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## Challenges to the Conventional Wisdom About Mergers and Consumer Welfare in a Converging Internet Marketplace

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## Articles

### CHALLENGES TO THE CONVENTIONAL WISDOM ABOUT MERGERS AND CONSUMER WELFARE IN A CONVERGING INTERNET MARKETPLACE

ROB FRIEDEN\*

#### ABSTRACT

This Article identifies substantial flaws in how U.S. government agencies and courts assess the impact of proposed mergers by firms using broadband networks to reach consumers. Applying current market definitions, consumer impact assessments, and economic doctrine, antitrust enforcement agencies may fail to identify the risk of harm to consumers and competition, a so-called false negative.

In recent years, the Department of Justice, Federal Communications Commission, and Federal Trade Commission, individually and collectively, have assessed the competitive consequences of numerous multibillion-dollar acquisitions and have conditionally approved almost all of them. These agencies appear predisposed to favor deals that involve vertical integration between market segments, based on an assumption that short-term consumer welfare gains would exceed any potential harms.

The Article concludes that reviewing government agencies appear too willing to extend current assumptions about how “bricks and mortar” markets work to transactions occurring via broadband networks. By “fighting the last war,” these agencies fail to identify new risks to consumer welfare, particularly by ventures operating in multiple markets that do not readily fit into the conventional assessment of mutually exclusive vertical and horizontal “food chains.” In a broadband ecosystem where both technologies and markets converge, ventures can appear to offer consumers an incredible value proposition. Like economists’ determination that there is no such thing as a free lunch, a better calibrated, multidimensional analysis would identify significant offsetting harms to “free” internet services like that offered by Facebook and Google.

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The Article suggests that the narrow fixation on near-term impact on consumers and the prices they pay insufficiently assesses the potential for harm, particularly for broadband-mediated service requiring no direct cash payment from users. Government antitrust enforcement agencies compound mistakes in market impact assessment by ignoring how internet firms finance services through often obscured collection, analysis, and sale of consumer data. In light of increasing concentration in the broadband markets, through mergers and the impact of converging technologies, surviving ventures can adversely impact both core and now more closely integrated adjacent markets.

The Article examines how and why the FTC approved the acquisition of DoubleClick by Google in 2007, having concluded insignificant competitive harm would occur even as Google quickly grew to dominate nearly all sectors of the internet advertising marketplace. The Article also evaluates whether, in conditionally approving Comcast's acquisition of NBC Universal, Inc., the FCC failed to safeguard consumers. Additionally, the Article considers whether AT&T, as anticipated by reviewing courts, flowed through to consumers any of the anticipated efficiency gains and cost savings generated by its acquisition of Time Warner.

The Article concludes that recent and future internet acquisitions have a much greater likelihood of generating legitimate concerns about competitive and consumer harms, particularly as markets become ever more concentrated and often dominated by a single firm. The Article does not recommend a repudiation of Chicago School antitrust doctrine, but recommends that reviewing agencies and courts calibrate empirical measures of prospective costs and benefits to consumers from a proposed merger by identifying short-term and longer-term impacts on core and adjacent markets.

CONTENTS

INTRODUCTION .....	482
I. CONVERGING INTERNET MARKETS AND TECHNOLOGIES .....	490
II. INTERNET MARKETS DO NOT ALWAYS FIT WITHIN CONVENTIONAL ANTITRUST ASSESSMENT MODELS .....	494
III. ANTITRUST MERGER REVIEW EMPHASIS ON SHORT-TERM CONSUMER WELFARE CAN FAIL TO IDENTIFY COUNTERVAILING HARMS .....	508
IV. CONSUMER WELFARE ASSESSMENT REQUIRES EMPIRICISM AND QUANTIFICATION .....	510
A. <i>Caution in Concluding Market Exclusivity and Noncompeting Merger Candidates</i> .....	511
B. <i>The Need for Post-Merger and Acquisition Monitoring and Mid-Course Corrections</i> .....	516
C. <i>More Sophisticated, Nuanced, Granular, and Empirical Calculation of Consumer Benefits and Costs</i> .....	518
CONCLUSION .....	519

## INTRODUCTION

THE internet marketplace increasingly triggers complaints about the efficacy of antitrust law enforcement that seems powerless or disinterested in constraining dominant Big Tech firms.<sup>1</sup> Converging technologies and markets favor firms able to acquire potential competitors<sup>2</sup> while simultaneously accruing unmatched advantages in scale,<sup>3</sup> scope,<sup>4</sup> and network externalities.<sup>5</sup> The internet ecosystem appears to favor “winner-take-all”<sup>6</sup> sweepstakes enhanced by limited government oversight, based on the assumption that consumers benefit when they can access attractive services without having to make direct cash payments.<sup>7</sup>

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1. See, e.g., TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (Columbia Glob. Reports, 2018); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Maurice Stucke, *Should We Be Concerned About Data-Opiates?*, 2 GEO. L. TECH. REV. 278 (2019).

2. See e.g., Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 70–71 (2018) (detailing harm to competition when large firms acquire small, innovative companies).

3. Scale economies refers to the ability of a single firm to produce a good or service at the lowest per unit cost. See Henry H. Perritt Jr., *Keeping the Internet Invisible: Television Takes Over*, 21 J. TECH. L. & POL'Y 121, 127 (2017).

4. Mirit Eyal-Cohen, *Innovation Agents*, 76 WASH. & LEE L. REV. 163, 205–06 (2019) (explaining how an enterprise can reduce its overall cost-per-unit when it produces two or more interrelated products, compared to firms producing each product separately and in similar quantities).

5. Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 300 (using the telephone system to demonstrate that the value of a network increases as a function of the number of subscribers rises); see also John M. Newman, *Anticompetitive Product Design in the New Economy*, 39 FLA. ST. U. L. REV. 681, 688–89 (2012).

6. Khan, *supra* note 1, at 785 (explaining the winner-take-all characteristic of many online platform ventures); see also Jonathan M. Barnett, *The Host's Dilemma: Strategic Forfeiture in Platform Markets for Informational Goods Contents*, 124 HARV. L. REV. 1861, 1876 (2011) (showing how single platform ventures can generate transaction cost savings for subscribers); Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401, 413 (2014) (showing how Google captured dominant market share in online advertising).

7. Natascha Just, *Governing Online Platforms: Competition Policy in Times of Platformization*, 42 TELECOM. POL'Y 386, 387 (2018) (asserting the need for changes in competition policy to consider how zero-priced transactions affect competition and consumers).

Legislators,<sup>8</sup> academics,<sup>9</sup> the court of public opinion,<sup>10</sup> and belatedly, the Department of Justice (DOJ),<sup>11</sup> have begun to question the value proposition<sup>12</sup> offered by largely unregulated internet firms, particularly when these companies seek further market consolidation through mergers and acquisitions. United States federal antitrust enforcement agencies and reviewing courts have not followed suit. By maintaining the status quo and using current market definitions, consumer impact assessments, and economic doctrine, reviewers may approve mergers based on flawed assessments. False negatives fail to identify offsetting and quantifiable costs incurred by consumers as well as less easily quantified harms to competition and consumers through privacy invasion, identity theft, and reduced trust in governments, elections, news media, and capitalism.

In recent years, the DOJ, Federal Communications Commission (FCC), and Federal Trade Commission (FTC), individually and collectively, have assessed the competitive consequences of numerous multibillion-dollar acquisitions and have conditionally approved nearly all of them.<sup>13</sup> These agencies seem predisposed to favor deals that appear to generate short-term consumer benefits. Agencies base the deals' favorability on an evaluative criterion articulated by academics and practitioners embracing the so-called Chicago School model of antitrust market assessment.<sup>14</sup> This model emphasizes the duty of agencies with antitrust

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8. Steve Lohr, Mike Isaac & Nathaniel Popper, *Tech Hearings: Congress Unites to Take Aim at Amazon, Apple, Facebook and Google*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/technology/big-tech-antitrust-hearing.html> [<https://perma.cc/EF97-UGBQ>]; Matt Stevens, *Elizabeth Warren on Breaking up Big Tech*, N.Y. TIMES (June 26, 2019), <https://www.nytimes.com/2019/06/26/us/politics/elizabeth-warren-break-up-amazon-facebook.html> [<https://perma.cc/U9R7-U3LW>] (reporting on Senator Warren's proposal to divest assets from America's largest tech companies).

9. See, e.g., Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 981 (2019) (arguing the need for structural rather than conduct antitrust remedies in digital markets).

10. PEW RESEARCH CENTER, *Public Attitudes Toward Technology Companies* (June 28, 2018), <https://www.pewresearch.org/internet/2018/06/28/public-attitudes-toward-technology-companies/> [<https://perma.cc/95VK-GW8A>].

11. Daisuke Wakabayashi, Katie Benner & Steve Lohr, *Justice Department Opens Antitrust Review of Big Tech Companies*, N.Y. TIMES (July 23, 2019), <https://www.nytimes.com/2019/07/23/technology/justice-department-tech-antitrust.html> [<https://perma.cc/SV4Z-CMH8>] (reporting Justice Department antitrust review of major online technology firms).

12. Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1627–28 (2017) (explaining how online ride sharing businesses exploit asymmetric information about consumers).

13. See, e.g., *Current and Recent Major Transactions*, FED. COMM'NS COMM'N <https://www.fcc.gov/transactions/recent-transactions> [<https://perma.cc/CDQ9-ASZZ>] (last updated Dec. 4, 2015).

14. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (suggesting that antitrust policy emphasize allocative efficiency in markets); see also Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 215 (1985) (summarizing orthodox Chicago School antitrust policy as seeking to maximize economic efficiency); Herbert Hovenkamp & Fiona M. Scott

enforcement responsibilities to assess consumer and competitive merits of mergers by prioritizing an assessment of whether the transaction results in lower prices to consumers and greater efficiency. Additionally, current antitrust market assessment makes no distinction between conventional transactions involving “bricks and mortar” ventures having a combination of tangible and intangible assets and firms whose value accrues mostly from intangible assets. Firms relying on broadband networks for the delivery of services do not always operate in discrete, mutually exclusive market segments that can be mapped on a vertical or horizontal plane.<sup>15</sup>

Internet market acquisitions can have substantial near-term and longer-term impacts that antitrust enforcement agencies may ignore or fail to identify.<sup>16</sup> Additionally, these agencies may overestimate the benefits from consumer access to “free” services,<sup>17</sup> conditioned on ambiguous, but valuable, collection,<sup>18</sup> processing, analysis, and marketing of data about consumers’ behavior.<sup>19</sup>

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Morton, *Framing the Chicago School of Antitrust Analysis* (Inst. for Law and Econ., Research Paper No. 19-44, 2019), <https://ssrn.com/abstract=3481388> [permalink unavailable].

15. See U.S. DEP’T OF JUSTICE & THE FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (2010), <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf> [<https://perma.cc/4KW9-NCFG>]; U.S. DEP’T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES (1997), <https://www.justice.gov/sites/default/files/atr/legacy/2006/05/18/2614.pdf> [<https://perma.cc/H9J2-HUGL>].

16. Charles A. Miller, Note, *Big Data and the Non-Horizontal Merger Guidelines*, 107 CALIF. L. REV. 309, 311–12 (2019) (suggesting that a merger between Facebook and Comcast would presumptively pass muster with the Justice Department, because under current merger guidelines, these firms would appear not to compete directly in any market for goods or services).

17. See Michal Gal & Daniel Rubinfeld, *The Hidden Costs of Free Goods: Implications for Antitrust Enforcement*, 80 ANTITRUST L.J. 521 (2016) (noting that free goods may promote competition, but in other instances raise complex questions about overall welfare gains or losses to consumers); see also Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet’s Most Popular Price*, 61 UCLA L. REV. 606 (2014); John Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015) (asserting that heavy methodological dependence on consumer prices has led antitrust courts and enforcement agencies to overlook massive welfare harms to consumers).

18. See Angelo Ilumba, *Fact: A Truly Unlimited Data Plan Doesn’t Exist*, WHISTLE OUT (July 13, 2018), <https://www.whistleout.com/CellPhones/Guides/Fact-A-Truly-Unlimited-Data-Plan-Doesnt-Exist> [permalink unavailable] (explaining that few subscribers of “free” internet services realize that, in addition to allowing collection of valuable consumer behavior data, they also agree to allow data collectors to use their wired or wireless broadband data transmission subscription to download monitoring software and to upload the surveillance results).

19. When discussing methods of data collection by internet platforms, Natascha Just writes:

A central characteristic of internet platforms is that they generate, collect, process and aggregate big data through sophisticated algorithmic methods in order to extract economic value from it . . . . This concerns both the data and contents of competitors as well as the unprecedentedly available data on individuals’ personal information, behavior, communication, and transactions.

Vertical mergers involve integration of two ventures up or down a “food chain” of market segments.<sup>20</sup> Because antitrust enforcement agencies assume these parties operate in different markets and have not engaged in direct competition, merger approval typically occurs.<sup>21</sup> Horizontal mergers trigger closer scrutiny because the proposed transaction involves two firms whose combination concentrates a single market and reduces the number of standalone competitors.<sup>22</sup> In both evaluative planes, reviewing agencies and courts emphasize the downstream impact on consumers with less concern for upstream impacts on competitors and possibly no concern about firms operating in adjacent markets affected by how the acquiring and acquired companies do business.

Additionally, antitrust enforcement agencies appear unable or unwilling to consider instances where a merger or acquisition has multidimensional impacts<sup>23</sup> with simultaneous impacts on vertical, horizontal, core, and adjacent markets.<sup>24</sup> For example, consider the speedy and multifaceted market diversification of Amazon. The company started off as a

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Just, *supra* note 7, at 391; see also Sofia Grafanki, *Autonomy Challenges in the Age of Big Data*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 803 (2017); Max N. Helveston, *Consumer Protection in the Age of Big Data*, 93 WASH. U. L. REV. 859 (2016); Miller, *supra* note 16; Newman, *supra* note 6; Sheri B. Pan, *Get to Know Me: Protecting Privacy and Autonomy Under Big Data's Penetrating Gaze*, 30 HARV. J.L. & TECH. 239 (2016); Daniel L. Rubinfeld & Michal S. Gal, *Access Barriers to Big Data*, 59 ARIZ. L. REV. 339 (2017); D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Dig Data*, 23 GEO. MASON L. REV. 1129 (2016).

20. See *Vertical Mergers, Competitive Effects*, FED. TRADE COMM'N <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects> [<https://perma.cc/YN25-WA3W>] (last visited May 20, 2020).

21. Brent Skorup & Adam Thierer, *Uncreative Destruction: The Misguided War on Vertical Integration in the Information Economy*, 65 FED. COMM. L.J. 157, 173 (2013) (explaining that under current DOJ merger guidelines, non-horizontal mergers involve firms that do not operate in the same market, and therefore, their combination would result in no immediate change in the level of market concentration).

22. The FTC defines a horizontal merger as follows:

A horizontal merger eliminates a competitor, and may change the competitive environment so that the remaining firms could or could more easily coordinate on price, output, capacity, or other dimension of competition. As a starting point, the agencies look to market concentration as a measure of the number of competitors and their relative size. Mergers occurring in industries with high shares in at least one market usually require additional analysis.

*Horizontal Mergers, Competitive Effects*, FED. TRADE COMM'N <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects> [<https://perma.cc/YN25-WA3W>] (last visited May 20, 2020).

23. Perritt Jr., *supra* note 3, at 159 (proposing to divide the video content marketplace into six discrete segments: the market for programmer acquisition of content; programmer access to distribution; viewer access to distribution; advertiser access to programming; advertiser access to distributors; and advertiser access to viewers).

24. Kristine Laudadio Devine, *Preserving Competition in Multi-Sided Innovative Markets: How Do You Solve a Problem Like Google?*, 10 N.C. J.L. & TECH. 59, 59 (2008) (asserting that current antitrust analysis “does not adequately account for the impact of multi-sided network effects . . . or on competition”).



retail vendor of books but vertically and horizontally integrated by creating, packaging, selling, and storing all sorts of content. Now, Amazon is fully integrated up and down in vertical and side-by-side horizontal markets. It also operates as both a competitor of other internet ventures and a vendor of services these competitors need and willingly rely on Amazon to deliver, e.g., internet cloud<sup>25</sup> storage and transmission of content to consumers.

Ride sharing services, such as Uber and Lyft, offer insights about the direct, secondary, and tertiary impacts of internet-mediated services. Direct benefits accrue for transportation consumers in terms of price, availability, and innovation, but offsetting direct costs also can result. Data mining provides ride sharing companies “real time” access to current market conditions in terms of availability of drivers and their proximity to customers requesting service. Access to current supply and demand, coupled with the ability to change offered prices, generates mixed outcomes for consumers. Freed of the obligation to pay a fixed, tariffed rate filed with a taxicab authority, consumers in low demand, high capacity conditions can accrue transportation savings. However, constant and up-to-the-minute surveillance of supply and demand also can result in “surge pricing” with rates quoted far in excess of the fixed taxicab rate. While economists might champion better calibrated pricing, based on real time measurements of supply and demand elasticities, surge price paying consumers might be far less enthused.

Price, consumer welfare, and competitive impacts extend beyond the direct impact on individual transportation consumers. Secondary impacts include the effect of ride sharing platforms on the overall cost of local, for-hire transportation. Positive impacts may include an increase in the total number of available vehicles and a lower average price paid per unit of distance and time, even factoring in surge pricing, but negative, secondary impacts also can occur. For example, the rise in new full- and part-time rideshare drivers for hire may reduce the value of taxicab medallions that some cities auction off. Reduction in auction proceeds might create incentives for taxicab authorities to increase the number of available medallions, thus, further reducing their value and triggering market exit by preexisting drivers. These drivers might have to then declare bankruptcy in light of their inability to pay back loans secured to pay for the far more expensive medallion. Ironically, government efforts to stimulate market entry could trigger the opposite outcome.

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25. The internet cloud refers to the vast array of interconnected networks that make up the internet and provide users with seamless connectivity to these networks and the content available via these networks. See William Jeremy Robinson, Note, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1199 (2010) (explaining how “cloud computing” represents the ability to run applications and store data on a service provider’s computers over the internet, rather than on a person’s desktop computer).

Tertiary impacts affect a possible large segment of the local population, irrespective of whether they use ride sharing services. Positive impacts include the possibility of migration from public transportation to ride sharing services, particularly during off-peak hours when prices are at their lowest. Additionally, some operators of privately owned vehicles will migrate to ride sharing, possibly reducing congestion and pollution. Negative impacts include the likelihood of increased road congestion, even taking into consideration the possible reduction in privately operated vehicles. If the total number of vehicles on the road increases, then higher congestion and pollution affect users of ride sharing services, public transportation riders, and drivers of privately operated vehicles. Everyone suffers when a shared resource, e.g., public roads, becomes congested with a surfeit of vehicles.<sup>26</sup>

The internet's ascendancy and that of ventures using broadband networks to deliver services have substantially impacted both incumbent and new markets. However, antitrust enforcement agencies do not appear inclined to acknowledge the need to adjust their evaluative process for assessing the impact on consumers and competition. Merger reviewers appear to have forgotten old lessons about antitrust and markets while also ignoring new lessons generated by transactions in the internet marketplace.

A false negative, showing no harm to consumer welfare, can occur if merger review ignores the long-standing economic rule that "there is no such thing as a free lunch"<sup>27</sup> in the commercial marketplace. While many broadband-mediated services, such as social networks like Facebook and Twitter, do not require monthly cash payments, subscribers must allow these firms to acquire, collate, process, analyze, and sell data about their wants, needs, desires, interests, purchases, viewpoints, and location. Social network subscribers may consider "data mining"<sup>28</sup> a fair trade-off. It forecloses the need to make direct, financial payments while facilitating participation in an enjoyable and apparently welfare-enhancing series of free transactions. Social network subscribers may underestimate the nature, scope, and value of their personal data,<sup>29</sup> particularly in light of the hid-

26. A "tragedy of the commons" occurs when "a resource that is designated for common usage is prone to despoliation as individual users increase their consumption of the resource without taking care to ensure that they do not overuse the resource." Philip J. Weiser & Dale N. Hatfield, *Policing the Spectrum Commons*, 74 *FORDHAM L. REV.* 663, 674 (2005).

27. John M. Newman, *The Myth of Free*, 86 *GEO. WASH. L. REV.* 513, 515 (2018) (reporting on the origin of the adage "there ain't no such thing as a free lunch").

28. Liane Colonna, *A Taxonomy and Classification of Data Mining*, 16 *SMU SCI. & TECH. L. REV.* 309, 310 (2013) (defining data mining as database analysis that attempts to discover useful patterns or relationships).

29. Steve Lohr, *Calls Mount to Ease Big Tech's Grip on Your Data*, *N.Y. TIMES* (July 25, 2019), <https://www.nytimes.com/2019/07/25/business/calls-mount-to-ease-big-techs-grip-on-your-data.html> [<https://perma.cc/A3B6-PZ6G>] (explaining how data mining works).

den financial transactions taking place between social networks and advertisers that participate in auctions for the opportunity to place better targeted commercial pitches on websites.<sup>30</sup>

Antitrust enforcement agencies should offset their identification of consumer benefits with also triggered countervailing costs. The balancing of benefits and costs does not currently occur, particularly when it is easier to limit market assessment to downstream impacts on consumers that can be readily identified and quantified.<sup>31</sup> Assessing harms to consumers and competitors requires more nuance, speculation, and projections, particularly for upstream impacts between vendors of free services and the advertisers, data brokers, and data analytics firms that pay for access to subscribers of broadband-delivered services. Additionally, it may not be feasible to identify and quantify both near-term and longer term harms generated by these upstream commercial transactions. For example, few dispute that foreign governments had an impact on the United States 2016 presidential election,<sup>32</sup> but no consensus exists as to the directly attributable effects on the vote tally and trust in governments, news media, and other institutions.

Antitrust enforcement agency officials may dismiss as unproven and counterintuitive allegations that internet firms harm consumers and competitors, particularly when consumers readily subscribe to “free” and quite popular services. However, a more sophisticated and granular analysis can identify offsetting costs,<sup>33</sup> such as privacy invasion, identity theft, reduction or elimination of consumer surplus,<sup>34</sup> increased risks, loss of trust in

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30. Nicole E. Pottinger, Note, *Don't Forget to Subscribe: Regulation of Online Advertising Evaluated Through Youtube's Monetization Problem*, 107 Ky. L.J. 515, 522 (2018) (explaining how data mining makes it possible for advertisers to tailor a specific advertisement to a specific person at the correct time and in the right format using the information the advertiser has gathered about the individual).

31. Erik Brynjolfsson, Avinash Collis & Felix Eggers, *Using Massive Online Choice Experiments to Measure Changes in Well-Being*, PROC. NAT'L ACAD. SCI. (Feb. 24, 2019), <https://doi.org/10.1073/pnas.1815663116> [<https://perma.cc/PX9W-98S5>] (estimating that the median Facebook user required compensation of around \$48 to give it up for a month).

32. See Mark Mazzetti & Katie Benner, *12 Russian Agents Indicted in Mueller Investigation*, N.Y. TIMES (July 13, 2018), <https://www.nytimes.com/2018/07/13/us/politics/mueller-indictment-russian-intelligence-hacking.html> [<https://perma.cc/5FN7-GZYV>]; Matt Apuzzo & Sharon LaFraniere, *13 Russians Indicted as Mueller Reveals Effort to Aid Trump Campaign*, N.Y. TIMES (Feb. 16, 2018), <https://www.nytimes.com/2018/02/16/us/politics/russians-indicted-mueller-election-interference.html> [<https://perma.cc/6UT5-3Z4W>].

33. See, e.g., Robert Shapiro & Siddhartha Aneja, *Who Owns Americans' Personal Information and What Is It Worth?*, FUTURE MAJORITY (Mar. 8, 2019), <https://asets.futuremajority.org/uploads/report-for-future-majority-on-the-value-of-peoples-personal-data-shapiro-aneja-march-8-2019.pdf> [<https://perma.cc/P8AZ-ECBD>] (quantifying the value of Americans' personal information gathered and used by major internet platforms, data brokers, credit card, and healthcare data companies).

34. For example, data mining can provide better insights on a prospective customer's intensity of demand for a particular good or service and tolerance for

government, elections, the news media, and capitalism, and the reduction or elimination of competition.

Reviewing government agencies appear to overemphasize past and current marketplace conditions rather than assess future impacts on consumers and competition. By “fighting the last war,” these agencies fail to identify new risks to consumer welfare, particularly by ventures operating in multiple markets that do not readily fit into the conventional assessment of mutually exclusive vertical and horizontal planes. In an ecosystem where both technologies and markets converge, ventures can appear to offer consumers an incredible value proposition akin to a “free lunch.” A better calibrated, multidimensional analysis would identify significant benefits, but also significant, offsetting harms.

The narrow fixation on near-term impact on consumers’ out-of-pocket costs, as well as the tendency to treat complex deals solely as either vertical or horizontal arrangements, increasingly fail to identify longer term harms to both competition and consumers. With the internet marketplace becoming increasingly concentrated through mergers and the impact of converging technologies, surviving ventures have the potential to impact both core and now more closely integrated adjacent markets.

This Article examines how and why the FTC approved the acquisition of DoubleClick by Google in 2007<sup>35</sup> based on a determination of insignificant competitive harm, even though the internet advertising market quickly became concentrated and dominated by Google. The Article also evaluates whether the FCC successfully imposed or secured voluntary conditions that accrued measurable benefits to consumers, such as lower prices reflecting Comcast’s reduced programming costs when it acquired

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price increases. Better calibration of so-called demand and price elasticity makes it possible for vendors to adjust prices with an eye toward maximizing profits. This occurs when a ride sharing vendor, such as Uber, substantially raises prices to reflect immediate changes in the current supply of drivers and demand for service. “More generally, discriminatory pricing can ‘introduce distortion into the overall market’ by ‘disadvantaging certain classes’ of complementors and decreasing the profits available to them by diverting more consumer surplus to the dominant platform.” Khan, *supra* note 9, at 1096 (quoting BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 277 (2010)); *see also* Keyawna Griffith, Note, *The Uber Loophole That Protects Surge Pricing*, 26 VA. J. SOC. POL’Y & L. 34, 43–44 (2019) (explaining how the Robinson–Patman Price Discrimination Act does not apply to ride sharing transactions); Gerhard Wagner & Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions*, 86 U. CHI. L. REV. 581 (2019) (posing questions about how lawmakers can create legal objectives and requirements for transactions that can be modified by software).

35. FED. TRADE COMM’N, STATEMENT OF FEDERAL TRADE COMMISSION CONCERNING GOOGLE/DOUBLECLICK, (Dec. 20, 2007), [https://www.ftc.gov/system/files/documents/public\\_statements/418081/071220googledc-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf) [<https://perma.cc/ZR5B-K9HJ>] [hereinafter FTC APPROVAL OF DOUBLECLICK ACQUISITION].

NBC Universal, Inc.<sup>36</sup> Additionally, the Article considers whether having also eliminated video program access costs, AT&T passed along any cost savings to its customers when the company acquired Time Warner.<sup>37</sup>

Recent and future internet acquisitions have a much greater likelihood for generating legitimate concerns about competitive and consumer harms, particularly as markets become concentrated or dominated by a single firm. It appears that a strict and unrevised application of Chicago School emphasis on consumer welfare<sup>38</sup> can fail to identify real, possibly near-term adverse effects on consumers and competition:

[T]he Chicago School's backward-looking approach is flawed in its logic and ignores legislative history. More importantly, focusing on consumer welfare to the exclusion of everything else, and using market efficiency to do so, disregards the new and unique challenges presented by the twenty-first-century market. The world has changed dramatically with the internet, and the current framework of antitrust law is not equipped to deal with the change.<sup>39</sup>

Antitrust enforcement agencies and courts should use better calibrated measures of prospective consumer costs and benefits of a proposed merger and make both short-term and longer-term predictions of how combined firms will impact both core and related markets.

#### I. CONVERGING INTERNET MARKETS AND TECHNOLOGIES

Convergence in internet markets favors concentration by ventures able to exploit favorable economies of scale and scope by offering a variety of attractive services to consumers who typically use a limited number—

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36. Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, 26 F.C.C. Rcd. 4238 (2011), *order clarified*, 27 F.C.C. Rcd. 15,053 (2012).

37. United States v. AT&T, Inc., 310 F. Supp. 3d 161, 254 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

38. Critical assessors of the consumer welfare model offer thoughtful, worthwhile analysis. See, e.g., ROBERT PITOFKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 1 (Pitofsky ed., 2008); Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583 (2018); Herbert Hovenkamp, *Progressive Antitrust*, 2018 U. ILL. L. REV. 71 (2018); Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, ANTITRUST CHRON., Apr. 2018, at 12 [https://www.competitionpolicyinternational.com/wp-content/uploads/2018/08/AC\\_APRIL.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2018/08/AC_APRIL.pdf) [permalink unavailable].

39. Zachariah Foge, *American Oligarchy: How the Enfeebling of Antitrust Law Corrodes the Republic*, 12 J. BUS. ENTREPRENEURSHIP & L. 119, 130 (2019) (rejecting Chicago School antitrust principles as ill-suited for twenty-first century markets); see also Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U. N.H. L. REV. 179 (2018) (supporting the injection of social, political, moral, and economic values in antitrust enforcement); Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439 (2019) (advocating a resurrection of public and political interest in antitrust enforcement).

often just one—broadband link to the internet cloud. Many internet markets reward single ventures with dominant market shares in a “winner-take-all” contest. So-called unicorn ventures<sup>40</sup> can quickly acquire billion-dollar valuations based on accrual of positive network externalities where company revenues and consumer welfare both increase with growth in the number of subscribers.

Many internet ventures serve as an intermediary between downstream consumers and upstream companies offering products, services, content, and advertising via the internet venture’s platform.<sup>41</sup> This two-sided market<sup>42</sup> makes it possible for platform operators and upstream ventures to enhance their commercial attractiveness by offering downstream consumers access to attractive services without requiring direct cash payments. Platform intermediaries can calibrate payment streams, often opting to secure all direct financial compensation from upstream ventures willing to pay for data collected by the intermediary about consumers’ wants, needs, desires, web searches, location, prior purchases, and communications via social media and other forums.<sup>43</sup>

Consumers have widely embraced this value proposition even as they may not fully appreciate the nature and scope of the nonpecuniary compensation they provide platform operators.<sup>44</sup> Intermediaries appearing to offer free goods and services have triggered little, if any, government scrutiny. Such regulatory forbearance helped incubate the internet based on a

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40. “‘Unicorns’ are private companies with valuations of a billion dollars or more.” Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 583 (2016). “As their name indicates, unicorns were originally so rare as to be almost mythical. But Uber and other technology companies have ushered in a new era: we now have a blessing of unicorns, each one of which has the potential to transform financial and cultural norms.” *Id.*

41. Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 146 (2017) (“[P]latforms both enable and benefit from competitive dynamics of economic exchange that differ in profoundly important ways from those of traditional, one-sided markets”); see also Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87 (2016).

42. Two-sided markets can be defined as follows:  
[T]he volume of transactions between end-users depends on the structure and not only on the overall level of fees charged by the platform. A platform’s usage or variable charges impact the two sides’ willingness to trade once on the platform and, thereby, their net surpluses from potential interactions; the platforms’ membership or fixed charges in turn condition the end-users’ presence on the platform.  
Jean-Charles Rochet & Jean Tirole, *Two-Sided Markets: A Progress Report*, 37 RAND. J. ECON. 645, 646 (2006).

43. See Rob Frieden, *Two-Sided Internet Markets and the Need to Assess Both Upstream and Downstream Impacts*, 68 AM. U. L. REV. 713 (2019) [hereinafter Frieden, *Two-Sided Internet Markets*]; Rob Frieden, *The Internet of Platforms and Two-Sided Markets: Implications for Competition and Consumers*, 63 VILL. L. REV. 269 (2018).

44. See Alexander Tsesis, *Marketplace of Ideas, Privacy, and the Digital Audience*, 94 NOTRE DAME L. REV. 1585, 1601 (2019) (explaining that while subscribers accrue ample benefits from access a wealth of information, they lack knowledge about how to protect personal data).

non-quantified, general sense that consumers have benefitted. Additionally, the “court of public opinion” did not object to the deal struck between platform operators and consumers whose access to “free” content and services is contingent on the legal right of the intermediary to engage in extensive and financially lucrative surveillance,<sup>45</sup> data collection, and sale of both consumer data and advertising.<sup>46</sup>

Consumers, industry observers, and some government officials have begun to reconsider their initial conclusion that the internet market structure always has a beneficial or benign impact on consumers and competition. Throughout the political spectrum, advocates seek regulatory and even structural antitrust remedies for real or perceived harms.<sup>47</sup> Such advocacy has triggered predictable pushback from incumbents and parties content with the status quo and able to use case precedent, economic doctrine, and political ideology to support limited government oversight.<sup>48</sup>

Proponents of the status quo see no reason to abandon adherence to the doctrine of limited government intervention in markets. They oppose government’s intervention absent compelling evidence of direct harm to consumers, such as increased prices.<sup>49</sup> The so-called Chicago School of

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45. “Surveillance capitalism operates through unprecedented asymmetries in knowledge and the power that accrues to knowledge. Surveillance capitalists know everything *about us*, whereas their operations are designed to be unknowable *to us*. They accumulate vast domains of new knowledge *from us*, but not *for us*.” SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER* 11 (PublicAffairs 2019).

46. See, e.g., Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93 (2014) (identifying privacy harms to individuals caused by data mining and recommending a framework for redress).

47. Daniel A. Crane, *Antitrust’s Unconventional Politics*, 104 VA. L. REV. ONLINE 118, 118 (2018) (“Antitrust law stands at its most fluid and negotiable moment in a generation.”).

48. “Hipster Antitrust, or the ‘New Brandeis Movement,’ . . . proposes to divorce antitrust law from economic analysis, to abandon the well-established consumer welfare framework that introduced the rule of law to antitrust, and to replace that standard with a vague and pliable socio-political approach.” Elyse Dorsey, Jan M. Rybnicek & Joshua D. Wright, *Hipster Antitrust Meets Public Choice Economics: The Consumer Welfare Standard, Rule of Law, and Rent Seeking*, COMPETITION POL’Y INT’L ANTITRUST CHRON., Apr. 2018, at 21, 22, [https://www.competitionpolicyinternational.com/wp-content/uploads/2018/08/AC\\_APRIL.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2018/08/AC_APRIL.pdf) [permalink unavailable].

Hipster Antitrust claims the consumer welfare standard invites excessive corporate control over antitrust agencies and outcomes. Hipster Antitrust claims it would reduce corporate control over antitrust institutions and their decision-making by relaxing the constraints imposed upon them by the consumer welfare standard and simultaneously granting them greater discretion under a broader, multi-factored public interest test.

*Id.*

49. Joshua Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 364–65 (2019) (repudiating all recent initiatives to replace Chicago School doctrine).

antitrust law and economics serves as the primary intellectual foundation for assessing marketplace conditions. It provides an economically driven template for assessing mergers and acquisitions in terms of their impact on consumer welfare and marketplace efficiency.<sup>50</sup> Robert H. Bork and Ward S. Bowman identified the primary goals of antitrust as maximizing efficiency and consumer welfare by emphasizing whether and how competition affects consumer prices.<sup>51</sup> The model has evolved into a three-tiered analysis:

First, both economists and courts ultimately settled upon the same basic premise that antitrust laws are designed to promote consumer welfare. . . . The principled answer that emerged was competition's ability to lower prices, increase output, enhance quality and innovation—that is, to achieve consumer benefits. . . .

Second, the Chicago School insights led to the conclusion that economic theory, empirical evidence, and the error-cost framework should guide antitrust enforcement decisions. . . .

Third, in assessing liability and establishing applicable standards, courts should consider error costs. . . . In implementing any legal regime, courts face tradeoffs between false positives (Type I errors) and false negatives (Type II errors). In the antitrust context, false positives equate to erroneously condemning procompetitive or competitively neutral conduct. . . . False negatives, meanwhile, incorrectly allow anticompetitive conduct to persist, but are likely to experience some amount of self-correction in the long run.<sup>52</sup>

Using this template, incumbent firms offering free goods and services surely enhance consumer welfare, even as markets become increasingly concentrated. These firms also may harm consumers and marketplace competition. Assuming the Chicago School model seeks to avoid both false negatives and positives, it should follow that adherents to this model would appreciate the need to assess both benefits and costs to consumers, particularly in light of changed circumstances resulting from mergers of internet firms and growing reliance on broadband networks.

This Article does not challenge the appropriateness of the Chicago School antitrust model and its emphasis on consumer welfare assessment. However, it does question the efficacy and accuracy of the model when

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50. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 271 (2017) (characterizing Chicago School merger review as one that considers the transaction as having a benign or possibly favorable consumer impact in light of enhanced economies of scale and scope).

51. Robert Bork, *Contrasts in Antitrust Theory: I*, 65 COLUM. L. REV. 401 (1965); Ward Bowman, *Contrasts in Antitrust Theory: II*, 65 COLUM. L. REV. 417 (1965).

52. Wright et al., *supra* note 49, at 304–06 (footnotes omitted).



applied to markets where platform intermediaries operate in a two-sided market. The Article recommends refinements to the model so that it identifies both benefits and costs to consumers in the internet marketplace. In this major sector of the economy, consumers must consent to surveillance by intermediaries and other firms that collect, mine, collate, analyze, and market data about consumer behavior. Such refined analysis can provide empirical evidence likely to challenge unconditional conclusions that consumers only stand to benefit by participating in internet markets.<sup>53</sup>

Current antitrust and public interest assessments of proposed mergers and acquisitions can generate false negatives concluding that further market concentration would not harm consumers and competition. Inertia, intellectual intransigence, doctrinal purity, and politics appear to create incentives for maintaining the status quo. Rather than consider whether changed circumstances warrant reassessment, some status quo adherents mock initiatives for change as romantic<sup>54</sup> or trendy.<sup>55</sup> While using the key evaluative criterion of consumer welfare, these critics of new refinements may ignore empirical evidence that, if considered, would reduce estimates of net benefits to consumers.

## II. INTERNET MARKETS DO NOT ALWAYS FIT WITHIN CONVENTIONAL ANTITRUST ASSESSMENT MODELS

Antitrust enforcement and regulatory agencies, as well as reviewing courts, typically assess proposed mergers and acquisitions with models emphasizing whether the transaction has direct or indirect market effects. When a deal combines competitors, antitrust modeling characterizes the transaction direction as horizontal, and potentially troublesome, because the acquiring company buys out a competitor and increases its market share. When a proposed merger combines companies operating in different segments of a market food chain, antitrust assessment frames the transaction as vertical in direction, and therefore less worrisome,<sup>56</sup> because the two companies did not compete against each other previously.

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53. See Christopher Savage, *Managing the Ambient Trust Commons: The Economics of Online Consumer Information Privacy*, 22 STAN. TECH. L. REV. 95 (2019) (questioning reliance on market forces to achieve optimal equilibrium between consumer and seller interests).

54. See, e.g., Thibault Schrepel, *Antitrust Without Romance*, 13 N.Y.U. J.L. & LIBERTY 326 (2020).

55. See, e.g., Konstantin Medvedovsky, *Hipster Antitrust—A Brief Fling or Something More*, COMPETITION POL'Y INT'L (Apr. 17, 2018), <https://www.competitionpolicyinternational.com/hipster-antitrust-a-brief-fling-or-something-more/> [https://perma.cc/W8AN-MVVH].

56. See Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962 (2018) (offering reasons why vertical merger enforcement is essential in markets where economies of scale and network effects lead to entry barriers and market power).

Internet markets and proposed mergers do not conveniently fit into mutually exclusive vertical and horizontal market planes for several reasons. First, the prospective merging ventures already may have diversified by buying or developing in-house the ability to serve many market elements in both vertical and horizontal segments. For example, even before acquiring NBC Universal, Inc., Comcast had vertically integrated as a video content creator, syndicator, packager, and retail distributor. The company creates and packages video content as an owner or investor in broadcast cable, television, and regional sports networks. It offers unaffiliated cable and satellite companies the opportunity to deliver this content to their subscribers. Farther downstream on the vertical plane, the company has installed cable television distribution plants providing “last mile,” broadband content access to its retail customers.

While vertically integrating throughout the video marketplace, Comcast also has diversified into adjacent markets offering competitive alternatives to its cable television option. The company provides wireless broadband access to residential and business subscribers who can use this infrastructure to access the same video content available via Comcast’s cable television networks, but also competitive alternatives. Comcast operates in a multidimensional or 360-degree marketplace<sup>57</sup> with an eye toward providing service bundles that combine video content it creates or acquires, broadband access, wired and wireless telephone service, and security services. The company has diversified to shore up revenues that may substantially decline as consumers pursue alternatives. As a fully integrated and diversified company, Comcast has multiple and diverse opportunities to generate revenues via several integrated markets.

When ventures integrate multidimensionally,<sup>58</sup> a proposed merger or acquisition may not fit solely within a single vertical or horizontal direction. Most major internet companies recognize the benefits in economies of scope, including the opportunity to diversify into adjacent markets to offset possible declines in revenue from core services. For example, one of the key reasons for Comcast’s interest in acquiring NBC Universal, Inc. lies in its forecasted need to respond to changing market conditions by

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57. See Elizabeth Sch  r  , *The Trouble with Mergers Is . . .*, 25 UCLA ENT. L. REV. 133, 141 (2018) (explaining the Antitrust Division’s “horizontal relationship concerns” to the “traditional vertical merger” thus, exhibiting Comcast’s multidimensional marketplace concerns).

Though the Comcast-NBCU merger was vertical in essence, it did involve some horizontal concerns since Comcast-NBCU would be competing with online video distributors in the same relevant market (i.e., Netflix and Hulu). If the merger had gone through without scrutiny from the Antitrust Division and the FCC, Comcast would have been able to limit competition by withholding content from online video services or stifle their businesses by leveraging the content for higher prices.

*Id.* at 141–42.

58. See Brian J. Smith, Note, *Vertical vs. Core Search: Defining Google’s Market in a Monopolization Case*, 9 N.Y.U. J.L. & BUS 331 (2012) (discussing complexity in defining the scope of internet search markets).

owning more of the content it distributes and by relying less on cable television revenues that might decline as consumers eliminate (“cord cut”) or reduce (“cord shave”) their monthly cable television bill.<sup>59</sup> Comcast expects to benefit by reducing its content costs, particularly payments to unaffiliated ventures, and also to diversify revenue streams.

Economists use the term double marginalization to identify two profit margins occurring when a firm acquires a good or service and subsequently resells it.<sup>60</sup> One of the assumed benefits in a vertical merger or acquisition lies in the elimination of the markup woven into the price previously paid by the acquiring firm that it no longer has to pay. For example, after acquiring NBC Universal, Inc., Comcast, in its capacity as a cable television operator, no longer had to pay video carriage rights, including a profit margin, for the video content NBC Universal, Inc., created, including NBC’s owned and operated broadcast television and cable networks, such as CNBC and MSNBC.

When a venture such as Comcast diversifies throughout the internet marketplace, it can improve the odds that it will remain profitable regardless of what mix of technologies and services consumers choose to purchase. Ignoring the company’s overall business strategy and concentrating solely on its vertical or horizontal integration efforts ignores how Comcast and other similarly situated firms have devised a sophisticated and multifaceted strategy that responds to changing consumer preferences.

Consider one of the key antitrust concerns in a proposed vertical merger or acquisition: the potential for price discrimination, such as charging competitors higher video content carriage fees with an eye toward rendering them less attractive in the marketplace. With Comcast’s acquisition of NBC Universal, Inc., the potential exists for Comcast, as content creator and distributor, to offer competitors access to “must see” video networks on discriminatory terms and conditions. Conventional antitrust wisdom dismisses the likelihood of such a scenario. This is based on the view that Comcast would lose revenue in light of customer defections

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59. Drew FitzGerald, *Cord-Cutting Hits AT&T Again While Wireless, Media Grow*, WALL ST. J. (July 24, 2019), <https://www.wsj.com/articles/cord-cutting-hits-at-t-again-while-wireless-media-grow-11563965519> [<https://perma.cc/8JWN-752A>] (reporting a loss of nearly one million subscribers in the second quarter of 2019).

60. Courts have defined double marginization as follows:

[D]ouble marginalization refers to the situation in which two different firms in the same industry, but at different levels in the supply chain, each apply their own markups (reflecting their own margins) in pricing their products. . . . Those “stacked” margins are both incorporated in the final price that consumers have to pay for the end product. . . . By vertically integrating two such firms into one, the merged company is able to “shrink that total margin so there’s one instead of two,” leading to lower prices for consumers.

United States v. AT&T, Inc., 310 F. Supp. 3d 161, 197 (D.D.C. 2018) (citations omitted) (quoting Transcript of Trial at 2252: 1–3 (Shapiro), *AT&T, Inc.*, 310 F. Supp. 3d at 197–98 (No. 17-2511 (RJL)), *aff’d*, 916 F.3d 1029 (D.C. Cir. 2019).

triggered by the company's extraordinary price increases for access to its content access or by refusing to carry popular content provided by an unaffiliated programmer. Without providing empirical proof, Chicago School adherents assume that companies invariably suffer financially when they unilaterally act in ways that reduce the value of their offerings or unreasonably raise prices.<sup>61</sup> Applying this assumption, Comcast immediately would lose revenues as a result of subscription cancellations of service and possible migration from video services no longer able to offer "must see" channels to options offering that content or acceptable substitutes. Presumably, Comcast could not likely recoup lost revenues even for short "blackout" periods when it failed to reach agreements with competing multichannel video programming distributors (MVPDs), e.g., cable television companies, such as Cox and Charter, as well as the direct broadcast satellite companies DirecTV (AT&T) and Dish, for access to Comcast-owned programming.

The conventional wisdom does not include scenarios where Comcast could recoup some or all of its lost revenues as disgruntled subscribers abandon the competing MVPD and migrate to one or more services offered by Comcast. In the multidimensional markets served by Comcast, the company can attract current subscribers to an MVPD competitor by offering a video-only service that includes the blacked-out channels, or better yet, a bundle containing video, broadband, and telephone service. Rather than losing money from an attempted price squeeze of an MVPD competitor, Comcast stands to generate higher revenues by attracting some of the MVPD's current customers, angry at the lack of access to a preferred network, and by offering them further financial inducements to change carriers ("churn") with a bundle of video, broadband, and telephone services.

The district court judge presiding over the Justice Department's 2018 antitrust suit against AT&T's \$85 billion acquisition of Time Warner<sup>62</sup> did not deviate from the conventional wisdom about vertical integration having little risk to competition and consumers. Additionally, Judge Richard J. Leon dismissed the potential for the acquisition to generate more "blackouts" that occur when video programmers and distributors cannot agree on new contract renewal terms and conditions.<sup>63</sup>

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61. "Chicago School scholars further believed that firms cannot generally obtain or enhance monopoly power through unilateral action. This is because, in most cases, firms would just preserve or gain market share at the expense of profits." Anu Bradford, Adam S. Chilton & Filippo Maria Lancieri, *The Chicago School's Limited Influence on International Antitrust*, 87 U. CHI. L. REV. 297, 308 (2020). "In addition, antitrust law should not be concerned with attacking companies in monopolistic or oligopolistic industries when their size has been achieved by internal growth, as larger firms are normally more efficient than smaller ones." *Id.*

62. *Id.* at 161.

63. Video programmers and distributors increasingly miscalculate the value of their contribution to the mutually beneficial delivery of content to consumers. Recently, blackouts have occurred more frequently and for longer durations. *See*

Judge Leon concluded that a content programmer or distributor, such as AT&T, would rarely, if ever, financially gain by withholding content, even for a short period of time, in an attempt to extort higher prices from an MVPD competitor for highly desired video content.<sup>64</sup> The decision largely concentrated on assessing whether and how AT&T's vertical integration into content ownership could raise the cost of access by MVPDs to Time Warner content now owned by AT&T. The court largely ignored the potential for AT&T to raise both its broadband and MVPD subscription rates<sup>65</sup> to favor its content through zero rating,<sup>66</sup> to raise consumer costs for accessing video content from an AT&T competitor, and to promote bundled subscriptions combining its video content, telephone, and internet access services.

The decision also failed to consider how changes in the video marketplace might prompt AT&T to consider and execute new blackout strategies. Instead of, or in addition to, withholding video content as leverage

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Brad Adgate, *TV Station Blackouts Are Accelerating; Here's Why*, FORBES (Nov. 12, 2019, 10:38 AM), <https://www.forbes.com/sites/bradadgate/2019/11/12/tv-station-blackouts-are-accelerating-heres-why/#3ac0f3597f6c> [<https://perma.cc/ZQL3-6G2F>]; Tara Lachapelle, *TV Blackouts Will Only Get Worse*, BLOOMBERG OPINION (Nov. 27, 2018), <https://www.bloomberg.com/opinion/articles/2018-11-27/tv-blackouts-like-dish-hbo-will-only-get-worse> [permalink unavailable] (reporting a substantial spike in blackouts).

64. "Given that blackouts are negative events for both programmers and distributors, however, deals between programmers and distributors are invariably struck in order to avoid long-term blackouts." *AT&T Inc.*, 310 F. Supp. 3d at 200.

[G]iven that a post-merger Turner, like a pre-merger Turner, would stand to suffer large losses in affiliate fee and advertising revenues in the event of a blackout—the record is barren of any contentions by the third-party competitors that they would actually give in to any price increases demanded by Turner as a result of its purported increase in post-merger leverage.

*Id.* at 214. Judge Leon agreed with the defendant's assertion that no single or group of programming networks are so essential that their absence would render the venture uncompetitive. "Based on the evidence, I agree with defendants that Turner's content is not *literally* 'must have' in the sense that distributors cannot effectively compete without it. The evidence showed that distributors have successfully operated, and continue to operate, without the Turner networks or similar programming." *Id.* at 202.

65. Scott Moritz & Kameron Leach, *AT&T Hikes Online-TV Prices Up to 30% in Second Boost This Year*, BLOOMBERG (Oct. 18, 2019), <https://www.bloomberg.com/news/articles/2019-10-18/at-t-hikes-online-tv-prices-up-to-30-in-second-boost-this-year> [permalink unavailable] (reporting rate increases in excess of 30%).

66. "'Zero rating' provides subscribers with cost-saving opportunities where an ISP offers not to debit a subscriber's monthly data allotment when she downloads content originating from specific sources." Rob Frieden, *Freedom to Discriminate: Assessing the Lawfulness and Utility of Biased Broadband Networks*, 20 VAND. J. ENT. & TECH. L. 655, 662 (2018); see also Ellen P. Goodman, *Zero-Rating Broadband Data: Equality and Free Speech at the Network's Other Edge*, 15 COLO. TECH. L.J. 63, 64 (2016) (explaining how broadband subscribers can conserve their monthly data allowance because zero rating exempts specific content from metering).

for higher compensation,<sup>67</sup> AT&T might strategically use blackouts in its capacity as an MVPD to reduce or eliminate increases in its substantial program access costs, particularly for retransmission rights to local broadcast television stations.<sup>68</sup> Under this scenario, AT&T would risk churn by its subscribers frustrated by channel blackouts. However, the company might consider this risk readily offset by savings in broadcast television retransmission costs<sup>69</sup> and possibly securing greater flexibility in deciding into which service tiers and video on-demand options AT&T would offer the most desired non-broadcast content, such as HBO.<sup>70</sup> In 2019, MVPDs paid an estimated \$11.72 billion for local broadcast television stations' consent to retransmit their content and \$10.57 billion in 2018.<sup>71</sup> These amounts constitute a significant increase over the \$9.3 billion paid in 2017, which represented 30% of total revenue.<sup>72</sup>

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67. The Justice Department's argued that "by combining Time Warner's programming and DirecTV's distribution, the merger would give Time Warner increased bargaining leverage in negotiations with rival distributors, leading to higher, supracompetitive prices for millions of consumers." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1035 (D.C. Cir. 2019).

68. "The Communications Act requires that a television station give its consent to a cable system or other multichannel video programming distributor (MVPD) to carry its broadcast signal." *Retransmission Consent*, FED. COMM'NS COMM'N, <https://www.fcc.gov/media/policy/retransmission-consent> [<https://perma.cc/N5MJ-RDVT>] (last updated Dec. 13, 2015).

Television stations and cable systems, as well as satellite carriers, negotiate for this "retransmission consent" and money or other consideration is generally exchanged between the parties in these private negotiations. If the parties do not produce an agreement in time, they may decide to extend the existing agreement, which means they would continue to carry the stations during their negotiations. If they do not reach an agreement, then the cable system or other MVPD must stop offering the stations to their subscribers.

*Id.*; see 47 C.F.R. §§ 76.51–70 (2019) (establishing, inter alia, MVPD must carry duties and retransmission consent duties).

69. Edmund Lee, *CBS Is Blacked Out for 6.5 Million AT&T Customers. Here's Why*, N.Y. TIMES (July 20, 2019), [https://www.nytimes.com/2019/07/20/business/media/cbs-blackout-att.html?auth=forgot-password&referring\\_pv\\_id=0nEfZ-hrUstJvLzxVpRKwZcM](https://www.nytimes.com/2019/07/20/business/media/cbs-blackout-att.html?auth=forgot-password&referring_pv_id=0nEfZ-hrUstJvLzxVpRKwZcM) [<https://perma.cc/PT8Z-KJ5U>] (reporting an attempt by CBS in 2019 to increase retransmission consent compensation from AT&T by 50%).

70. "In addition to a smaller fee increase, AT&T is pushing for the ability to sell CBS's streaming service as a separate option, which could give it more flexibility and lower costs by potentially removing the channel from its basic bundle." *Id.*

71. Adam Jacobson, *Retransmission Consent Revenue: An 11% Growth Engine*, RADIO & TELEVISION BUS. RPT. (July 30, 2019), <https://www.rbr.com/retransmission-consent-revenue-an-11-growth-engine/> [<https://perma.cc/PT8Z-KJ5U>].

72. Communications Marketplace Report, 33 F.C.C. Rcd. 12,558, 12,615–16 (2018).

Many television broadcast stations generate revenue by granting MVPDs the right to carry their signal. Pursuant to Section 325 of the Act, MVPDs may not retransmit a local television broadcaster's signal without the station's express permission. If a station elects retransmission consent, the broadcaster and MVPD negotiate a carriage agreement, which often includes monetary or other types of compensation to the television broad-

In its complete rejection of the Government's attempts to prove that AT&T's merger with Time Warner would substantially lessen competition, the district court decision bolsters the existing, conventional view that vertical mergers do not likely harm competition, because the combining parties did not compete with each other in the first place.<sup>73</sup> The decision rejected all of the DOJ's arguments that the merger would enable the combined company to charge rivals and, in turn, consumers higher prices than what a standalone Time Warner could have imposed. It also rejected the contention that AT&T would attempt to stifle competition generated by streaming video services, commonly referred to as virtual MVPDs,<sup>74</sup> which offer video content via broadband links, or prevent rivals from using HBO as a promotional tool to attract and retain subscribers.<sup>75</sup>

On the matter of AT&T having increased opportunities to leverage access to "must see" video content, the decision noted that no other anti-trust trials have validated the likelihood of success in strategies designed to extort high carriage fees by leveraging access to the most desirable networks.<sup>76</sup> Judge Leon concluded "that the Government has failed to clear the first hurdle of showing that the proposed merger is likely to increase Turner's bargaining leverage [over access to CNN, HBO, and other most desired content] in affiliate negotiations . . . ."<sup>77</sup> Therefore, the court did not even have to consider whether and how the merger would result in a

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caster. In 2016 and 2017, respectively, broadcasters earned about 25% of their revenue (\$7.9 billion) and 30% of their revenue (\$9.3 billion) from retransmission consent fees.

*Id.* (footnotes omitted).

73. "[T]he proposed transaction between AT & T and Time Warner is a vertical merger—*i.e.*, one that involves 'firms that do not operate in the same market' and thus 'produce[s] no immediate change in the level of concentration in any relevant market.'" *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161, 192 (D.D.C. 2018) (second alteration in original) (quoting DEPT. OF JUSTICE & FED. TRADE COMM'N, NON-HORIZONTAL MERGER GUIDELINES § 4.0 (June 14, 1984)), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

74. "I conclude that the Government has failed to meet its burden on its claims arising from AT & T's asserted potential to unilaterally harm virtual MVPDs through its post-merger control of Turner content." *Id.* at 245–46.

75. "The Government has failed to meet its burden of proof on this theory for two independent reasons." *Id.* at 250. "*First*, the Government has failed to show that the merged entity would have *any* incentive to foreclose rivals' access to HBO-based promotions. This is because the Government's promotion-withholding theory conflicts with HBO's business model, which remains 'heavily dependent' on promotion by distributors." *Id.* at 250–51. "*Second*, the Government fails to establish that HBO promotions are so valuable that withholding or restricting them will drive customers to AT & T. Put differently, the Government has failed to show that the marketplace substitutes for HBO are 'inferior, inadequate, or more costly.'" *Id.* at 251 (footnote omitted) (quoting Proposed Conclusions of Law of the United States at ¶ 62, *AT&T, Inc.*, 310 F. Supp. 3d 161 (No. 17-2511 (RJL))).

76. "Indeed, the Government has not pointed to *any* prior trials in federal district court in which the Antitrust Division has successfully used this increased-leverage theory to block a proposed vertical merger as violative of Section 7." *Id.* at 199.

77. *Id.*

substantial lessening of competition, the evaluative criterion required by Section 7 of the Clayton Act.<sup>78</sup>

The decision emphasized the assumption that content providers will not use blackouts to gain a negotiation advantage, because they cannot possibly profit from such a strategy. Judge Leon failed to recognize both the customary course of content carriage disputes when consumers have limited alternatives to the blacked-out content and the impact of new broadband-mediated options. Before the introduction of consumer video streaming options, using broadband access for so-called Over the Top (OTT)<sup>79</sup> applications and Internet Protocol Television, MVPDs typically “blinked first” and accepted content carriage rate increases. At that time, MVPDs could pass through rate increases to subscribers who had few competitive alternatives for accessing expensive, “must see” sporting events<sup>80</sup> and other “live” content. For example, many past broadcast television retransmission disputes often got resolved just as the National Football League transitioned to the regular season.<sup>81</sup>

According to Judge Leon’s assessment of the video content marketplace, one should consider new OTT options as further reducing any upside financial benefits for programmers from pursuing a backout strategy as leverage for extracting higher compensation at contract renewal time. Presumably, OTT alternatives to cable television would offer highly desired and currently blacked-out content, thereby diminishing the programmer’s leverage.

Despite growing evidence of dissatisfaction with expensive, large bundles of video channels, and migration to OTT options,<sup>82</sup> the vast majority of video consumers still subscribe to an incumbent cable or satellite

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78. 15 U.S.C. § 18 (2018).

79. “Over-the-top VoIP [Voice over Internet Protocol] [and other] services require the end user to obtain broadband transmission from a third-party provider, and providers of over-the-top [services] can vary in terms of the extent to which they rely on their own facilities.” Preserving the Open Internet, Broadband Indus. Practices, 25 F.C.C. Rcd. 17,905, 17,916 n.48 (2010), *vacated sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).

80. Josh Mathews, Comment, *Sports Broadcasting Blackouts: A Harbinger of Change in a Rapidly Evolving Media Landscape?*, 18 HOUS. BUS. & TAX L.J. 202, 203 (2018) (reporting that pay television consumers pay approximately 15% of their cable bill for sports programming, regardless of whether they consume the product or not).

81. Dom DiFurio, *AT&T, CBS End 20-Day Blackout in Time for NFL’s Start. But Is Losing Channels the New Normal for Pay TV Customers?*, DALLAS MORNING NEWS (Aug. 8, 2019, 10:08 PM), <https://www.dallasnews.com/business/local-companies/2019/08/08/att-cbs-end-20-day-blackout-in-time-for-nfl-s-start-but-is-losing-channels-the-new-normal-for-pay-tv-customers/> [<https://perma.cc/7SD6-XQBG>].

82. Sapna Maheshwari & John Koblin, *Why Traditional TV Is in Trouble*, N.Y. TIMES (May 13, 2018), <https://www.nytimes.com/2018/05/13/business/media/television-advertising.html> [<https://perma.cc/Q5S9-HLKL>] (reporting ratings decline for broadcast television, especially among young video consumers).



MVPD.<sup>83</sup> Some content networks have refrained from providing the most desirable content to OTT streaming services. Instead, they permit alternative on-demand access via wired and wireless broadband only for existing MVPD subscribers who must authenticate their accounts before accessing video content via alternative, broadband delivery options. Additionally, not many of the OTT streaming service providers offer access to local television stations affiliated with one of the major live, broadcast networks.<sup>84</sup>

Most new OTT video providers offer on-demand, “non-linear” access to original programming.<sup>85</sup> Consumers may gladly abandon linear “appointment television”<sup>86</sup> in exchange for access anytime, anywhere, via any device, and in multiple video presentation formats.

New designations, such as cord cutting and cord shaving, refer to the growing number of video consumers who abandon an MVPD subscription or incur lower monthly rates by downgrading to a less expensive service tier containing fewer channels. The term “cord nevers” refers to young video consumers who never had to pay monthly recurring costs for content access. This increasingly influential group, to both content providers and advertisers, appears less willing to consider linear television more desirable vis-à-vis less expensive, or advertiser subsidized, non-linear content.<sup>87</sup>

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83. Despite the success of Amazon Prime, Netflix, and Hulu, the vast majority of consumers continue to subscribe to cable, satellite, or telephone company MVPD. Of the ninety-four million video subscribers in 2017, cable served 51.9 million, DBS served 31.5 million, and telephone companies served 10.6 million. Commc’ns Marketplace Report, 33 F.C.C. Rcd. 12,558, 12,625 fig.6-b (2018). Virtual MVPDs, which provide similar programming via a broadband link, had a total market share of only 4.8 million subscribers, while Amazon Prime reached 55.4 million and Netflix 52.8 million. *Id.*

84. AT&T, Dish Network, Hulu, and YouTube TV offer live, broadcast network content. *See, e.g.*, HULU, <https://www.hulu.com/live-tv> [<https://perma.cc/3QUM-B7LT>] (last visited May 21, 2020).

85. “Viewership through an OTT provider bypasses the traditional TV distributors because the subscriber receives content over the Internet instead of through a set-top box provided by the cable company.” Cal Keating, Comment, “*Over the Top*” or “*Over the Heads*” of Sports Broadcasting? *Sports and Entertainment Content Licensing and Distribution in a New Era*, 25 SPORTS LAW. J. 177, 181 (2018).

The OTT marketplace is competitive, innovative, personalized, and undeniably chaotic at this juncture as it continues to grow into its own and cater to the market demands of individual consumers: presenting the opportunity to forego the bundling dilemma and subscribe to individual TV network channels or access content in an a-la-carte manner.

*Id.*

86. “Traditional subscription television providers have come to rely most on live content—particularly sports—to retain customers. Channels showing popular live sports have been relatively safe from this trend away from subscription television—sports content is generally considered ‘appointment television,’ which consumers insist on watching as it happens.” James Rickard, Note, *Going Live: The Role of Automation in the Expedient Removal of Online Content*, 96 B.U. L. REV. 2171, 2175 (2016).

87. Daniel Frankel, *Cord-Cutting Got 75% Worse in Q1, Most Terrible Quarter Ever for Pay TV*, MULTICHANNEL NEWS (May 7, 2019), <https://www.multichannel.com/>

AT&T can execute different types of profit maximizing strategies having combined new video content ownership with preexisting video delivery services. In lieu of attempting to raise the price of access to video content by MVPDs and risking harmful blackouts financially harming both AT&T and MVPDs, AT&T could execute a different blackout strategy in its capacity as a major vertically integrated MVPD. It could refuse demands for higher compensation from other video programming sources, such as local broadcast television stations the company retransmits via its DirecTV satellites and its U-verse terrestrial broadband networks. Under this scenario, the availability of alternative access to broadcast networks via OTT services may threaten AT&T's MVPD revenues but also provide some consumers with "self-help" options via AT&T broadband network options for accessing desirable content, such as broadcast networks, during the blackout. Such alternative access might reduce incentives for AT&T to "blink first" and agree to higher retransmission rates, which Judge Leon identified as standard procedure.<sup>88</sup>

A quite plausible reason for AT&T to tolerate longer blackouts post-merger stems from the greater likelihood that it would have steady or increasing revenues from the wired and wireless broadband internet access it provides consumers for accessing OTT streaming services.<sup>89</sup> Judge Leon refused to consider whether ventures such as AT&T, which operates in multidimensional markets, would have more incentives to "hang tough" and tolerate prolonged blackouts in its capacity as both a programmer *and* MVPD. While considering the onset of robust competition from new broadband-delivered video services as evidence AT&T could not successfully pursue price gouging or blackouts, the judge even refused to consider two alternative financial safety valves available to help AT&T tolerate short-term revenue losses triggered by blackouts.

After having received approval to acquire Time Warner, AT&T has opted to raise subscriber costs for all of its video services.<sup>90</sup> Additionally,

news/cord-cutting-got-75-percent-worse-in-q1 [https://perma.cc/8G6Z-WHC9] (estimating an annual decline of 4.8% in pay television viewership).

88. Judge Leon highlighted AT&T's propensity to balk at higher retransmission rates and stated:

Because blackouts are almost always negative events for both programmers and distributors, 'at the end of the day . . . [t]here's no benefit for anyone to walk away' without an affiliate agreement. Therefore, bargains between programmers and distributors are almost always struck in order to avoid long-term blackouts.

United States v. AT&T, Inc., 310 F. Supp. 3d 161, 172 (D.D.C. 2018) (alteration in original) (citation omitted), *aff'd*, 916 F.3d 1028 (D.C. Cir. 2019).

89. John Eggerton, *AT&T: Locast Is Option If There Is CBS Blackout*, MULTICHANNEL NEWS (July 19, 2019), <https://www.multichannel.com/news/at-t-locast-is-option-if-there-is-cbs-blackout> [https://perma.cc/C77B-A3SN] (reporting AT&T's tough retransmission consent negotiation posture).

90. See Sarah Perez, *AT&T to Revamp DirecTV Now with New Plans Bundling in HBO, Price Hikes*, TECHCRUNCH (Mar. 11, 2019, 12:15 PM), <https://techcrunch.com/2019/03/11/att-to-revamp-directv-now-with-new-plans-bundling-in-hbo-price-hikes/> [https://perma.cc/5A43-H4MK]; Chris Welch, *AT&T Confirms Drastic*

the company has evidenced a greater tolerance for geographically widespread and longer lasting blackouts of local broadcast television channels.<sup>91</sup> The National Association of Broadcasters reported that AT&T and Dish were responsible for 82% of all blackouts occurring from 2015–2019.<sup>92</sup>

As a multidimensional market participant, AT&T can develop profit-maximizing strategies both for downstream access of content it owns, such as HBO and CNN, and for unowned content it pays to retransmit, such as local broadcast network affiliates. Having the safety valves provided by growing broadband revenues and its two MVPD options, AT&T can consider raising the cost for distribution rights of its “must see” content while becoming more price-sensitive and aggressive in retransmission negotiations for content it does not own. Consumers increasingly can access this content without a cable or satellite television subscription. They do so using broadband access to OTT streaming video options, or substitute with non-linear, on-demand options. Additionally, urban and suburban residents can use antennas to receive most local broadcast television stations without any paid subscription.<sup>93</sup>

Judge Leon dismissed as implausible<sup>94</sup> the Government’s theory that a combined AT&T and Time Warner would accrue more opportunities to

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*Changes to DirecTV Now and Raises Cheapest Plan to \$50*, VERGE (Mar. 13, 2019, 10:48 AM), <https://www.theverge.com/2019/3/13/18263839/att-directv-now-2019-channel-changes-hbo-plan-price> [permalink unavailable].

91. Ben Munson, *AT&T Declines Deal to Keep Local Channels on DirecTV, U-verse, Nexstar Claims*, FIERCE VIDEO (July 8, 2018, 12:11 PM), <https://www.fiercevideo.com/video/at-t-declines-deal-to-keep-local-channels-directv-u-verse> [https://perma.cc/UY7-MXQ3] (reporting the loss of 120 broadcast television stations in ninety-seven markets when AT&T and Nexstar failed to reach closure on a new retransmission consent contract).

92. *Allow Broadcasters to Continue Negotiating in the Free Market*, NAT’L ASS’N BROADCASTERS, <https://www.nab.org/advocacy/issue.asp?id=1891&issueid=1008> [https://perma.cc/X4H9-HS2B] (last visited May 21, 2020). A major blackout with CBS and Nexstar lasted for up to fifty-seven days. Kelly Tyko, *AT&T, Nexstar End Eight-Week Dispute, Channels Returning to DirecTV, U-Verse and AT&T TV*, USA TODAY (Aug. 29, 2019, 7:07 PM), <https://www.usatoday.com/story/money/2019/08/29/at-t-nexstar-dispute-ends-stations-returning-directv-u-verse/2156291001/> [https://perma.cc/A5B5-HMD2]; see also Dade Hayes, *CBS Stations Go Dark on DirecTV, U-Verse in AT&T Contract Dispute—Update*, DEADLINE (July 20, 2019, 6:35 AM), <https://deadline.com/2019/07/cbs-blackout-directv-u-verse-att-contract-dispute-1202649633/> [https://perma.cc/P34U-DM5P]; *Nexstar and AT&T Statement on New Distribution Agreement*, BUS. WIRE (Aug. 29, 2019, 5:14 PM), <https://www.businesswire.com/news/home/20190829005762/en/Nexstar-ATT-Statement-New-Distribution-Agreement> [https://perma.cc/ZE4D-9RBH].

93. *See Receiving Broadcast TV Stations Dropped from Pay TV Service*, FED. COMM’NS COMM’N, <https://www.fcc.gov/consumers/guides/receiving-broadcast-tv-stations-dropped-pay-tv-service> [https://perma.cc/W9YZ-FYEG].

94. Judge Leon apparently did not know that video carriage blackouts are increasing in both number and duration. See, e.g., *TV Blackouts Skyrocket in 2019, Making It Worst Year Ever*, AM. TELEVISION ALL. (July 17, 2019), <https://www.americatelevisionalliance.org/tv-blackouts-skyrocket-in-2019-making-it-worst-year-ever/> [https://perma.cc/3ND7-LNE9].

leverage concessions and higher compensation from rival MVPDs. The judge based this conclusion on the assumption that AT&T would not, or could not, successfully deviate from Time Warner's prior track record evidencing an inclination to avoid anything more than a brief blackout of cable network access.

It appears that the judge could not anticipate any scenario where AT&T would be in a better position than a standalone Time Warner to offset losses. Evidence presented at the trial showed how AT&T could attract customers migrating from a rival MVPD to one of the available AT&T options still providing access to CNN and other blacked-out content. Additionally, AT&T broadband revenues could increase when subscribers of a rival MVPD migrate to OTT, streaming services via an AT&T wired or wireless network.

The judge largely discredited testimony from MVPD competitors of AT&T about the absolute necessity in having HBO, CNN, and other Turner Network content available to subscribers.<sup>95</sup> Additionally, he opted to dismiss as insignificant previous assertions made by the defendants that vertical integration threatened competition and consumers, because such statements were made in the context of FCC regulatory proceedings when AT&T and DirecTV were pursuing their interests as content distributors. While AT&T and DirecTV opposed the Comcast-NBCUniversal merger as anticompetitive and likely to raise content carriage prices for rival MVPDs, Judge Leon saw no applicability of such advocacy now, particularly for supporting the Government's increased-leverage theory. He differentiated an FCC public interest assessment from an antitrust court review and also dismissed the matter in its entirety by considering the video marketplace as vastly more competitive in 2018 than when Comcast sought to vertically integrate in 2011:

[D]efendants' specific predictions regarding the ability of a merged Comcast-NBCU to leverage price increases by threatening to withhold the particular programming at issue is not particularly probative of whether a merged AT&T-Time Warner could do the same with its programming in today's more competitive marketplace.<sup>96</sup>

Judge Leon accepted the testimony of AT&T's expert witnesses asserting that vertically integrated video content firms have not evidenced an enhanced ability to raise rivals' content prices, notwithstanding assertions made by actual competitors that such practices are commonplace. Addi-

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95. "Based on the evidence, I agree with defendants that Turner's content is not *literally* 'must have' in the sense that distributors cannot effectively compete without it. The evidence showed that distributors have successfully operated, and continue to operate, without the Turner networks or similar programming." *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161, 202 (D.D.C. 2018), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

96. *Id.* at 206–07.

tionally, the judge accepted the allegation that, in actual fee negotiations, MVPDs do not consider the identity of a programmer's owner as a significant factor,<sup>97</sup> or that vertically integrated firms have a newfound incentive to threaten video distributors with long-term blackouts, based on greater upside financial gains from maintaining an aggressive negotiating posture.<sup>98</sup> The court also disagreed with the Government's estimate of how many MVPD subscribers would migrate to an AT&T option in the event of a long-term blackout or above-average rate increase.

The D.C. Circuit Court of Appeals affirmed the lower court's decision, despite having identified a significant—and arguably serious—mistake in the analysis.<sup>99</sup> The appellate court held that the lower court did not clearly err in finding that the government failed to show that the proposed merger would violate the Clayton Act. The appellate court accepted the lower court's unquantified assessment that the video marketplace operated with sufficient competition to diminish any increased bargaining leverage AT&T would have after acquiring Time Warner. Curiously, the appellate court validated as probative some "real world" testimony that vertically integrating firms did not subsequently lower their rates, but agreed with the district court that sworn FCC filings about future harms in other vertical mergers were not significant. The appellate court also accepted the lower court's rejection of assertions that AT&T would execute more and different strategies to maximize profits.

Perhaps most important of all, the appellate court placed great emphasis on AT&T's offer to seek "baseball style" arbitration of its content access disputes with MVPDs for seven years<sup>100</sup> and the existence of contracts that locked in content carriage rates until 2021. Baseball style arbitration maintains the status quo during negotiations, thereby foreclosing blackouts of AT&T-owned content networks, and long-term content carriage contracts prevent near-term rate increases.

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97. *Id.* at 222.

98. *Id.* at 249.

99. *United States v. AT&T, Inc.*, 916 F.3d 1029, 1046 (D.C. Cir. 2019).

It is true that the district court misstated that the government had not proven that any price increases would 'outweigh the conceded \$350 million in annual cost saving to AT&T's customers.' . . . Professor Shapiro testified that the merger would result in \$352 million cost savings to AT&T and that not all those savings would be passed on to consumers. The \$352 million, therefore, was not cost savings to consumers but to AT&T.

*Id.* (citation omitted).

100. "Turner Broadcasting 'irrevocably offer[ed]' approximately 1,000 distributors agreements to engage in baseball style arbitration in the event the parties fail to reach a renewal agreement, and the offered agreement guarantees no blackout of Turner Broadcasting content once arbitration is invoked. AT&T's counsel represented the no-blackout commitment is 'legally enforceable' . . ." *Id.* at 1035 (alteration in original) (citations omitted). "Consequently, the government's challenges to the district court's treatment of its economic theories becomes largely irrelevant, at least during the seven-year period." *Id.*

The appellate court also glossed over Judge Leon's assumption that AT&T would pass through all savings accruing from owning, rather than having to mark up prices paid for content acquired from a non-affiliate. Accepting the accuracy of this \$352 million savings juxtaposes with the spate of post-acquisition AT&T rate increases<sup>101</sup> and the appellate court's general skepticism about other forecasted higher costs to consumers identified by the DOJ's expert witnesses.<sup>102</sup> The appellate court did note that Judge Leon incorrectly assumed that all of AT&T's estimated \$352 million video programming cost savings would flow to subscribers, but dismissed that error as "harmless" because the court agreed with the lower court that DOJ had failed to prove that AT&T would be able to raise customer rates at all,<sup>103</sup> despite FCC statistics confirming yearly increases in subscription rates well above general inflation measures.<sup>104</sup>

Since its acquisition of Time Warner, AT&T has raised DirecTV, Universe and HBO subscription rates significantly<sup>105</sup> despite unprecedented declines in subscribership.<sup>106</sup> The company also has leveraged access to

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101. "AT&T Inc. is hiking prices on its pay TV services for the second time since January, even after telling a judge during the U.S. antitrust trial last year that prices would go down if it was allowed to buy Time Warner Inc." Todd Shields, David McLaughlin, & Scott Moritz, *DirecTV to Hike Prices After Owner AT&T Promised Cheaper Bills*, BLOOMBERG (Mar. 14, 2019, 4:00 AM), <https://www.bloomberg.com/news/articles/2019-03-14/directv-to-hike-prices-after-owner-at-t-promised-cheaper-bills> [permalink unavailable].

102. "Neither Professor Shapiro's opinion testimony nor his quantitative model considered the effect of the post-litigation offer of arbitration agreements . . . ." *AT&T Inc.*, 916 F.3d at 1046.

103. "The \$352 million, therefore, was not cost savings to consumers but to AT&T." *Id.* at 1046.

But the district court did not weigh increased prices for consumers against cost savings for consumers, and instead found that the government had not shown at the first level that the merger was likely to lead to any price increases for consumers because of the failure to show that costs for rival MVPDs would increase as a result of Turner Broadcasting's increased leverage in affiliate negotiations after the merger.

*Id.* at 1046–47.

104. See, e.g., Report on Cable Indus. Prices, Implementation of Section 3 of the Cable Television Consumer Prot. & Competition Act of 1992, Statistical Report on Average Rates for Basic Serv., Cable Programming Serv., and Equip. (2018) (MM Docket No. 92-266), <https://www.fcc.gov/document/report-average-rates-cable-programming-service-and-equipment-5> [<https://perma.cc/ZXL8-9HPR>] (reporting an average 4.4% cable television rate increase compared to a 1.4% increase in the Consumer Price Index).

105. See, e.g., Karl Bode, *AT&T Jacks Up TV Prices Again After Merger, Despite Promising That Wouldn't Happen*, VICE (Mar. 12, 2019, 8:21 AM), [https://www.vice.com/en\\_us/article/eve8kj/atandt-jacks-up-tv-prices-again-after-merger-despite-promising-that-wouldnt-happen](https://www.vice.com/en_us/article/eve8kj/atandt-jacks-up-tv-prices-again-after-merger-despite-promising-that-wouldnt-happen) [<https://perma.cc/SV2B-FA4J>].

106. Jon Brodtkin, *AT&T to Lose 1.1 Million TV Subscribers as DirecTV Continues Nosedive*, ARS TECHNICA (Sept. 12, 2019, 3:39 PM), <https://arstechnica.com/information-technology/2019/09/att-expects-to-lose-another-1-1-million-tv-subscribers-this-quarter/> [<https://perma.cc/3YJN-QJPC>].

HBO consistent with the DOJ's prediction that AT&T would bundle HBO with subscriptions to other less desired channels.<sup>107</sup>

### III. ANTITRUST MERGER REVIEW EMPHASIS ON SHORT-TERM CONSUMER WELFARE CAN FAIL TO IDENTIFY COUNTERVAILING HARMS

Regulatory agencies and courts reviewing proposed mergers and acquisitions properly concentrate on how the transaction will affect consumers and competition. Whenever possible, reviewers should use empirical and quantifiable data to support their assessment and to take every possible step to avoid politicizing the process or biasing the review with non-empirical assumptions about how markets work.<sup>108</sup> Antitrust enforcement agency staff need to appreciate the harm they can impose on consumers with either a false positive, that might reject or unfairly condition a benign merger, and a false negative, that finds no harm even though damage is apparent when using properly calibrated market assessment tools. Simply put, antitrust enforcement agencies should not forget longstanding lessons about markets, or refrain from learning new ones,<sup>109</sup> occasioned by changed circumstances and the particular market conditions under which internet ventures operate.

The potential for false positives and negatives increases in internet markets, particularly ones where intermediaries operate in a two-sided marketplace. Platform operators can appear to offer consumers "free" service because no direct monetary payment is required. Consistent with the adage that "there is no such thing as a free lunch," the so-called free service does trigger a number of transactions quite valuable to the intermediary and potentially costly to consumers.

A singular emphasis on short-term consumer welfare may render antitrust authorities oblivious to all applicable costs and benefits in transactions that a market consolidating firm would undertake. Such a flawed analysis likely fails to consider impacts both downstream to consumers and upstream to vendors of goods and services, data analytic companies, data brokers,<sup>110</sup> and advertisers. In many transactions, the readily observable

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107. See Ashley Rodriguez, *AT&T's Streaming-TV Service Is Now Forcing You to Buy HBO*, QUARTZ (Mar. 13, 2019), <https://qz.com/1572543/atts-directv-now-is-basically-forcing-you-to-buy-hbo/> [<https://perma.cc/6VDC-2D77>].

108. Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527, 1528 (2011) (criticizing Chicago School antitrust analysis on its assumption of rational self-interested market participants operating market with perfect willpower).

109. Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 241–42 (2012) (promoting the superiority of empirical models over theoretical ones for assessing market impacts from mergers).

110. See Laura Palk & Krishnamurty Muralidhar, *A Free Ride: Data Brokers' Rent Seeking Behavior and the Future of Data Inequality*, 20 VAND. J. ENT. & TECH. L. 779 (2018); Ashley Kuempel, Comment, *The Invisible Middlemen: A Critique and Call for Reform of the Data Broker Industry*, 36 NW. J. INT'L L. & BUS. 207 (2016).

and quantifiable enhancements to consumer welfare are at least partially offset by less easily detected and quantified upstream data mining opportunities. Both consumers and antitrust enforcement agencies may not know the length and breadth of such permissible activities because of non-disclosure agreements and the fact that the intermediary can contract with many different types of upstream ventures whose identity and activities can be obscured and not disclosed.

To make matters worse, some antitrust enforcement agencies appear disinclined to consider upstream activities as having any significant and measurable impact on consumers. Merger reviewers appear unable or unwilling to appreciate that transactions occurring upstream between an intermediary and an unaffiliated firm can have both direct and indirect impacts on downstream consumers. Alternatively, they may overemphasize the zero direct payment characteristic of the transaction and discount or ignore the countervailing effects of data mining and commercial surveillance.

Even the Supreme Court has recognized the importance of upstream activities on the overall value proposition of two-sided market transactions. In *Ohio v. American Express*,<sup>111</sup> a majority of the Court considered the positive effects of interrelated, multiple transactions on some consumers having such a favorable impact as to offset a related adverse impact. This case assessed the potential for harmful effects of a vertical restraint imposed by contractual terms imposed by American Express on all vendors agreeing to accept the company's credit card.

The Court acknowledged the direct harms of contractual language barring vendors from steering customers to a different credit card with lower "swipe fees" on the vendors, a savings that might flow in part to consumers. The Court considered whether offsetting benefits to consumers existed and found them by noting how American Express used swipe fee revenues to underwrite benefits to its credit card users, including extensive travel services. Arguably, if the Supreme Court supports a consumer impact analysis on both sides of a platform intermediary's market to prevent a false positive of harm to consumers, then courts—and by extension agencies with antitrust jurisdiction—should use this more inclusive analysis to prevent a false negative. If the Supreme Court's conservative majority can embrace new economic doctrine supporting more robust and complete analysis of consumer impacts occurring on both sides of an intermediary's market, then other reviewing courts and antitrust enforcement agencies should do so as well.

Alternatively, reviewers might overestimate the benefits accruing from such transactions, particularly ones that can occur when an acquiring firm vertically integrates and internalizes transactions that possibly could generate benefits to consumers. For example, both courts reviewing AT&T's

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111. 138 S. Ct. 2274 (2017); see also Frieden, *Two-Sided Internet Markets*, *supra* note 43 (offering extensive analysis of the case).



acquisition of Time Warner dismissed as largely irrelevant whether AT&T would pass on to its subscribers any of the estimated \$352 million in programming cost savings resulting from the elimination of double marginalization of Time Warner content. AT&T's expert witnesses referred to conventional economic doctrine that anticipates efficiency gains and cost savings when an acquiring firm can eliminate having to pay a markup for an essential good or service that a merger or acquisition would bring in-house. Before acquiring Time Warner, when AT&T secured distribution rights for content, such as HBO and CNN, Time Warner could include a profit margin that AT&T would have to pay. Subsequently, AT&T itself would factor in a second profit margin markup when pricing MVPD services to its retail subscribers.

Conventional economic doctrine notes that mergers and acquisitions can eliminate one of the two markups (double marginalization)—because AT&T would own the content programmer—rather than having to pay an unaffiliated venture carriage fees that included a profit margin. Without explaining how and why, Judge Leon accepted the estimate of AT&T's expert witness that the eliminated margin would generate a \$352 million savings, and this entire amount would flow through from AT&T to its subscribers, presumably by way of reduced monthly fees.<sup>112</sup>

It should come as no surprise that after receiving authorization to complete its acquisition of Time Warner, AT&T did not reduce rates at all, but in fact raised the cost of its “must see” HBO content on a standalone basis and used it as an inducement for bundling video, broadband, and wireless services.<sup>113</sup>

#### IV. CONSUMER WELFARE ASSESSMENT REQUIRES EMPIRICISM AND QUANTIFICATION

Assessing the impact of mergers on consumers and competition requires a forward-looking projection of consumer and marketplace impacts with reference to backward-looking, historical data. Antitrust enforcement agencies willingly consider qualitative factors that can corroborate preexisting philosophical, political, theoretical, legal, and economic doctrine that may affect future market impact assessments. In a worst-case scenario, these non-quantitative factors can undermine or substitute for empirical findings, going so far as to discount obvious instances of market concentration and the impact of nonpecuniary burdens on subscribers of “free” internet-delivered services.

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112. “All told, those savings to AT&T customers add up to \$352 million annually. Those savings, moreover, would begin flowing to AT&T's customers ‘pretty quickly’ after consummation of the merger.” *United States v. AT&T, Inc.*, 310 F. Supp. 3d 161, 198 (D.D.C. 2018) (quoting AT&T expert witness), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019).

113. Perez, *supra* note 90 (reporting new AT&T strategies to raise prices and leverage access to HBO to entice streaming subscribers).

Some advocates who support ever-concentrating markets dismiss quantitative measurements of increased market consolidation as irrelevant. Non-quantified arguments, such as efficiency and competition enhancing, subordinate findings of severe market concentration. For example, proponents of the Sprint and T-Mobile merger urged antitrust authorities to ignore the reduction in the total number of facilities-based wireless competitors, resulting in a commensurately higher measures of market concentration. They favored replacing quantified data with non-quantifiable arguments that a combination of the third and fourth national wireless carriers would foster more robust competition, help the United States maintain or reclaim global supremacy over fifth generation wireless technology, and expedite the rollout of cutting-edge service to rural locales thereby ending a digital divide with better served urban locations.<sup>114</sup> These merger advocates succeeded in promoting institutional amnesia of old and emerging lessons about the likely forward-looking impacts of mergers and acquisitions.<sup>115</sup>

The internet marketplace has the potential for generating new and important lessons for regulators and antitrust reviewing courts. A combination of factors promotes this likelihood as no other industrial segment offers so many free services, even as many market segments are dominated by one or two firms. Few would dismiss the potential for dominant internet firms, operating highly popular platforms in a two-sided market, to exploit positive networking externalities and economies of scale and scope. One does not have to be an emotional populist, contrarian, revolutionary, or socialist to consider antitrust review in need for significant fine-tuning.

A. *Caution in Concluding Market Mutual Exclusivity and Noncompeting Merger Candidates*

Internet mergers and acquisitions can have profound future impacts on markets currently deemed unlikely to ever support competition between acquiring and acquired firms. Conventional doctrine about vertically integrated mergers and acquisitions supports a strong bias in favor of approval largely based on the perception that the combining firms do not compete because they operate in unrelated markets. The FTC's 2007 approval of Google's acquisition of DoubleClick embraced this rationale.<sup>116</sup>

A majority of FTC commissioners concluded that Google's acquisition of DoubleClick would have no significant impact on the advertising mar-

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114. T-Mobile & Sprint, *Creating a 5G Future for All*, [https://newtmobile.com/\[https://perma.cc/WQH2-HYMT\]](https://newtmobile.com/[https://perma.cc/WQH2-HYMT]) (last visited May 21, 2020) (touting the consumer benefits in the proposed merger of T-Mobile and Sprint).

115. See Edmund Lee & Katie Benner, *U.S. Approves T-Mobile-Sprint Merger, a Deal That Would Reshape the Industry*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/business/media/sprint-tmobile-merger.html> [https://perma.cc/KKS5-MZTL].

116. See FTC APPROVAL OF DOUBLECLICK ACQUISITION, *supra* note 35.

ketplace, including segments that involve the internet for direct links to advertising recipients,<sup>117</sup> indirect links via advertising platform intermediaries,<sup>118</sup> techniques for identifying candidate audiences,<sup>119</sup> selling unfilled opportunities to make commercial pitches,<sup>120</sup> and auctioning off advertising space on web pages.<sup>121</sup> These commissioners summarily concluded that internet advertising segments are mutually exclusive with Google and DoubleClick serving separate and noncompeting segments.<sup>122</sup>

The FTC decision first differentiated internet advertising provided via Google as an intermediary versus the direct sales of advertising by content providers:

The evidence in this case shows that advertisers buy online advertising space from both search engine providers, like Google, and content providers (referred to as publishers in the online advertising business). However, the evidence in this case shows that the advertising space sold by search engines is not a substitute for space sold directly or indirectly by publishers or vice versa. Or, to put it in terms of merger analysis, the evidence shows that the sale of search advertising does not operate as a significant constraint on the prices or quality of other online advertising sold directly or indirectly by publishers or vice versa.<sup>123</sup>

The FTC expressed absolute confidence that Google, as an “ad intermediary,”<sup>124</sup> did not compete with direct sellers of advertising such as

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117. *Id.* at 7.

118. *Id.* at 8 (concluding “the evidence shows that even a significant increase in ad serving costs would be unlikely to cause an increase in the number of ads delivered through intermediaries”).

119. *Id.* at 12.

120. *Id.* at 11–12.

121. *Id.* at 12.

122. *Id.* at 12–13.

123. *Id.* at 3. “The evidence shows that ad intermediation is not a substitute for publishers and advertisers who place display ads into directly acquired ad inventory or vice versa. (In other words, ad intermediaries placing ads indirectly do not significantly constrain the pricing or quality of ads placed directly, or vice versa.)” *Id.* at 4. “Publishers with direct sales forces are able to charge prices several times higher for directly sold ad inventory than for inventory filled by ad intermediation providers, and those publishers rely on publisher side ad serving to place ads into that premium inventory.” *Id.*

124. The FTC identifies two intermediation market products: ad networks and ad exchanges.

Ad networks and ad exchanges are alike in that they both aggregate advertising inventory. Ad networks are intermediaries that aggregate or purchase advertising inventory from a group of websites and sell this inventory to advertisers or ad agencies, taking a share of the revenue from each sale. Ad exchanges differ in that they aggregate inventory by providing platforms for advertisers and publishers to list and bid for inventory. The evidence shows that the market in which ad networks and ad exchanges compete is relatively nascent, dynamic, and highly fragmented. *Id.* at 5.

newspapers, magazines, broadcast television networks and stations, cable television networks, and MVPDs. While the Commission correctly may have perceived the internet advertising marketplace in 2007, direct and indirect advertising have become quite interlinked and competitive as evidenced by the massive decline in direct advertising revenues and the commensurate substantial increase in revenues and market share accrued by Google and Facebook.<sup>125</sup> These two firms accounted for approximately 72.1% of all internet-delivered advertising, with Google generating 50% and Facebook generating 22.1% in 2018, representing \$53.8 billion and \$23.7 in revenues respectively.<sup>126</sup> Severe declines in revenues by direct sellers of advertising raise questions about their future commercial viability.

The FTC bolstered its conclusion that advertising intermediaries do not compete with direct sellers by stating that intermediaries do not match the effectiveness of more expensive direct advertising even with the use of “targeting technology” that can match advertisers with audiences more likely to respond favorably to specific commercial pitches.<sup>127</sup> Even as it acknowledged Google’s AdSense subsidiary as “a leading provider of contextual [intermediary delivered] advertising,”<sup>128</sup> the FTC concluded that Google’s acquisition of DoubleClick would not bolster the company’s overall market share of the “broader ad intermediation market . . . [because] DoubleClick does not provide contextual advertising, and it does not currently act as an intermediary.”<sup>129</sup>

The FTC majority sought to characterize the online advertising marketplace as comprising several separate segments with companies exclusively targeting just one or two segments. By concluding that it did not have to assess the Google-DoubleClick acquisition in terms of its impact on a multisegmented, online advertising marketplace, the FTC could conclude that the two firms had not, and probably would never, directly compete against each other; Google would continue to sell “advertising on its

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125. Keach Hagey & Vivien Ngo, *How Google Edged out Rivals and Built the World’s Dominant Ad Machine: A Visual Guide*, WALL ST. J. (Nov. 8, 2019, 10:54 AM), <https://www.wsj.com/articles/how-google-edged-out-rivals-and-built-the-worlds-dominant-ad-machine-a-visual-guide-11573142071> [https://perma.cc/Q3VC-4BNT] (alleging most of Google’s market power in online advertising stems from acquisitions of ad-technology companies, such as DoubleClick).

126. Trefis Team, *A Detailed Look at Trends in Advertising Revenues for Google, Facebook and Amazon*, NASDAQ (June 7, 2019, 9:07 AM), <https://www.nasdaq.com/articles/detailed-look-trends-advertising-revenues-google-facebook-and-amazon-2019-06-07> [https://perma.cc/922Q-LWKD].

127. FTC APPROVAL OF DOUBLECLICK ACQUISITION, *supra* note 35, at 5. “The evidence shows that, as with other ads placed through ad intermediaries, most advertisers do not consider contextually targeted ads sold through ad intermediaries to be substitutes for directly purchased display ads.” *Id.*

128. *Id.* at 6.

129. *Id.* The FTC characterized DoubleClick as “the leading firm in the third party ad serving markets.” *Id.* These companies primarily work directly with advertisers “in the delivery and tracking of online advertisements.” *Id.*

search engine and through its ad intermediation product” and DoubleClick would continue to operate “third party ad serving products.”<sup>130</sup> The FTC also considered each online advertising market segment as competitive with declining prices and margins.<sup>131</sup>

The FTC dismissed as unlikely or ineffective any attempt by Google to leverage DoubleClick’s market leadership in third party ad serving to acquire market dominance and pricing power in that and other market segments:

A leveraging strategy cannot be effective, and thus anticompetitive, unless the merged firm has market power in one of the complementary products. As discussed above, the evidence suggests that DoubleClick does not have market power despite its high market share. The third party ad serving markets are competitive and are likely to become even more so in the future.<sup>132</sup>

The FTC also discounted any future scenario where Google’s superior access to consumer behavior data would generate such competitive advantages that the company could acquire market power.<sup>133</sup>

The far greater accuracy of hindsight,<sup>134</sup> but also the contemporaneous dissenting statement of Commissioner Pamela Jones Harbour, show severe flaws in the FTC’s assessment of the online advertising marketplace and the odds for market domination by Google and Facebook. The FTC concluded that “the dynamic nature” of the online advertising marketplace, the Commission’s factual analysis, and “careful application of tested antitrust analysis” made even conditional approval of the merger unnecessary.<sup>135</sup>

Since 2007, Google and Facebook have become “one stop shops” for online advertising while direct advertising has severely declined.<sup>136</sup> This

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130. *Id.* at 7.

131. *Id.* at 8–9.

132. *Id.* at 9–10.

133. “[T]he evidence failed to show that the accessibility to Google of any additional data would likely enable it to exercise market power.” *Id.* at 12. “[T]he evidence indicates that neither the data available to Google, nor the data available to DoubleClick, constitutes an essential input to a successful online advertising product.” *Id.*

134. “Media companies are so reliant on the proprietary advertising demand flowing through Google’s AdWords that one executive at a major publisher referred to it as ‘crack.’” Hagey & Ngo, *supra* note 125.

135. FTC APPROVAL OF DOUBLECLICK ACQUISITION, *supra* note 35.

136. “Much of Google’s power as an ad broker stems from acquisitions of ad-technology companies, especially its 2008 purchase of DoubleClick.” Hagey & Ngo, *supra* note 125. “Google will reach a milestone of surpassing 20% of all U.S. ad spending both online and offline this year. Google captures 74.6% of U.S. search ad spending. And the company is expected to lead the U.S. digital ad market with a 37.2% share, totaling \$48.05 billion this year.” Megan Graham, *Google Says It Competes With ‘Lots of Companies’ in Advertising—Here’s the Hole in That Argument*, CNBC (Sept. 12, 2019, 12:00 PM), <https://www.cnbc.com/2019/09/12/google-the-adtech-industry-is-crowded-and-competitive.html> [<https://perma.cc/>

migration shows that direct and indirect channels are functionally interchangeable and do compete for the same online advertising revenues. Google has acquired dominant market share largely as a result of strategic acquisitions of companies like DoubleClick and its integration with the company's advertising buying tool DV360 and the real-time auctions of advertisements Google manages.<sup>137</sup> The company has the potential to favor its advertising placements and to raise the cost to competitors through its role as the primary auctioneer for selling digital ads. Further, Google can favor its own placements throughout its active participation as the operator of the primary ad server identifying web page space for sale by publishers, the developer of a buying tool for purchasers of advertisers, and the seller of its own advertising."<sup>138</sup>

The success of Google and Facebook provides answers to questions posed by Commissioner Harbour about whether these companies could acquire and maintain competitive advantages in any and all online advertising market segments.<sup>139</sup> Ever more invasive data surveillance, the absence of effective privacy protection, coupled with the "winner-take-all" effects of scale, scope, and positive network effects have created a substantially concentrated web advertising marketplace.<sup>140</sup>

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VH44-G43R]; see also Nicole Perrin, *Facebook-Google Duopoly Won't Crack This Year*, EMARKETER (Nov. 4, 2019), <https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year> [<https://perma.cc/M2VC-PWLJ>].

137. "Google has, at times, provided incentives to use its products in tandem." Hagey & Ngo, *supra* note 125.

A few years ago, Google waived certain fees for DoubleClick for Publishers if an ad sale was made through its AdX exchange, according to a contract reviewed by The Wall Street Journal. Last year, Google merged those two products—DoubleClick for Publishers and AdX—into a single product called Google Ad Manager, making it plain to the industry that they are indeed linked, ad and publishing executives say.

*Id.*

138. "Overall, Google made \$116 billion in advertising revenue last year, a 22% rise from the previous year and 85% of the company's total revenue." *Id.* "Most of that ad revenue came from Google's own properties, but the company's vast role in brokering online ad sales off its own platforms gives it an added level of dominance." *Id.*

139. For assessments of the FTC's consumer data protection performance, see J. Howard Beales III & Timothy Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157 (2015); Jeffrey Eisenach & Illene Knable Gotts, *Looking Ahead: The FTC's Role in Information Technology Markets*, 83 GEO. WASH. L. REV. 1876 (2015); Woodrow Hartzog & Daniel Solove, *The Scope and Potential of FTC Data Protection*, 83 GEO. WASH. L. REV. 2230 (2015).

140. "One former senior Federal Trade Commission official who supported the DoubleClick deal in 2008 now regrets it. 'At the time, it seemed like the right decision, but things changed a lot in the last dozen years,' the official said." Hagey & Ngo, *supra* note 125.

B. *The Need for Post-Merger and Acquisition Monitoring and Mid-Course Corrections*

Antitrust enforcement agencies offer assurances that they will require merging firms to comply with imposed conditions and voluntary commitments. While claiming to remain vigilant, the record shows plenty of instances where regulatory agencies, such as the FCC, did not unilaterally identify lapses, but instead had to respond to numerous complaints.<sup>141</sup> Regulatory agencies apparently have more pressing, current concerns than making sure that past decisions continue in effect, or that changed circumstances require a reassessment and recalibration of merger conditions.

Post-merger performance reviews and compliance audits are essential,<sup>142</sup> particularly given the pace of technological and marketplace changes and incentives for acquiring firms to ignore or evade conditions that constrain profitability and flexibility. Antitrust enforcement agencies should validate that the marketplace and the combined venture continue to operate as expected. Often, reviewing agencies anticipate favorable public interest and consumer benefits directly attributable to mergers and acquisitions. Did such public dividends accrue?

Changes in prices offer a readily available, empirical assessment of marketplace conditions. During their preliminary assessment of a proposed merger and considering whether a firm has violated antitrust law, reviewing agencies examine whether a specific venture has both the incentive and ability to raise prices, even a small but significant and non-transitory increase. Merger applicants often promise not to raise prices for a time period after regulatory approval.

Merged ventures do not always lower prices, share cost savings generated by efficiency gains and elimination of double marginalization,<sup>143</sup> or

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141. See, e.g., *Bloomberg L.P. v. Comcast Cable Commc'ns, LLC*, 27 F.C.C. Rcd. 4891 (2012) (partially granting a complaint that Comcast failed to assign a channel to Bloomberg business network in the vicinity of other business networks).

142. Hovenkamp, *supra* note 2, at 74 (asserting that post-merger conduct may pursue anticompetitive goals without effective oversight and remedies).

143. Salop, *supra* note 56, at 1970–71.

While many vertical mergers, like many horizontal mergers, may entail efficiency benefits, the [end of double marginalization] EDM theory does not prove that vertical mergers are almost always procompetitive. Claims that EDM must lead to lower downstream prices are overstated for several reasons. First, if the upstream firm sells to rivals at a higher price than charged to the downstream merging firm, then diverting sales to its downstream partner creates an “opportunity cost” resulting from lower upstream profits, which mitigates or eliminates the incentive to reduce the downstream price. Second, if the downstream firm’s price reduction would be given to a large number of existing customers relative to the number of new customers diverted from firms that did not buy the upstream firm’s input, then the incentive to cut the downstream price will also be mitigated or eliminated. Third, double marginalization may have been totally or partially eliminated in the premerger market by contracts with quantity forcing or “nonlinear” pricing. Fourth, EDM would not be

become more innovative, competitive, and employment generating. Courts and antitrust enforcement agencies rarely get re-involved when a merger's anticipated procompetitive enhancements did not arise. Involvement has occurred when the combined venture allegedly failed to comply with conditions contained in a merger approval. For example, the FCC granted the application of Sirius and XM digital audio radio ventures<sup>144</sup> to merge based on the argument that one or both companies would fail absent their combination. The Commission also accepted such a broad relevant market definition that even the creation of a monopoly in satellite radio did not raise significant public interest concerns because consumers had plenty of competitive alternatives available including broadcast radio and compact disks. The merged venture has thrived, and the anticipated competition with other functional equivalent options has not foreclosed the company from raising rates significantly and inserting a variety of new billing line items for non-regulatory costs such as copyright royalty payments. The FCC got involved post-merger only after receiving numerous complaints about Sirius XM's failure to comply with a merger condition.<sup>145</sup>

Extensive consolidation in other internet markets, including cable television, cellular radio, broadcasting, and landline telephone service, typically does not result in lower rates for consumers. In some instances, even a merger proponent, Comcast, acknowledged that consumers would not receive any rate reductions as a result of acquisitions framed as enhancing competition and serving the public interest.<sup>146</sup> Internet mergers and acquisitions appear to enhance the ability of surviving firms to increase consumer costs well in excess of general measures of inflation.

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merger-specific if it can be achieved as a practical matter absent the merger. Fifth, there is no EDM if the downstream firm's technology is incompatible with the upstream firm's inputs. Finally, the existence of EDM does not prove that the merger is procompetitive. An EDM incentive to reduce prices may be dominated by the incentives to raise prices resulting from foreclosure or coordination. Thus, the potential for EDM is not a valid rationale for weak or nonexistent enforcement.

*Id.* (footnotes omitted).

144. Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings, Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, 23 F.C.C. Rcd. 12,348 (2008).

145. Sirius XM Radio Inc., 27 F.C.C. Rcd. 6968 (2012).

146. In a conference call to reporters, a Comcast Executive Vice President explained, "[w]e're certainly not promising that customer bills are going to go down, or even that they're going to increase less rapidly." Statement in Opposition to Comcast's Proposed Acquisition of Time Warner Cable at 6 n.19, Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Transfer Control of Licenses and Authorizations (2014) (MB Docket No. 14-57) (internal quotation marks omitted) (quoting Transcript of Comcast/Time Warner Cable Conference Call with Reporters (2014)), <https://ecfsapi.fcc.gov/file/7521817502.pdf> [<https://perma.cc/A9YR-B678>].



C. *More Sophisticated, Nuanced, Granular, and Empirical Calculation of Consumer Benefits and Costs*

Antitrust enforcement agencies, well versed in Chicago School law and economic doctrine, emphasize the need to consider impact on consumers. With zero out-of-pocket costs to consumers and massive subscriber numbers, internet ventures such as Google and Facebook have avoided close scrutiny, even for acquisitions of firms that might have offered a competitive alternative. Similar reluctance to probe has applied to platform intermediaries, such as Airbnb, Alibaba, Amazon, Apple, Ebay, PayPal, and Uber that offer faster, better, smarter, more convenient, and possibly cheaper services.

Consumer welfare analysis typically does not require much empirical statistical analysis and quantification of benefits and costs. If merger advocates can create a compelling narrative claiming consumer welfare enhancement and guarantees of competition, innovation, stimulation, and limited loss of employment numbers, then reviewers appear to give them the benefit of the doubt.

Merger advocates appear able to enhance their prospects with antitrust enforcement agencies by injecting other non-empirical, non-quantifiable factors such as national security, industrial policy, national pride, technological leadership, and fostering closer parity of access to internet services between rural and urban residents. These factors make antitrust less scientific and more politicized.

Consider the merger of Sprint and T-Mobile, the third and fourth carriers in terms of national market penetration by wireless telecommunications ventures. These companies undertook an aggressive campaign to frame their merger not in terms of horizontal integration resulting in even more market concentration, but rather competition-enhancing by making the combined carrier better able to compete aggressively with the two dominant carriers: AT&T and Verizon. Their campaign eschewed math and conventional antitrust law and economics, replacing them with broad and loose arguments touting how the nation, consumers, and competition will improve if the carriers can merge.

The merger of T-Mobile and Sprint was touted as the best way for the United States to retain or regain global leadership in fifth generation (5G) wireless technology and to serve vital national security interests.<sup>147</sup> The

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147. "Expanding 5G access to all Americans will also enhance the benefits of 5G innovation for the overall United States economy and will support American technological leadership. The larger the United States' 5G user base, and the broader its nationwide coverage, the greater the opportunity for entrepreneurs and innovators." Applications of T-Mobile US, Inc., and Sprint Corp. For Consent to Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 F.C.C. Rcd. 10,578, 10,583 (2019). "The network benefits of the T-Mobile/Sprint transaction will thus extend beyond mobile wireless services alone, to enhance the competitiveness of the United States' economy." *Id.*

companies implied that sinister foreign ventures could harm the national interest and engage in espionage if they dominated 5G infrastructure deployment. Somehow the merger of Sprint and T-Mobile will prevent companies like Huawei and ZTE from offering lower cost 5G technology at home and abroad.

In frequent advertisements, Sprint and T-Mobile claimed that the merged company would quickly remedy persistently expensive and inferior wireless service, particularly in rural areas. While ignoring how they could not have improved conditions as standalone companies, Sprint and T-Mobile claimed that as a combined venture the nation's wireless posture will improve significantly.<sup>148</sup> The companies never explained how they lacked access to debt and equity financing, or any other shortfall occurring as competitors instead of collaborators. The combined company offered a binding commitment to freeze rates for three years, and to bridge the so-called digital divide by making wireless broadband robust, affordable, and ubiquitous, outcomes three national carriers can achieve that four apparently could not.

#### CONCLUSION

Antitrust market impact analysis requires far more than slogans, conjecture, and lobbyists. Recent derisive criticism of reform efforts ignores the real prospect that the failure to recalibrate antitrust review will result in more flawed assessments and substantial harms. Even some scholars at the University of Chicago have begun to reconsider deep-seated doctrine and assumptions about how markets operate.<sup>149</sup>

Antitrust enforcement agencies should commit to rigorous, empirically driven analyses as free as possible from politics. This independence avoids reliance on sponsored research that would never pass muster using peer review, results-driven decision making, and slavish devotion to current economic doctrine. Internet market assessment requires the willingness to consider impacts to consumers and competition arising from a broader array of factors and stakeholders. Internet mergers and acquisitions have yet to trigger a more nuanced and sophisticated assessment to offset reduced regulatory oversight and consumer safeguards.<sup>150</sup> At a time

148. "We've united and combined our resources to bring customers the connectivity, service, and value they deserve. We are taking things to an entirely new level! With the arrival of the new T-Mobile, consumers and businesses win—when it's more important than ever." T-MOBILE, *Why Have T-Mobile and Sprint Merged?* [https://www.t-mobile.com/brand/t-mobile-sprint-merger-updates?ds\\_rl=1082060&ds\\_rl=1264208&cmpid=ADV\\_PB\\_P\\_20NEWTMO\\_43700049462900002\\_434718399537&gclid=EAIaIQobChMIxur836n16QIVk-eGCh0ClgAIEAAYASAAEgKRHvD\\_BwE&gclsrc=aw.ds](https://www.t-mobile.com/brand/t-mobile-sprint-merger-updates?ds_rl=1082060&ds_rl=1264208&cmpid=ADV_PB_P_20NEWTMO_43700049462900002_434718399537&gclid=EAIaIQobChMIxur836n16QIVk-eGCh0ClgAIEAAYASAAEgKRHvD_BwE&gclsrc=aw.ds) [<https://perma.cc/S3AN-MC2U>] (last visited July 18, 2020).

149. See Ianni Drivas, *Reassessing the Chicago School of Antitrust Law*, U. CHI. L. SCH. (June 4, 2019), <https://www.law.uchicago.edu/news/reassessing-chicago-school-antitrust-law> [<https://perma.cc/T5J5-5T64>].

150. "Even within a purely economic framework, merger review is flawed. The fact that a merger may be designed to eliminate a future or 'potential' com-

when deregulation reduces or eliminates the first, and possibly only, form of government oversight,<sup>151</sup> antitrust review offers an essential guard against the potential for both false negatives and false positives.<sup>152</sup>

The approval of AT&T's acquisition of Time Warner revalidates the conventional wisdom that vertical integration has little if any potential for harm, notwithstanding credible evidence to the contrary. The FTC's approval of DoubleClick's acquisition by Google evidences a profound disinclination to consider markets as constituting numerous segments for which competitors can readily enter and exit. The DOJ's conditional approval of the T-Mobile and Sprint merger evidenced incredible willingness to deflect concerns about real potential harm in a wireless services oligopoly with broad, mostly unenforceable promises of better days ahead.

More broadly, antitrust enforcement agencies appear disinclined to probe whether markets operate in ways that defy simple modeling along vertical and horizontal planes. Technological and market convergence promote the development of a fully diversified company offering multiple products and services throughout any and all food chains. Noncompeting ventures may soon vie for the same customer base, particularly in converging internet markets where options for accessing video content have increased.

Antitrust enforcement agencies also need to use better calibrated tools to assess the current and future impacts of mergers and acquisitions. Several transactions that eliminated double marginalization did not generate any measurable savings passed onto consumers, despite the economic doctrine that touts efficiency gains and cost savings. Assuming such benefits did occur, antitrust reviewers need to confront scenarios where acquiring firms encounter such insufficient competition that they had no commercial necessity to share the financial benefits from mergers with consumers. Perhaps the lack of such competitive necessity calls into question whether the approved transaction had no adverse effect on the potential for monopolization, concentration of market power, and harm to competition and consumers.

This Article has identified several instances where strict adherence to conventional law and economic doctrine has supported mergers and ac-

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petitor is often ignored as too speculative." Wu, *supra* note 1, at 128. "That's why American and European agencies allowed Facebook and Google to buy many of their major potential competitors. Innovation and dynamic effects, being harder to measure, do not get due consideration." *Id.*

151. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), the Supreme Court held that antitrust review should offer no greater oversight or remedies than that available from regulatory review. See *Verizon Commc'ns Inc.*, 540 U.S. at 407. This case appears to establish precedent for eliminating antitrust review and potential remedies if regulatory agencies have opted to reduce or eliminate oversight.

152. Howard Shelanski, *Antitrust and Deregulation*, 127 YALE L.J. 1922, 1959 (2018) (arguing against reducing antitrust enforcement, particularly in light of substantial deregulation).

quisitions that did not warrant summary conclusions about the absence of harm to consumers and competition. Such false negatives should necessitate soul searching and a conscientious willingness to rethink the viability of highly revered doctrine and the wisdom of regulatory forbearance in ever-concentrating internet markets.