Five False Claims Underscore the Case Against the Senate's Antitrust Bills

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The Senate's main antitrust bills—the American Innovation and Choice Online Act and the Open App Markets Act—emulate a stalled House package and the EU's deeply flawed Digital Markets Act. They err on many fronts, and the main arguments for them are at odds with reality.

KEY TAKEAWAYS

- Moderate experts have raised deep concerns with the Senate's leading antitrust bills. Many sensible antitrust reformers cannot stomach them, either.
- First, radical antitrust reformers—self-proclaimed Neo-Brandeisians—claim antitrust laws are outdated. But the fact is antitrust laws are adaptable to new market realities.
- Second, Neo-Brandeisians claim antitrust bills should only focus on the largest platforms. But antitrust laws are based on conduct, not per se size distinctions.
- Third, Neo-Brandeisians claim antitrust bills are needed to address "unprecedented" industry concentration. In reality, corporate concentration has not increased.
- Fourth, Neo-Brandeisians claim antitrust bills prohibit anticompetitive conduct. Unfortunately, antitrust bills also prohibit pro-competitive, pro-consumer conduct.
- Fifth, Neo-Brandeisians claim antitrust bills will allow plenty of leeway for companies to raise legitimate justifications for their conduct. But the truth is the bills will stifle innovation by making companies risk-averse.

OVERVIEW

As Congress considers antitrust reforms, lawmakers should adopt neither of the two main antitrust bills currently under discussion in the Senate, which are the American Innovation and Choice Online Act (AICOA) and the Open App Markets Act (OAMA).[1] These bills emulate not only a House legislative package that remains in limbo, but also the European Union's deeply flawed Digital Markets Act.[2]

It's not surprising that radical antitrust reformers—self-proclaimed Neo-Brandeisians—champion these bills, given their goal of creating a very different type of U.S. economy, one where large companies are atomized or heavily regulated, and innovation is stalled.[3] Yet, more moderate expert voices have raised a range of concerns with even antitrust reformers calling for Congress not to pass these bills.[4]

The reality is that not only do these bills err on many fronts, but the claims made in support of them fail to represent the reality.[5] This brief examines and rebuts the five most important.

CLAIM #1: ANTITRUST LAWS NEED TO BE UPDATED

Reality: Antitrust Laws Are Adaptable to New Market Realities

The claim that the Sherman Act of 1890 needs to be "rejuvenated" underpins all antitrust bills introduced in Congress.[6]

The reality is there is no need to update antitrust laws to adapt to new technologies. As the Supreme Court once opined, U.S. antitrust law is the "comprehensive charter of economic liberty" in America, as antitrust rules represent an economic constitution and therefore provide legal certainty and sufficient adaptability.[7] The Supreme Court made clear that the Sherman Act "as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[8] The 1890 Sherman Act has, for example, enabled enforcers to prosecute Microsoft and American Express while suing Google and Facebook.[9]

Changes to antitrust legislation, often made in response to pressure from businesses seeking protection from competition, have a poor track record. Case in point: the Robinson-Patman Act of 1936, which was passed in response to the rise of supermarkets and many consumers choosing them over small "mom and pop" grocers. The misguided law has long been unenforceable as it essentially protects certain retailers and harms consumers and innovation.[10] Indeed, the former Antitrust Modernization Commission recommended the repeal of the act.[11] Any antitrust legislation needs to be carefully drafted and should not generate unintended consequences. The current legislative process has not removed the risk that these antitrust bills turn out to be the new Robinson-Patman Act—well-meaning, ineffective, and detrimental—are high. Consequently, these bills may become antitrust's least glorious hour.[12] The antitrust laws are flexible enough to apply across centuries as courts adequately adjust to new market realities.

CLAIM #2: ANTITRUST BILLS SHOULD ONLY FOCUS ON THE LARGEST PLATFORMS

Reality: Antitrust Laws Are Based on Conduct, Not Per Se Size Distinctions

The antitrust bills only apply to "covered platforms" and not to their rivals, thereby distorting, rather than promoting, "fair" competition. Indeed, the AICOA applies to "covered platforms" defined as "online platforms" which i) are publicly traded companies, ii) have 50,000,000

United-States based monthly active users or 100,000 United States-monthly active business users, iii) have United States net annual sales of greater than $550 billion or an average market capitalization greater than $550 billion on average over the last two years, and iv) are critical trading partners for the sale or provision of any product or service offered on or directly relate to the online platforms. The OAMA applies to companies that own or control an app store whose users in the United States exceed 50,000,000.

These size thresholds violate the legislative history of antitrust laws while distorting competition. Besides enacting merger rules, antitrust laws prohibit anticompetitive conduct without quantitative thresholds. In other words, antitrust laws sanction the abuse, not the mere use or possession, of market power. Herbert Hovenkamp has made clear that antitrust laws "cannot be interpreted as limitations on political power, large size, or some common law or criminal offense … *unless* those bad acts serve to injure competition."[13] For instance, the Supreme Court has consistently judged that charging high prices is not an antitrust offense unless accompanied by a misconduct.[14] In monopolization cases, the Supreme Court established that Section 2 of the Sherman Act has two elements: "1) the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[15] In other words, market power enjoyed by entrepreneurial merits is lawful; only misuse of market power can be considered anticompetitive.[16]

The antitrust bills will decrease growth and productivity, as some firms' pro-competitive conduct will be banned. Additionally, these bills will generate unfair discrimination, as competitors will be treated dissimilarly depending on whether they fall within the bills' arbitrary quantitative thresholds.

The current antitrust bills fracture this essential foundation of our antitrust laws. They ignore the two fundamental tenets of Section 2 of the Sherman Act, as firms may not have market power but may be "critical trading partners" subject to a wide range of obligations and prohibitions, and firms may engage in pro-competitive, pro-growth conduct, with designated firms prevented from delivering products and services to consumers. The bills turn antitrust on its head by focusing on blind size thresholds rather than on firm conduct to determine anticompetitiveness.

Indeed, the antitrust bills turn pro-competitive acts into prohibited conduct without requiring evidence of the anticompetitive effects of such conduct, and do so while allowing rivals to engage in the very same conduct the bills' "covered platforms" are no longer be allowed to perform.

Consequently, these bills decrease growth and productivity, as some firms' pro-competitive conduct is banned. Additionally, these bills generate unfair discrimination, as competitors are treated dissimilarly depending on whether they fall within the bills' arbitrary quantitative thresholds.

The antitrust bills' focus on certain companies distorts competition. For instance, Amazon would be subject to a wide range of prohibitions while conducting its business, but rivals such as Walmart and Alibaba would enjoy the bills' exemptions. Google may no longer offer Google Chrome with a Gmail account while Mozilla Firefox or Opera remain free to bundle services together for improved customer experience. Apple may have to downgrade the compatibility

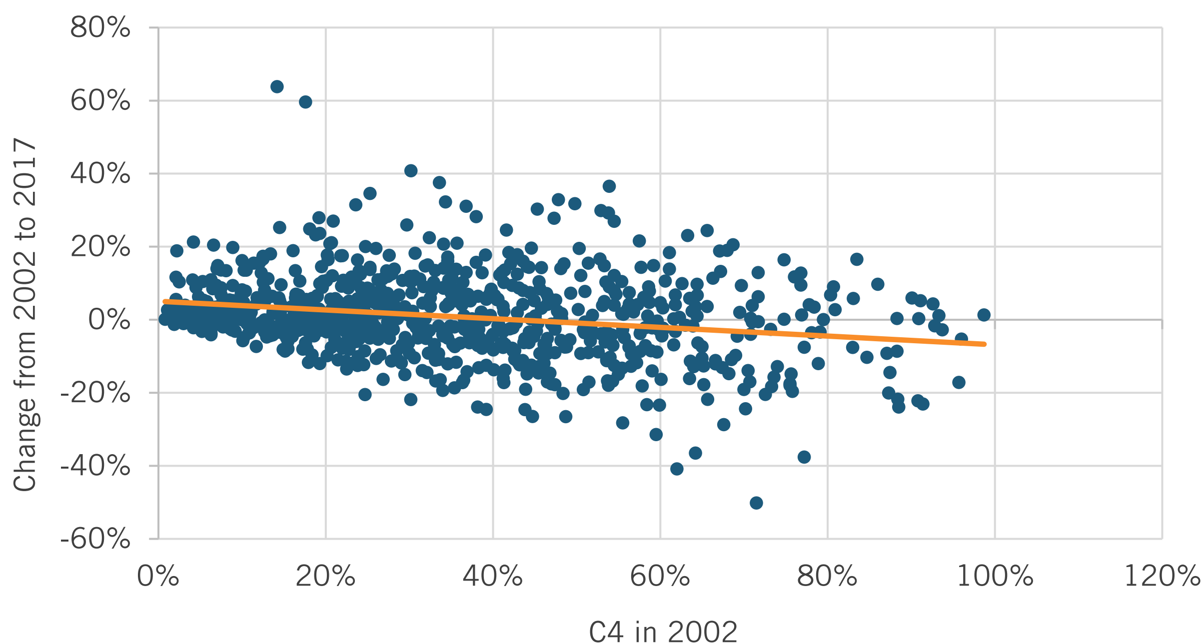
between its devices to match with the compatibility of third-party devices. And Facebook may end its marketplace service on its social media platform as other websites are able to claim a premium placement on the social media platform. The number of frivolous claims third-party businesses may successfully be able to make using these antitrust bills is countless. These claims may harm consumers and downgrade user experiences, while rivals may thrive under the unequal playing field these antitrust bills generate among competitors.

CLAIM #3: ANTITRUST BILLS ARE NEEDED TO ADDRESS UNPRECEDENTED CONCENTRATION

Reality: Corporate Concentration Has Not Increased

The House's Majority Staff Report in 2020, after which the antitrust bills were proposed, suggests, "Congress must revive its tradition of robust oversight over antitrust laws and increased market concentration in our economy."[17] Unsubstantiated claims of increased concentration have become the winning formula for Neo-Brandeisians who want to weaponize antitrust laws in order to advance their redistributive goals at the expense of innovation. But facts are stubborn things: Concentration has not increased.

Figure 1: The downward trend in industry concentration shown as the change in market share for the top four firms in each sector (their "C4" ratios) relative to 15 years prior[18]



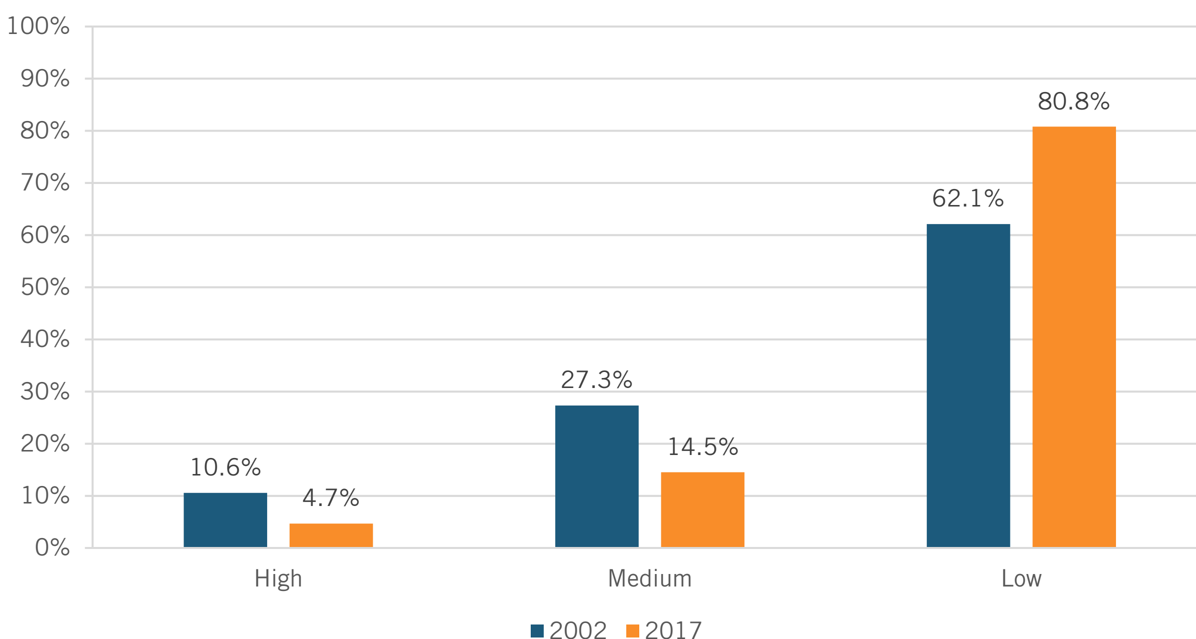
Using the most recent census data, the Information Technology and Innovation Foundation (ITIF) found economic concentration increased by only 1 percentage point between 2002 and 2017—an insignificant increase hardly justifying alteration of antitrust laws.[19] On the contrary, the number of concentrated industries in 2017 increased from 2002. (See figure 1.) NERA Economic Consulting analyzed the same data and found an overall slight decline in concentration, unequivocally stating that "NERA's economists conclude that trends in industrial concentration should not be put forward by policymakers or antitrust enforcers as a basis for

changing U.S. antitrust policy. To the contrary, pursuing deconcentration as an economic policy objective in and of itself is unwarranted and risks causing significant economic harm."[20]

Interestingly, the share of economic output from highly concentrated industries decreased from 10.6 percent in 2002 to 4.7 percent in 2017, while in low-concentrated industries, the share of output increased from 62.1 percent to 80.8 percent. In other words, the number of unconcentrated industries increased. Out of 851 industries in 2017, less than 5 percent were considered to be highly concentrated.

Moreover, the correlation between industry concentration and price increases was negative, with more-concentrated industries raising prices the least; concentrated industries portray deflationary, not inflationary, characteristics, thereby benefitting consumers. This confirms a well-known historical truth that "increasing output and overcapacity [intensifies] competition and [drives] down prices."[21] Concentration enables scale economies, which are a powerful tool for price deflation.[22]

Figure 2: High-, medium-, and low-concentration industries' share of total U.S. business output[23]



Consequently, for the Biden administration to support these bills on the premise that decades of industry consolidation have often led to excessive market concentration is misguided, since evidence demonstrates that such a claim is baseless.[24]

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When there is corporate consolidation, it is because new technologies disrupt markets with scale and scope economies. Innovation increases, thereby generating increased growth and productivity.[25] In fact, the Neo-Brandeisian case against concentration echoes Marx's case against concentration. It is the very consumer benefits and technological superiority concentration brings about that represents the threat to the noncorporate society both Marxists

and Neo-Brandeisians advocate for. In his *Theory of Concentration*, Karl Marx lamented that "the battle of competition is fought by the cheapening of commodities. The cheapness of commodities depends, *ceteris paribus*, on the productiveness of labor, and this again on the scale production. Therefore, the larger capitals beat the smaller."[26]

The antitrust bills supported by the Neo-Brandeisians mainly target a few large online platforms that offer competitive or zero-priced products and services, and whose available capital enables them to invest in breakthrough technologies, thereby outcompeting smaller and less competitive rivals.[27]

CLAIM #4: ANTITRUST BILLS PROHIBIT ANTICOMPETITIVE CONDUCT

Reality: Antitrust Bills Also Prohibit Pro-Competitive, Pro-Consumer Conduct

Antitrust laws prohibit anticompetitive conduct. However, the Senate antitrust bills prohibit pro-competitive conduct.[28] This unfortunate objective can only be justified by the populist motto that "big is bad."[29] Two practices illustrate the considerable unintended consequences of these bills: The prohibition of self-preferencing and the obligation of sideloading, respectively, in the AICOA and the OAMA.[30]

First, the prohibition of self-preferencing would decrease competition by innovative firms, thereby harming consumers and overall welfare. Self-preferencing is a common business practice, not a bizarre anticompetitive conduct.[31] From supermarkets' private labels to digital companies' diversification of offerings, self-preferencing is a legitimate corporate practice both beneficial to consumers and to competition.[32] Professor Herbert Hovenkamp wrote unequivocally that "the pending self-preferencing legislation is an affront to both antitrust policy and intelligent regulatory policy. Indeed, it displays all the signs of special interest capture disguised as an antitrust law."[33]

Should smartphones be sold without applications because pre-installed apps constitute self-preferencing vis-à-vis third-party apps? Should online platforms refrain from selling their private labels' products because these popular products may become better placed in algorithm-based search results, thereby leading to de facto self-preferencing? Should online platforms stop developing products and services, since such innovations may enjoy prominent placement on the platform, thereby generating a self-preference over third-party products and services?[34] If the answers to these questions are affirmative, as the antitrust bills suggest, then consumer harm, stifled innovation, and depleted growth may ensue with no tangible benefit other than insulating a small set of competitors from competition.[35]

As antitrust laws have aptly been interpreted as a consumer-welfare prescription, it is the consumer welfare—and not competitors' welfare—that should be the North Star of antitrust enforcement.

Second, the obligation to allow sideloading would decrease innovation, thereby decreasing competition in the "app economy."[36] Sideloading refers to the ability to download apps into a device by bypassing the proprietary app store of the operating system. In other words, consumers become entitled to download apps without the operating system, thereby ensuring the quality and desirability of these apps. It is nothing but the jettisoning of the property rights of the operating system. Sideloading obligations, however detrimental they can be, derive from the

belief that the operating system has a "monopoly" over its proprietary app store. Such a thoughtless argument amounts to lament that a car manufacturer has a "monopoly" over the manufacturing of its proprietary chassis. It is both an insincere and dangerous argument.

Such an argument takes direct inspiration from European enforcers who want to break into America's most iconic innovation of the digital economy: smartphones and their app stores.[37] For the antitrust bills to clone European rules and mandate sideloading ignores cybersecurity risks.[38] Additionally, sideloading undermines competition between Google's app-store model and Apple's app-store model.[39] Moreover, sideloading would stifle innovation, as companies may yield fewer benefits in investing and improving app stores and strengthening quality controls. Finally, sideloading would harm consumers unable to distinguish high-quality apps from "lemons," thereby damaging a vibrant app market.[40]

The illustration of the bills' prohibitions of pro-consumer and pro-innovative conduct (or their mandate to carry out harmful conduct) proves far-reaching. Many bills' provisions harm consumers in order to protect (less competitive and innovative) rivals.[41] As antitrust laws have aptly been interpreted as a consumer-welfare prescription, it is the consumer welfare—and not competitors' welfare—that should be the North Star of antitrust enforcement.

Unfortunately, should these bills ever be applied, antitrust enforcement would protect laggard competitors at the expense of competition and innovation (i.e., at the expense of consumers and economic growth).

CLAIM #5: ANTITRUST BILLS ALLOW FOR LEGITIMATE JUSTIFICATIONS

Reality: Antitrust Bills Will Make Companies Risk Averse

Lawmakers supporting the antitrust bills are aware of the considerable unintended consequences of the legislation they advocate. Yet, they attempt to appease fears of decreased competition and innovation by arguing that targeted companies will have sufficient room to raise legitimate justifications for engaging in conduct that is beneficial to society. In reality, the evidentiary thresholds to legitimately justify conduct prohibited by these bills are so high that targeted companies will refrain from engaging in them in the first place.

For example, a targeted company willing to engage in "self-preferencing" will have to justify to federal enforcers that "by a preponderance of the evidence that the conduct was narrowly tailored, nonpretextual, and reasonably necessary to" either comply with the law; protect "safety, user privacy, the security of nonpublic data, or the security of the covered platform" or "maintain or substantially enhance the core functionality of the covered platform."[42] In other words, absent these stringent justifications, no business justification is acceptable. Furthermore, the risks that the enforcer may find the self-preferencing practice as "unnecessary" irrespective of the justification invoked are too high for the targeted companies to run the risk of violating the law. The result would be no self-preferencing of any sort, be it for increased price competition with cheaper products, increased complementarity of services, or increased innovation with the introduction of new services.

In other words, targeted companies would be deterred from innovating and competing through the pro-competitive conduct prohibited in the bills. Consequently, embedding such an attitude

would favor regulatory compliance over competitive disruption. Targeted companies would adopt a risk-averse approach to innovation reminiscent of the precautionary principle.

The precautionary logic of the bills is no surprise, as the bills are inspired by the EU's Digital Markets Act.[43] That legislation finds its inspiration from the so-called precautionary principle: Innovation is usually risky and so should be resisted or regulated this principle posits.[44] Adopting the Senate bills is to import a precautionary attitude at odds with the innovative spirit that has propelled America's technological leadership. The justifications present in the antitrust bills would be useless, leading to per se rules of illegality in line with the precautionary principle.

CONCLUSION: THE CASE AGAINST THE SENATE'S MAIN ANTITRUST BILLS

The two antitrust bills discussed herein are part of a wider set of bills aimed at curbing the ability of a few online platforms to compete, innovate, and deliver products and services efficiently. The proposed legislation supported by Neo-Brandeisians weaponizes antitrust to lash out a few tech companies—namely, Microsoft, Apple, Amazon, Google, and Meta.[45] While Microsoft has avoided excessive popular outcry, the company is nevertheless accused of unreasonable growth through mergers, as the acquisition of Activision illustrates.[46] Apple is targeted for the allegedly anticompetitive effects of its privacy-friendly policies, thereby creating insurmountable intricacies between privacy and competition objectives from a consumer perspective.[47] Amazon's highly competitive prices and efficient delivery have steered third-party vendors' ire, as they are disrupted inasmuch as other incumbents are disrupted by Amazon's acquisition policy which fosters competition and innovation.[48] Google's large variety of free services is at odds with the lawmakers' willingness to prohibit self-preferencing and is at odds with the enforcers' desire to silo Google in a search engine without adjacent services that are popular with consumers.[49] Meta is accused of monopolizing the metaverse it pioneered and that represents a business promise, and certainly not a mature market.[50]

These antitrust bills import the many prohibitions and obligations included in the EU's Digital Markets Act and, with it, the European precautionary approach to disruptive innovation and their focus on protecting businesses from competition, rather than promoting consumers' welfare. Congress should not follow the EU's precautionary path, as these antitrust bills would decrease consumer welfare and U.S. competitiveness and productivity.

Beyond this populist techlash antitrust advocates have successfully brought to Congress, lawmakers should be careful when urged to amend antitrust laws. These laws are fit for purpose, are adaptable to the digital economy as current enforcement actions demonstrate, and have enabled the American economy to deliver tech champions—a source of envy and admiration around the globe. Should lawmakers adopt these detrimental antitrust bills, Congress would provide competing regions—namely China and Europe—a formidable self-inflicted harm on its superstar firms, with no consequences other than to harm American consumers and competitiveness.

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About ITIF

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ENDNOTES

1. American Innovation and Choice Online Act, S.2992, 177th Cong. (2022); Open App Markets Act, S.2710, 117th Cong. (2022). See also Aurelien Portuese, "Open Letter to the Senate Judiciary Committee Regarding the 'Open App Markets Act' (S.2710)," January 24, 2022, https://itif.org/publications/2022/01/24/open-letter-senate-judiciary-committee-regarding-open-app-markets-act; Aurelien Portuese, "Open Letter to Sens. Durbin, Grassley, Klobuchar, and Lee Regarding the American Innovation and Choice Online Act (S.2992)," January 19, 2022, https://itif.org/publications/2022/01/19/open-letter-sens-durbin-grassley-klobuchar-lee-regarding-s2992. More generally, see: "Schumpeterian Takes on Pending Antitrust Bills," https://itif.org/schumpeterian-takes-pending-antitrust-bills.
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15. *United States v. Grinnell Corp,* 384 U.S. at 570–71. Even the more stringent European competition rules require an "abuse" to be demonstrated for a company in "dominant position" to be sanctioned

under European Treaties' rules. See Pinar Akman, *The Concept of Abuse in EU Competition Law. Law and Economic Approaches*, (Oxford: Oxford University Press, 2015).

16. On the need to identify anticompetitive conduct, see *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993); On why absence of market power cannot legitimately trigger antitrust liability, see Frank H. Easterbrook, "The Limits of Antitrust," 63 *Tuxane Law Review*, 20 (1984), 20 ("Firms that lack power cannot injure competition no matter how hard they try. They may injure a few consumers, or a few rivals, or themselves ... by selecting 'anticompetitive' tactics. When the firms lack market power, though, they cannot persist in deleterious practices. Rival firms will offer the consumers better deals.").
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26. Karl Marx, *Capital*, Vol. 1 (London: Penguin, 1976), 776–780. For a discussion, see Paul M. Sweezy, "Monopoly Capitalism," In John Eatwell, Murray Milgate, and Peter Newman (Eds.) *Marxian Economics* (The New Palgrave. Palgrave Macmillan, London, 1990), 292–303.
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(2020) (recommending “structural separations and prohibitions of certain dominant platforms from operating in adjacent lines of business.”).

28. Aurelien Portuese, “’Please Help Yourself:’ Toward a Taxonomy of Self-Preferencing” (ITIF, October 2021), https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing (The AICOA bill “would allow traditional suppliers to enjoy more profitable businesses at consumers’ expense by removing the competitive constraints and pressure to innovate that online platforms exert.”).
29. Aurelien Portuese, “Is Congress Committed to Making American Consumers’ Lives Costlier?” *WLF Legal Pulse*, January 12, 2022, https://www.wlf.org/wp-content/uploads/2022/01/011122Portuese_LP.pdf; Aurelien Portuese, “How Congress Got It Wrong On Tech Industry Competition,” *InsideSources,* February 16, 2022, https://insidesources.com/how-congress-got-it-wrong-on-tech-industry-competition/ (“These bills not only impose stringent obligations on companies that are likely to translate into costs for consumers, but they also err in three fundamental respects.”).
30. Section 3(a) of the AOICA bill states: “It shall be unlawful for a person operating a covered platform in or affecting commerce to engage in conduct, as demonstrated by a preponderance of the evidence, that would (1) preference the products, services, or lines of business of the covered platform operator over those of another business user on the covered platform in a manner that would materially harm competition.”; Section 3(d) of the OAMA bill states: “A covered company that controls the operating system or operating system configuration on which its app store operates shall allow and provide readily accessible means for users of that operating system to … (2) install third-party apps or app stores through means other than its app store.”
31. Aurelien Portuese, “’Please Help Yourself:’ Toward a Taxonomy of Self-Preferencing” (“Self-preferencing is a common business practice that often illustrates product diversification and innovations and constitutes an additional source of competitive constraint in distribution channels.”); Bruce Hoffman and Garrett D, Shinn, “Self-Preferencing and Antitrust: Harmful Solutions for an Improbable Problem,” *CPI Antirust Chronicle*, June 2021, https://www.competitionpolicyinternational.com/self-preferencing-and-antitrust-harmful-solutions-for-an-improbable-problem/ (concluding that “there is good reason to expect self-preferencing by vertically integrated platforms is more likely to benefit competition than to harm it.”).
32. Aurelien Portuese, “The Antitrust Prohibition of Favoritism, or the Imposition of Corporate Selflessness,” *Truth On The Market*, December 16, 2020, https://truthonthemarket.com/2020/12/16/the-antitrust-prohibition-of-favoritism-or-the-imposition-of-corporate-selflessness/ (“Absent a corporate self-interest, self-sacrifice may generate value destruction for the sake of some unjustified and ungrounded claims. The emerging prohibition of self-preferencing, similar to the established ban on the default setting on one’s own products into other proprietary products, materializes the corporate self’s losing.”); Pedro Caro de Sousa, “What Shall We Do About Self-Preferencing?” *CPI Chronicle*, June 2020 (“Given its potential for pro-competitive effects, it is challenging to identify the exact circumstances in which self-preferencing is anticompetitive.”).
33. Herbert Hovenkamp, “Selling Antitrust,” *Hastings Law Journal* (2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4026206.
34. These scenarios refer to Apple or Google selling smartphones with no apps.
35. Ignoring the gales of creative destruction means ignoring the very process whereby a capitalist society generates competition and innovation. See Joseph Schumpeter, *Capitalism Socialism and Democracy. 3rd Edition*, 1950 (New York: Harper Perennial 2008) (who coined the expression and considered that “this process of Creative Destruction is the essential fact about capitalism. It is what capitalism consists in and what every capitalist concern has got to live in.”).
36. For a discussion of the threats of sideloading, see Aurelien Portuese, “Open Letter to the Senate Judiciary Committee Regarding the ‘Open App Markets Act’ (S.2710)” (ITIF January 24, 2022),

https://itif.org/publications/2022/01/24/open-letter-senate-judiciary-committee-regarding-open-app-markets-act ("The app economy has created millions of jobs, led to unprecedented app entrepreneurship, and provided consumers with innovative services and products."); Daniel Castro, "Banning 'Closed' Mobile Ecosystems Would Hurt Consumer Choice and Competition" (ITIF January 23, 2022), https://itif.org/publications/2022/01/23/banning-closed-mobile-ecosystems-would-hurt-consumer-choice-and (Sideloading "would require Apple to allow users to install apps from app stores other than its own, a change its critics say would foster competition and consumer choice—but in reality, would do the exact opposite by forcing Apple to abandon its closed mobile ecosystem, thereby eliminating an important alternative to open mobile ecosystems.").

37. European Commission, "Antitrust: Commission opens investigations into Apple's App Store rules," press release, June 16, 2020, IP/20/1073 (Margrethe Vestager claiming that "Apple sets the rules for the distribution of apps to users of iPhones and iPads. It appears that Apple obtained a 'gatekeeper' role when it comes to the distribution of apps and content to users of Apple's popular devices."); See also European Commission, "Statement of Executive Vice-President Margrethe Vestager on the Statement of Objectives sent to Apple on App Store rules for music streaming providers," speech, April 30, 2021 ("On that market, Apple has a monopoly. The company not only controls the only access to apps on Apple devices. It also offers a music streaming service, Apple Music that competes with other apps available in the Apple App Store, such as Spotify or Deezer."); On app stores' contribution to innovation, see Rani Molla, "How Apple's iPhone changed the world: 10 years in 10 charts," *Vox Recode*, June 26, 2017, https://www.vox.com/2017/6/26/15821652/iphone-apple-10-year-anniversary-launch-mobile-stats-smart-phone-steve-jobs; Gary Shapiro, "App stores drive the innovation economy," *Protocol*, May 10, 2021, https://www.protocol.com/app-stores-innovation-opinion ("Today, more than 20 mobile app stores are on the market, facilitating a $1.7 trillion ecosystem led almost entirely by U.S. companies. This is no accident.").

38. Julie Carlson, "Open Letter to Speaker Pelosi and Minority Leader McCarthy Regarding National Security Concerns With Antitrust Bills," February 1, 2022 ("The antitrust bills currently under consideration do not improve national security. Hobbling U.S. superstar firms only makes Chinese firms more attractive to American consumers and limits these companies' ability to make security-enhancing investments. Congress would do well to heed the advice of our national security experts and not sacrifice our economic and national security with misguided antitrust bills.").

39. Daniel Castro, "Banning 'Closed' Mobile Ecosystems Would Hurt Consumer Choice and Competition."

40. George A. Akerlof, "The Market for 'Lemons': Quality Uncertainty and the Market Mechanism," 84(3) *The Quarterly Journal of Economics* (1970), 488–500 (where the author seminally discussed that inability to single out bad cars ('lemons') inevitably lead to the destruction of the market for second-hand cars.).

41. Dar'Shun Kendrick, "Anti-trust bill will hurt small businesses, disrupt commerce," *Gwinnet Daily Post*, March 16, 2022, https://www.gwinnettdailypost.com/opinion/columnists/opinion-anti-trust-bill-will-hurt-small-businesses-disrupt-commerce/article_7b2e5fa4-a3cf-11ec-9351-c3c82e4e2d55.html; Chuck Brooks, "New Antitrust Legislation Could Open the Door to Cybersecurity Problems," *Barrons*, February 1, 2022, https://www.barrons.com/articles/new-antitrust-legislation-could-open-the-door-to-cybersecurity-problems-51643664301; Adam Thierer, "Open-ended antitrust is an innovation killer," *The Hill*, February 25, 2017, https://thehill.com/opinion/technology/540391-open-ended-antitrust-is-an-innovation-killer.

42. Section 3(b)(1) of the AOICA bill.

43. Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust" (ITIF, May 2021), https://itif.org/publications/2021/05/24/digital-markets-act-european-precautionary-antitrust; Aurelien Portuese, "The Digital Markets Act: Precaution over Innovation," *Epicenter*, June 1, 2021, http://www.epicenternetwork.eu/wp-content/uploads/2021/06/Digital-Markets-Act-precaution-over-innovation-final.pdf; Aurelien Portuese, "European Competition Enforcement and the Digital

Economy," *The Global Antitrust Institute Report*, (2020), 597–651; Aurelien Portuese, "The DMA and the EU's French Presidency: The Road to Precaution and Tensions," Competition Forum, December 20, 2021, https://www2.itif.org/2021-dma-eu-french-presidency.pdf; Aurelien Portuese, "Precautionary Antitrust: A Precautionary Tale in European Competition Policy," in Klaus Mathis and Avishalom Tor (Eds.) *Law and Economics of Regulation*, (Heidelberg: Springer, 2021), 203–231.

44. Aurelien Portuese, "The Digital Markets Act: European Precautionary Antitrust."
45. See Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, "Investigation of Competition in Digital Markets," Majority Staff Report and Recommendations, (2020).
46. Erin Fuchs, "Why Microsoft avoided antitrust scrutiny that plagued other tech giants in 2021," *Yahoo! News*, December 6, 2021, https://news.yahoo.com/why-microsoft-avoided-antitrust-scrutiny-in-2021-143014584.html; Sara Morrison, "Microsoft avoided the latest round of Big Tech antitrust scrutiny. Then it bought a company for $69 billion," *Vox Recode*, January 27, 2022, https://www.vox.com/recode/22893117/microsoft-activision-antitrust-big-tech; Clare Duffy, "Microsoft's blockbuster Activision Blizzard deal could raise uncomfortable challenges for US antitrust enforcers," *CNN*, February 18, 2022, https://www.cnn.com/2022/02/18/tech/microsoft-activision-blizzard-ftc-antitrust/index.html.
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