts were willing to condemn large firms for merely being large, leading to allegations that populism was driving antitrust enforcement.²³ This inspired scholars from the University of Chicago and Harvard University in the 1970s to assert that antitrust was *harming* competition.²⁴ A notable contribution came from Robert Bork who wrote that firms could suffer liability if their low prices or high quality drove rivals out of business, which was effectively punishing competition rather than

¹⁸ See Richard D. Cudahy & Alan Devlin, *Anticompetitive Effect*, 95 MINN. L. REV. 59, 66 (2010) ("Enacted in 1890, the Sherman Act prohibits monopolization and concerted conduct in restraint of trade.38 Given the infamously opaque language of the statute, it fell to the courts to give meaning to what Congress proscribed.").

¹⁹ See Nat'l Soc. of Pro. Engineers v. United States, 435 U.S. 679, 688 (1978) (explaining antitrust's common law genesis).

²⁰ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940) ("[C]ourts should interpret [The Sherman Act] in the light of its legislative history.").

²¹ 15 U.S.C. § 1 (2012); 15 U.S.C. § 2 (2012).

²² Nat'l Soc. of Pro. Engineers v. United States, 435 U.S. 679, 687 (1978).

²³ Bennett Capers & Gregory Day, *Race-ing Antitrust*, __ MICH. L. REV. __, __ (forthcoming) ("It was also common for populism to drive antitrust, given the volume of lawsuits targeting large companies for merely being large or notorious.").

²⁴ See generally William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 35 (2007)

anticompetitive behaviors.²⁵ He insisted, based upon a review of the Sherman Act's history, that antitrust law should exclusively foster economic goals, describing the Act as a "consumer welfare prescription."²⁶ The Supreme Court agreed, noting antitrust may only redress economic harms from here on out.²⁷

In the following decades, courts and scholars tackled what exactly constitutes consumer welfare. The most obvious form of injury involves monopoly pricing. After all, artificially high prices have been a key harm of trade restraints and monopolies since the early days of antitrust.²⁸ But then economists noted that the real problem wasn't high prices as much as output.²⁹ They observed that few monopolists merely hike up prices, but they restrict output to create artificial scarcity; and it's this strategy that results in higher prices.³⁰

Furthermore, deadweight loss can derive from the transactions that don't take place due to restricted output.³¹ For instance, if a firm

²⁵ ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978).

²⁶ *Id.*

²⁷ *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977); Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 *FORDHAM L. REV.* 2405, 2406 (2013) (discussing the importance of *GTE Sylvania*).

²⁸ See, e.g., *The one is combinations between producers or dealers to limit the production or supply of an article so as to acquire a monopoly of it and then unreasonably enhance prices. Nat'l Ben. Co. v. Union Hosp. Co.*, 45 *MINN.* 272, 276, 47 *N.W.* 806, 807 (1891).

²⁹ See Newman, *supra* note 3, at 525 ("Leading treatises, law-school casebooks, amicus briefs, and oft-cited journal articles all conclude that antitrust can be boiled down to output effects.").

³⁰ *Id.* at 569 ("Under this view, the primary concern of antitrust law is certainly not concentrated political power or the destruction of small businesses--but neither is it higher prices. Instead, it is lost output, and the concomitant misallocation of societal resources. This misallocation is supposed to reduce welfare, making it undesirable from a utilitarian perspective.").

³¹ Thomas G. Krattenmaker, *Situating Realcomp in the Sweep of Antitrust Law and Policy*, 11 *U.C. DAVIS BUS. L.J.* 361, 364 (2011) ("'Consumer welfare' is not just a euphonious phrase meant to signify that consumers are happy. Rather, in the antitrust policy context, 'consumer welfare' has a somewhat technical, economic meaning. We say that consumer welfare is harmed when market output is reduced below otherwise prevailing competitive levels, so that market prices rise above competitive levels. When prices rise, some consumers will buy fewer of the goods in question. Some will cease to buy at all. None will buy more. Consumers still willing to buy some units at the new higher price(s) lose wealth when they purchase those units; the restraint of trade exacts a transfer of wealth from consumers to producers."). Consumers who are unwilling to pay the higher prices at all, or who reduce their purchases, lose the ability to engage in efficient transactions. They are ready, willing and able to pay what it costs to make the good, but producers will not sell it

facing competition would ordinarily sell 100 widgets/day at \$10 per unit, it might restrict output to 50 units/day and thereby sell each unit at \$15. Not only would the firm accrue artificially higher profits per unit, but society would suffer a deadweight loss if 50 people wouldn't purchase their desired widget. They may perhaps buy a poor substitute or nothing at all, reflecting an inefficient allocation of resources.³² To many scholars, the real activity condemned by antitrust law is restricted output.

There was also a prevailing notion that antitrust can protect against diminished quality. Indeed, a monopolist may make inferior goods because consumers cannot opt to buy higher quality goods.³³ While perhaps a bit of a stretch, low quality has also been described as a matter of restricting output.³⁴ But considering the difficulties of spotting reduced quality—whereas high prices seem objective—antitrust courts have largely scrutinized challenged conduct for whether it harmed consumer welfare in the form of restricted output.

It is under this framework that digital markets pose an array of challenges. Whether the consumer welfare standard 1) can currently promote competition in the digital arena, 2) needs to be slightly adjusted, or 3) must be completely obliterated has generated great discussions. And in few areas has this debate been more illustrative than with privacy.

to them. For these foregone transactions, society as a whole suffers a “deadweight loss” in value because an efficient exchange has been prevented and so some less efficient exchange must take its place.”).

³² *Id.*

³³ See William H. Rooney, *Consumer Injury in Antitrust Litigation: Necessary, but by What Standard?*, 75 ST. JOHN'S L. REV. 561, 569 (2001) (“Courts and the enforcement agencies thus appear to agree that consumer injury-- an actual or threatened marketwide, material, and sustained reduction in output (quantity or quality) and corresponding increase in price--is a necessary element in antitrust litigation not involving the per se rule of illegality or the quick-look doctrine.”).

³⁴ Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 118 (2018) (“This approach is consistent with antitrust's consumer welfare principle, which identifies antitrust's goal as competitively low prices and high output, whether measured by quantity or quality.”).

II. DIGITAL MARKETS AND PRIVACY

Digital markets, Big Tech, and platform technology have notably altered competition and economic theory. Key was that digital markets seem to defy modern conceptions of output and prices by reflecting conventionally high levels of consume welfare. But despite a façade of consumer utopia, critics assert that digital markets exist in a competitive vacuum and, as a result, consumers have suffered. If so, one would think that antitrust should intervene yet the nature of digital market, as this Part explains, has frustrated antitrust enforcers and courts, especially when it comes to privacy.

A. Attention/Digital Markets

Digital platforms have meaningfully altered the nature of markets and commerce—sort of. Digital markets are often synonymous with platform technology, bearing two important characteristics. The first is that platform companies can transmit information or services between third parties. With social media, the platform provides a place for users to receive content from friends, media outlets, or other parties. Or a platform can facilitate transactions such as rideshares or houses for rent.³⁵

Another characteristic is the dollar price of platforms or lack thereof. For many platforms, a service like social media comes at zero-prices, meaning that the user pays no dollar amount even though an exchange may still occur.³⁶ Other times the service is cheaper than its analog equivalent. For instance, Uber has successfully undersold the taxi industry. But this raises the question of how?

While data is important to digital markets, the primary commodity involves attention. A platform's value is generally a function of how much attention is spent using the technology, bolstered by the average user's engagement. For instance, the value of many apps

³⁵ See Day & Stemler, *supra* note 9 at 67 (“Instead of charging retail prices for goods and services, platforms facilitate exchanges between two or more groups, enabling them to harvest data from these interactions.”).

³⁶ See Newman, *supra* note 4, (explaining the term zero-price in contrast to “free”).

derives from the average amount of time spent on it.³⁷ The reasons are plentiful. One of which is simply advertising: a greater level of attention paid to advertising builds value.³⁸ Another factor is that attention and engagement allow platforms to design and present better content³⁹—e.g., if AirBnB is able to glean insights from engagement, it can design the platform to maximize transactions and optimize pricing. And the data a platform accrues provides value if sold or shared with third parties. For instance, Instagram monetized fashion insights, mined from the sharing, posting, and liking of photos.⁴⁰ So based on attention, platforms can design more efficient products than brick and mortar counterparts—for instance, Uber can better route and price cars than taxis—or supplement its prices with data. Even businesses like Dominos refer to themselves as “tech companies.”⁴¹

Note that this business model is kind of revolutionary. Scholars have noted that companies have historically sought to observe and track users, ranging from loyalty programs, coupons, garbology, and credit card data.⁴² Even the classic television or radio show was offered at

³⁷ Gregory Day, *Antitrust, Attention, and the Mental Health Crisis*, __ MINN. L. REV. __, __ (2022) (“The purpose of doing so is economic: a platform’s value is typically derived from the amount of time spent on it and depth of interaction.³⁷ By creating engagement (clicks, swipes, etc.), a company can track and analyze users, allowing it to target advertising, uncover insights into human behavior, innovate products, and capture more attention.”).

³⁸ See, e.g., John Koetsier, *Digital Crack Cocaine: The Science Behind TikTok’s Success*, FORBES (Jan. 18, 2020; 2:04PM), <https://www.forbes.com/sites/johnkoetsier/2020/01/18/digital-crack-cocaine-the-science-behind-tiktoks-success/#674f2a7a78be>; Echo Wang, *Exclusive: ByteDance Investors Value TikTok at \$50 Billion in Takeover Bid-Sources*, REUTERS (Jul. 29, 2020; 7:04AM), <https://www.reuters.com/article/us-bytedance-tiktok-exclusive/exclusive-bytedance-investors-value-tiktok-at-50-billion-in-takeover-bid-sources-idUSKCN24U1M9> (tracing the value of a popular app).

³⁹ See Day, *supra* note 37, (“In important part, surveillance enhances attention’s value: a greater level of engagement allows firms to develop nuanced insights, design goods, target certain consumers, and increase attention.”).

⁴⁰ Emerging Technology from the arXiv, *Data-Mining 100 Million Instagram Photos Reveals Global Clothing Patterns*, MIT TECH. REV. (June 15, 2017), <https://www.technologyreview.com/s/608116/data-mining-100-million-instagram-photos-reveals-global-clothing-patterns>.

⁴¹ Bernard Marr, *Big Data-Driven Decision-Making at Domino’s Pizza*, FORBES (Apr. 6, 2016, 3:00 AM), <https://www.forbes.com/sites/bernardmarr/2016/04/06/big-data-driven-decisionmaking-at-dominos-pizza>.

⁴² See Day, *supra* note 37, (discussing many of the historical ways in which companies monitored and tracked costumers).

zero-dollars in exchange for attention paid to advertising.⁴³ In this sense, a platform could merely be considered an advancement of traditional business. However, others are quick to point out that the amount of data aggregated by platforms trumps prior methods.⁴⁴ While companies had previously benefited from data, it was neither at the heart of the model nor as effectively gathered—and this is evidenced by the failure of brick and mortar companies to keep pace.

For a while platforms proved popular, providing cheap or “free” services in a fun way, but quickly anxiety emerged about the business practices employed by platforms.

B. Emerging Dissent

It soon became apparent that platform technology poses an array of harms even without a price. Perhaps because the depth and level of surveillance might have initially been surprising, users expressed anger about their dwindling privacy among other things. At first, complaints involved privacy, though definitions of privacy vary greatly.⁴⁵ It bothered individuals that platforms could, and did, monitor them without their knowledge.⁴⁶ The harm was that a firm may track one’s behaviors and choices absent consent; or when consent was sought, individuals lacked knowledge of the true extent. This led to cries of privacy invasions.

Then privacy anxieties became a bit more specific. For instance, platforms and other firms seemed to use haphazard measures to guard a user’s privacy, illustrated by Experian’s and Target’s data breaches.⁴⁷

⁴³ John M. Newman, *Regulating Attention Markets*, Unpublished Manuscript 12 (Mar. 6, 2022) (“The most frequently occurring examples occur within advertising-supported zero-price markets like broadcast radio and television, online social networks, and Internet search.”).

⁴⁴ *Blinding Me*, *supra* note 11 (stating that comparing digital methods of observation to grocery store loyalty programs is “too simplistic to be useful.”).

⁴⁵ See Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 ALA. L. REV. 1, 17 (2020) (“Privacy is an elusive concept, conceptualized as many things.”).

⁴⁶ See, e.g., Geoffrey Fowler, *How to Block Facebook From Snooping on You*, WASH. POST (Aug. 29, 2021), <https://www.washingtonpost.com/technology/2021/08/29/stop-facebook-tracking/>.

⁴⁷ AnnaMaria Andriotis, Michael Rapoport, & Robert McMillan, “We’ve Been Breached”: Inside the Equifax Hack, WALL ST. J. (Sept. 18, 2017; 8:04AM), <https://www.wsj.com/articles/weve-been-breached-inside-the-equifax-hack-1505693318>;

And given the sensitivity of a person's credit, financial, and health data, consumers became increasingly concerned about how companies protect their most intimate information. This sparked a cottage industry of products designed to maintain privacy, ranging from virus protection software, virtual personal networks, and credit monitoring services.⁴⁸

More recently, privacy has been recognized through the lens of personal decision-making. It seems that platforms maintain attention and promote engagement via arguably manipulative ways.⁴⁹ While more research is required to uncover how platforms spark dopamine releases in a user's brain—the point of which is thought to increase pleasure or even addiction—firms employ neurologists to help design technology.⁵⁰ Another tactic involves flooding one's screen with extremist, negative, or angry content, which is believed to keep users engaged; for instance, Facebook placed a greater value on posts garnering angry emojis than happy ones in determining which content to place on top of feeds.⁵¹ Related to this strategy is gamification whereby an app embraces the characteristics of a game replete with scores and progress markers to encourage users to do “more and

Robin Sidel & Danny Yardon, *Target Hit by Credit-Card Breach*, WALL ST. J (Dec. 19, 2013; 7:29AM), <https://www.wsj.com/articles/weve-been-breached-inside-the-equifax-hack-1505693318>.

⁴⁸ See, e.g., Attila Tomascheck & Rae Hodge, *A VPN Can Help Protect Your Home Office Privacy As Cybersecurity Threats Grow*, CNET (Mar. 2, 2022; 7:00AM), <https://www.cnet.com/tech/services-and-software/a-vpn-can-help-protect-your-home-office-privacy-as-cybersecurity-threats-grow>.

⁴⁹ James Niels Rosenquist et. al., *Addictive Technology and Its Implications for Antitrust Enforcement*, 100 N.C. L. REV. 431, 444 (2022) (“Social media platforms have engaged in well-documented attempts to manipulate users to increase platform usage.”).

⁵⁰ *Id.* at 434 (“The stimuli digital platforms produce are not physical substances consumed by the body like recreational and prescription drugs, but their effects on the brain follow the same common pathway of reward through the nucleus accumbens, which in turn regulates pathways of addiction. This nonmolecular substrate is not dissimilar to those found in other regulated behaviors, such as gambling. The commonality between digital platforms and other addictive products is evident in the way platforms seek to utilize principles of variable rewards schedules and content filtering to maximize the disutility of nonuse (i.e., craving) that leads to further use. Furthermore, studies have shown that these platforms are harmful when consumed in excess, particularly by vulnerable populations.”).

⁵¹ See generally Jennifer Powell-Lunder, *Caution: Your Tween May Be Stressing Over Snap Streaks*, PSYCH. TODAY (Mar. 26, 2017), <https://www.psychologytoday.com/us/blog/lets-talk-tween/201703/cautionyour-tween-may-be-stressing-over-snap-streaks>.

“better.”⁵² These practices, per many users, interfere with one’s personal autonomy and decision-making, known as “decisional privacy.”⁵³

Along the same lines, people perceived a type of privacy invasion when evidence of experimentation arose. A platform’s design may present users with slightly different options or displays in order to test the most effective designs—known as A/B testing.⁵⁴ This roiled users who, as unwitting participants in experiments, expressed feelings of manipulation.

As complaints about platforms and digital markets became more commonplace, so did demands for reform. One characteristic that seemed unescapable was the lack of competition in these markets. It seemed like the biggest offenders of privacy—e.g. Facebook and Uber—faced little to no effective competition.⁵⁵ Stories had also started to emerge about tactics used by these companies to stifle current and future rivals.⁵⁶ Even without a clear link between anticompetitive behavior and porous privacy, commentators complained about tech monopolists due in part to their treatment of competition. Whether antitrust law could logically be expected to promote privacy was far from clear.

III. ANTITRUST PRIVACY

Commentators demanded that antitrust enforcers and litigants bring lawsuits against Big Tech for violating their users’ privacy, but questions persisted about whether such a claim makes any sense. As an

⁵² See, e.g., James Fallows Tierney, *Investment Games*, 72 DUKE L.J. __, __ (forthcoming) (discussing the gamification of investment apps).

⁵³ Day & Stemler, *supra* note 9, at 4 (describing the concept of decisional privacy).

⁵⁴ See A/B Testing, OPTIMIZELY, <https://www.optimizely.com/optimization-glossary/ab-testing/> (last visited Nov. 17, 2019).

⁵⁵ See, e.g., Leo Sun, *Is Facebook a Monopoly?*, MOTLEY FOOL (Apr. 17, 2018; 8:02PM), <https://www.fool.com/investing/2018/04/17/is-facebook-a-monopoly.aspx>.

⁵⁶ See, e.g., Eugene Kim, *Amazon Has Been Promoting Its Own Products at the Bottom of Competitors’ Listings*, CNBC (Mar. 18, 2019, 3:48 PM), <https://www.cnbc.com/2018/10/02/amazon-is-testing-a-new-featurethat-promotes-its-private-label-brands-inside-a-competitors-product-listing.html> (discussing Amazon’s practice of mimicking products on its platform and then pushing the original product to lower pages).

initial matter, litigants struggled to bring *any* antitrust claims against Big Tech, given the quality, innovation, and zero prices of platform technology—all characteristics reflecting a high level of consumer welfare. With respect to privacy claims in specific, the problems ranged from whether this injury falls within antitrust’s purview or whether competition could plausibly help. But then on the heels of speeches by government enforcers in favor redressing privacy harms, the DOJ and FTC brought lawsuits against Facebook and Google.

A. The Doctrinal Argument Against

Antitrust courts and scholars were initially hostile to claims arising in digital markets due to the low prices. Even Robert Bork, who coined the term “consumer welfare,” insisted that antitrust should play no role with zero-price services.⁵⁷ He argued that the presence of “free” goods like Google’s search engine nullifies any need for antitrust enforcement.⁵⁸

A number of courts adopted a similar perspective. For instance, a collective of taxicabs sued Uber in Philadelphia for alleged anticompetitive practices.⁵⁹ The court rejected this claim, however, holding that Uber’s low prices insulated it from antitrust liability.⁶⁰ It asserted, in important part, that Uber seems to have in no way diminished consumer welfare.⁶¹

In terms of specifically privacy, a number of scholars cautioned antitrust courts and enforcers about the false promise of promoting privacy. It was initially asserted that privacy presents an impossible goal, considering that courts would likely to struggle to determine

⁵⁷ Robert H. Bork, Opinion, *Antitrust and Google*, CHI. TRIB., Apr. 6, 2012, http://articles.chicagotribune.com/2012-04-06/opinion/ct-perspec-0405-bork-20120406_1_unpaid-search-results-search-enginesearchalgorithms (“Regulators may attempt to develop ... antitrust complaints against the search engines but they are unsupported. There is no coherent case for monopolization because a search engine, like Google, is *free to consumers*.”).

⁵⁸ *Id.*

⁵⁹ *Philadelphia Taxi Ass'n, Inc v. Uber Techs., Inc.*, 886 F.3d 332, 338 (3d Cir. 2018).

⁶⁰ *Id.* at 340 (“[L]ow prices benefit consumers regardless of how those prices are set”).

⁶¹ *Id.*

whether the current level of privacy is suboptimal or not.⁶² Or whether increasing privacy would offset the benefits of platform technology if companies were forced to expend resources on privacy and thereby pass the costs along to consumers.

In fact, some of these problems struck at antitrust's core. Critics raised an important point: the privacy paradox.⁶³ This puzzle is that users claim to value privacy despite evidence to the contrary. Consumers are apparently willing to sacrifice privacy when presented with the risks, but then complain about data leakages and breaches. It also seems that consumers are resistant to spending money on privacy-conscious goods, choosing instead to use "data-reckless" services at zero-prices.⁶⁴ This suggests that consumer welfare is maximized by providing low privacy at zero-prices—after all, this is what consumers *want*.⁶⁵

A similar issue is whether competition can plausibly be expected to serve as a panacea. The theory is that poorly protecting privacy, entails the most effective means of competition; if so, then increasing the number of competitors in a digital market might erode competition ever further. In other words, upstarts might compete against dominant tech firms using the same, or even enhanced, tactics meant to capture the most data while spending the fewest resources on privacy. This is especially salient since it suggests that competition wouldn't promote privacy, nullifying any role for antitrust enforcement.⁶⁶

⁶² Stucke, *supra* note 6; Newman, *supra* note 43, at 205 (“[P]rivacy law is concerned with ensuring that individuals’ information remains confidential when its release or use was not bargained for as part of a voluntary exchange. Antitrust law does not concern itself with such harm.”).

⁶³ See Ignacio N. Cofone & Adriana Z. Robertson, *Consumer Privacy in A Behavioral World*, 69 HASTINGS L.J. 1471, 1487 (2018) (“One of the complications in the discussion of consumer data privacy is known as the privacy paradox. This paradox refers to the fact that, while individuals say that they are concerned about their privacy, they are willing to sell or trade this same privacy for almost nothing.”).

⁶⁴ See John D. Harkrider, *What Lemons Teach Us About Privacy and Competition*, ANTITRUST, Fall 2020, at 39, 41 (discussing the difference between privacy rhetoric and observable behaviors).

⁶⁵ See Solove, *supra* note 8, at 12-13 (discussing literature about whether consumers demand privacy).

⁶⁶ See Stucke, *supra* note 6 (discussing the failure of competition agencies, at first, to recognize the bond between competition and privacy).

In fact, are digital markets even capable of housing competition? The theory of network effects is that some companies, by virtue of being big, are almost impervious to competition—and that upstarts cannot possibly challenge the data advantages of stalwarts.⁶⁷ Consider Facebook: people enjoy the platform because of its size, offering gateways to friends and family. As a result, rivals would struggle to break into this market because they can't plausibly offer the same network.⁶⁸ Further, it's hard to fathom that people would want six different versions of Facebook instead of one platform. If so, then antitrust enforcement in digital markets would perhaps make little sense if such markets are inhospitable to competition; you'd merely replace one monopolist with another.

Based on this and similar theories, antitrust should stay in its lane by resisting urges to promote privacy. But antitrust enforcers chose the opposite direction.

B. The Case in Favor

Antitrust's privacy movement gained steam in 2019 after a couple notable articles and then the DOJ's interjection. Scholars insisted that objective ways of measuring privacy existed, and that competition can be expected to force companies to vie for consumers along this line.⁶⁹ It was argued that concentrated markets choke off information from consumers about privacy's value or short supply, which competition would help to remedy. Given the costs of ex ante protecting one's privacy or ex post cleaning up a data breach, the argument was that privacy is certainly an economic issue affecting consumer welfare.⁷⁰

⁶⁷ See Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 423, 424 (1985) (explaining network effects).

⁶⁸ Day & Stemler, *supra* note 9, at 75 ("The initial study of network effects focused on positive direct network externalities; that is, when a user joins a network, she benefits similar users on that network. A clear example is bitcoin, the digital currency. The more users trading in bitcoin, the more valuable bitcoin becomes for every owner of the currency.")

⁶⁹ *Id.* at 91 (seeking to explain how privacy can be viewed as an objective matter like dollar prices).

⁷⁰ *Id.*

The DOJ helped turn the tide when its chief, Makan Delrahim, made several speeches emphasizing the novelty and importance of digital markets and, notably, the primacy of privacy.

This rhetoric turned into action. It began with Senate hearings during heart of the pandemic focused on antitrust's role in digital markets regarding Big Tech.⁷¹ The heads of Apple, Facebook, Twitter, and Google were called to testify, grilled about why their market shares should not garner antitrust enforcement.⁷² Then the DOJ and FTC brought actions against Google and Facebook, respectively. For one of the first times, government enforcers claimed that tech companies had violated antitrust law without the presence of high prices.⁷³ Rather the claims targeted several forms of antitrust injuries including privacy harms. The government embraced the arguments presented by antitrust scholar and activists that privacy must become an important focus of enforcement even in the absence of positive prices.

It is notable how quickly this landscape evolved. The first inklings of antitrust privacy arose around 2018. Government enforcers brought cases in 2020 and now, just a couple years later, we can begin to assess this movement: can antitrust law be reasonably expected to promote privacy in digital markets?

⁷¹ David Shepardson, *Facebook, Google, Accused of Anti-Conservative bias at U.S. Senate Hearing*, REUTERS (Apr. 10, 2019; 5:35PM), <https://www.reuters.com/article/us-usa-congress-socialmedia-idUSKCN1RM2SJ>.

⁷² See generally Cecilia King et al., *Amazon, Apple, Facebook and Google Prepare for Their "Big Tobacco Moment,"* N.Y. TIMES (Jul. 28, 2020), <https://www.nytimes.com/2020/07/28/technology/amazon-apple-facebook-google-antitrust-hearing.html>.

⁷³ *Id.*