

**COVERING PRYING EYES WITH AN INVISIBLE HAND:
PRIVACY, ANTITRUST, AND THE NEW BRANDEIS
MOVEMENT**

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ABSTRACT

The dominance of digital giants like Amazon and Google has revived interest in antitrust law, with members of the “New Brandeis” movement taking the lead. Neo-Brandeisians are now well represented across the most important positions in the federal government, and their ideas are already reflected in ongoing litigation and proposed legislation regarding Big Tech. But this movement is also a marked departure from prevailing antitrust theory and caselaw, which focus on consumer welfare (as measured by efficiency, output, and prices). Neo-Brandeisians instead focus on market concentration itself, exhibit skepticism toward efficiency-based justifications, and use competition law to pursue broader policy goals — in particular, enhanced consumer privacy.

The structuralism and interventionism that define the New Brandeis movement, however, risk undermining consumer privacy just as much as they promise to enhance it. In short, privacy and competition are not always in a positive relationship with each other. On the contrary, from the “privacy paradox” to externalities to economies of scale, the nature of digital spaces frequently creates tension between the two. Reducing market concentration may lead to or require greater privacy intrusions; importing privacy concerns into antitrust would undermine the law’s clarity and efficacy; and legitimizing competition over privacy is apt to disproportionately harm vulnerable populations. To some extent, this is a privacy-specific problem, but it also suggests larger issues with the neo-Brandeisians’ intentions of pursuing broader social goals that do not naturally follow from enhanced market competition. To mitigate these risks, this Article concludes with suggestions for antitrust enforcers and policymakers going forward.

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EVERY PERSON WHO SHALL MONOPOLIZE . . . ANY PART OF
THE TRADE OR COMMERCE AMONG THE SEVERAL STATES . . .
SHALL BE DEEMED GUILTY OF A FELONY.

— SHERMAN ANTITRUST ACT OF 1890¹

IT IS OUR PURPOSE TO CONSIDER WHETHER THE EXISTING
LAW AFFORDS A PRINCIPLE WHICH CAN PROPERLY BE
INVOKED TO PROTECT THE PRIVACY OF THE INDIVIDUAL;
AND, IF IT DOES, WHAT THE NATURE AND EXTENT OF SUCH
PROTECTION IS.

— SAMUEL D. WARREN & LOUIS D. BRANDEIS, THE RIGHT
TO PRIVACY (1890)²

I. INTRODUCTION

Public interest in antitrust law has resurged after a long period of relative indolence in enforcement — and all eyes are on the digital giants that define the modern era. Google³ and Facebook⁴ are squaring

1. 15 U.S.C. § 2 (2021) (codifying Ch. 647, § 2, 26 Stat. 209).

2. 4 HARV. L. REV. 193, 197 (1890).

3. *See, e.g.*, Complaint, United States v. Google LLC, No. 20-cv-03010 (D.D.C. Oct. 20, 2020). As of now, this case is proceeding apace through discovery, with trial “by September 2023.” Matthew Perlman, *Antitrust Conduct Issues and Cases to Watch in 2023*, LAW360 (Jan. 2, 2023), <https://www.law360.com/articles/1560714/antitrust-conduct-issues-and-cases-to-watch-in-2023> [https://perma.cc/2U2U-ULEG].

4. *See, e.g.*, Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 20-cv-03590 (D.D.C. Jan. 13, 2021); Complaint, New York v. Facebook, Inc., No. 20-cv-03589 (D.D.C. Dec. 9, 2020). Most recently, the district court rejected Facebook’s motion

off against the Antitrust Division of the Department of Justice (“DOJ”), the Federal Trade Commission (“FTC”), and state attorneys general in litigation of historic scale. Amazon⁵ and Apple⁶ face myriad private suits brought by consumers and competitors alike. Meanwhile, Congress recently concluded comprehensive fact-finding efforts — arguably the first of their kind in more than fifty years⁷ — to determine how competition law should “address market power and anticompetitive conduct in digital markets.”⁸ Various antitrust legislation focused on

to dismiss the FTC’s amended complaint. *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 65 (D.D.C. 2022). Discovery is proceeding, with trial “not expected until sometime in 2024.” Perlman, *supra* note 3.

5. *See, e.g.*, Class Action Complaint ¶ 2, *Brown v. Amazon.com, Inc.*, No. 22-cv-00965 (W.D. Wash. July 13, 2022) (Amazon consumers alleging illegal price fixing across various products); Class Action Complaint ¶¶ 15, 24–25, *Hogan v. Amazon.com, Inc.*, No. 21-cv-00996 (W.D. Wash. July 26, 2021) (Amazon consumers alleging anticompetitive behavior regarding fulfillment services); Class Action Complaint ¶¶ 27, 112, *In re Amazon.com, Inc. eBook Antitrust Litig.*, No. 21-cv-00351 (S.D.N.Y. Jan. 14, 2021) (Amazon consumers alleging illegal price fixing of digital books); Class Action Complaint ¶ 10, *Frame-Wilson v. Amazon.com, Inc.*, No. 20-cv-00424 (W.D. Wash. Mar. 19, 2020) (Amazon consumers challenging most-favored-nation provisions with various product suppliers). Amazon additionally faces public suits from the state attorneys general of California and the District of Columbia over its use of most-favored-nation provisions. *See* Kelly Lienhard, *DC Attorney General Wants Amazon Antitrust Suit Resurrected*, LAW360 (Jan. 24, 2023), <https://www.law360.com/articles/1568645/dc-attorney-general-wants-amazon-antitrust-suit-resurrected> [<https://perma.cc/7DLQ-NGZJ>] (DC appealing from a successful motion below to dismiss for failure to state a claim); Demurrer to Plaintiff’s Complaint, *People v. Amazon.com, Inc.*, No. CGC-22-601826 (Cal. Super. Ct. Dec. 6, 2022). Last year, Amazon also settled claims of price fixing via the “Sold by Amazon” program with the Washington Attorney General. *See* Reed Albergotti, *Amazon Ends Program Washington State’s AG Alleged Was an Illegal Price-Fixing Scheme*, WASH. POST (Jan. 26, 2022), <https://www.washingtonpost.com/technology/2022/01/26/amazon-price-fixing-washington-attorney-general/> [<https://perma.cc/U7Y2-KKWV>].

6. *See, e.g.*, *Epic Games, Inc. v. Apple, Inc.*, 559 F. Supp. 3d 898, 1068 (N.D. Cal. 2021) (game developer antitrust challenge to Apple App Store commission); Unopposed Motion of the United States for Leave to Participate in Oral Argument, *Epic Games, Inc. v. Apple, Inc.*, No. 21-16506 (9th Cir. Sept. 16, 2022) (appealing *id.*, with DOJ involvement); *Apple, Inc. v. Pepper*, 139 S. Ct. 1514 (2019) (reversing dismissal of consumer class action antitrust challenge to Apple App Store commission rates); Plaintiffs’ Notice of Motion and Motion for Class Certification, *In re Apple iPhone Antitrust Litig.*, No. 11-cv-06714 (N.D. Cal. June 1, 2021) (pursuing claims from *id.*); Class Action Complaint, *Affinity Credit Union v. Apple, Inc.*, No. 22-cv-04174 (N.D. Cal. July 18, 2022) (regarding payment apps competing with Apple Pay); Complaint, *Alivecor, Inc. v. Apple, Inc.*, No. 21-cv-03958 (N.D. Cal. May 25, 2021) (regarding an app competing with Apple’s own WatchOS); Notice of Appeal, *SaurikIT, LLC v. Apple, Inc.*, No. 22-16527 (9th Cir. Oct. 5, 2022) (regarding a competing, third-party app store). Apple has just recently fended off antitrust claims in other cases as well. *See, e.g.*, *Blix, Inc. v. Apple, Inc.*, 2021 WL 2895654 (D. Del. July 9, 2021), *aff’d* 2022 WL 17421225 (Fed. Cir. Dec. 6, 2022) (regarding single-sign-on features).

7. The last significant revision to United States antitrust law was the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub L. No. 94-435, 90 Stat. 1383 (current version at 15 U.S.C. § 18(a)), which created a system of preclearance notification for mergers and acquisitions above a certain size, jointly executed by the DOJ and FTC.

8. MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., H. COMM. ON JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 6 (2020) [hereinafter

Big Tech is now under consideration by Congress,⁹ though its fate after the recent midterm elections remains uncertain.

As part of this new antitrust push, regulators, legislators, and commentators alike have emphasized the connection between competition in these digital markets and consumer privacy.¹⁰ There is a widely shared hope that robust antitrust enforcement, an area where the United States was historically a leader,¹¹ can help offset the lack of more direct and comprehensive privacy regulation. It is possible the invisible hand of competition may be able to block Big Tech's prying eyes.

The nature of competition in these modern digital markets presents novel conceptual challenges for antitrust law, to be sure.¹² The central statutory texts were first written to counter the old trusts of steel, oil, and rail; with only "some revisions" since the "time of horse and

INVESTIGATION OF COMPETITION IN DIGITAL MARKETS], https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [https://perma.cc/LP4U-2FBN]; see also, e.g., *The Impact of Consolidation and Monopoly Power on American Innovation: Hearing Before the S. Subcomm. on Competition Pol'y, Antitrust, & Consumer Rts.*, 117th Cong. (2021), <https://www.judiciary.senate.gov/meetings/the-impact-of-consolidation-and-monopoly-power-on-american-innovation> [https://perma.cc/53JB-HYY3]; *Big Data, Big Questions: Implications for Competition and Consumers: Hearing Before the S. Subcomm. on Competition Pol'y, Antitrust, & Consumer Rts.*, 117th Cong. (2021), <https://www.judiciary.senate.gov/meetings/big-data-big-questions-implications-for-competition-and-consumers> [https://perma.cc/CL8W-CZY9]; *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before the S. Subcomm. on Competition Pol'y, Antitrust, & Consumer Rts.*, 116th Cong. (2020), <https://www.judiciary.senate.gov/meetings/competition-in-digital-technology-markets-examining-self-preferencing-by-digital-platforms> [https://perma.cc/3YXA-JU9T].

9. See, e.g., American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022); Open App Markets Act, S. 2710, 117th Cong. (2022).

10. See, e.g., Complaint at 7, *United States v. Google LLC*, No. 20-cv-03010 (D.D.C. Oct. 20, 2020) ("American consumers are forced to accept Google's policies, privacy practices, and use of personal data . . ."); Complaint at 8, 38, *FTC v. Facebook, Inc.*, 20-cv-03590 (D.D.C. Dec. 9, 2020) (stating that Facebook's practices "deprive[] users of . . . the benefits of competition," including "protection of user privacy"); INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 8, at 7 ("The Subcommittee's series of hearings produced significant evidence that these firms wield their dominance in ways that erode entrepreneurship, degrade Americans' privacy online, and undermine the vibrancy of the free and diverse press."); AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 346 (2022) ("Bigger is not better when it comes to protecting individuals' privacy rights, because without meaningful competition in the technology sector . . . consumers don't have the prospect of seeing much competition among companies' privacy policies either."). Though such arguments have surely reached their apex at this moment, well-respected scholars have been advancing them for some time. See, e.g., Robert H. Lande, *The Microsoft-Yahoo Merger: Yes, Privacy Is an Antitrust Concern*, 714 *FTC WATCH* (Feb. 25, 2008).

11. See Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 *IND. J. GLOB. LEGAL STUD.* 433, 456 (2002) (describing the U.S. antitrust model as having had a "global reach," influencing many countries' development of competition-law systems, from "Germany and Japan" after World War II to "Asia and Latin America" through hired experts and official liaisons).

12. See, e.g., Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 *YALE L.J.* 1952, 1957 (2021) (suggesting "novel forms of relief" to address the unique economics of digital platform monopolies).

buggies,” they have remained essentially unchanged by legislation for more than a century.¹³ Instead, due to the courts adopting an evolving, almost “common-law” approach to the statutes’ text,¹⁴ it is the adoption (or rejection) of political and economic theories through precedent that has determined the course of antitrust. Today, a major force behind the renewed interest in antitrust is the “New Brandeis” movement,¹⁵ a growing intellectual coalition that believes the best way to resolve antitrust law’s modern challenges is by looking back, drawing on an earlier era of theory and caselaw.

Like their namesake,¹⁶ the neo-Brandeisians argue that antitrust law should focus primarily on market structure — especially market concentration.¹⁷ This school of thought is now strongly represented among antitrust regulators, with figures like Lina Khan (Chair of the FTC) and Jonathan Kanter (Assistant Attorney General for the Antitrust Division of the DOJ) staffing the most important competition policy positions.¹⁸ But the neo-Brandeisians’ emphasis on structuralism

13. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/2E6J-4QSG>].

14. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act . . .”).

15. *See, e.g.*, David Dayen & Alexander Sammon, *The New Brandeis Movement Has Its Moment*, AM. PROSPECT (July 21, 2021), <https://prospect.org/justice/new-brandeis-movement-has-its-moment-justice-department-antitrust-jonathan-kanter> [<https://perma.cc/5XDT-27VJ>] (describing the growth of the movement, from “a small group of intellectuals battling within the entrenched antitrust establishment” in 2017 to “the upper echelons of policymaking” today).

16. *See, e.g.*, LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 111 (Richard M. Abrams ed., 1st Harper Torchbook ed., 1967) (1914) (“Size, we are told, is not a crime. But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put. And it is size attained by combination, instead of natural growth, which has contributed so largely to our financial concentration.”); LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS* 38 (Osmond K. Fraenkel ed., 1934).

17. *See, e.g.*, Lina M. Khan, Note, *Amazon’s Antitrust Paradox*, 126 *YALE L.J.* 710, 717 (2017) (“My argument is that gauging real competition in the twenty-first century marketplace — especially in the case of online platforms — requires analyzing the underlying structure and dynamics of markets. . . . [A] company’s power and the potential anticompetitive nature of that power cannot be fully understood without looking to the structure of a business and the structural role it plays in markets.”); Greg Ip, *Antitrust’s New Mission: Preserving Democracy, Not Efficiency*, *WALL ST. J.* (July 7, 2021), <https://www.wsj.com/articles/antitrusts-new-mission-preserving-democracy-not-efficiency-11625670424> [<https://perma.cc/JC7D-DXDH>].

18. *About the FTC: Lina M. Khan*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/biographies/lina-m-khan> [<https://perma.cc/XZZ5-J7FK>]; *About the Division: Meet the Assistant Attorney General*, U.S. DEP’T OF JUST., <https://www.justice.gov/atr/staff-profile/meet-assistant-attorney-general> [<https://perma.cc/N8AG-35XJ>]; *White House Announces Additional Policy Staff*, WHITE HOUSE (Mar. 5, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/05/white-house-announces-additional-policy-staff> [<https://perma.cc/23ND-T3XW>]. *See generally* Sheelah Kolhatkar, *Lina Khan’s Battle To Rein in Big Tech*, *NEW YORKER* (Nov. 29, 2021), <https://www.newyorker.com/magazine/>

stands in some opposition to the consumer welfare standard that is actually reflected in contemporary caselaw.¹⁹ Focusing on consumer welfare prioritizes high output and low prices, permitting even overwhelming market concentration so long as it serves (or at least does not undermine) those ends.²⁰ Critics of the New Brandeis movement's structuralism accordingly argue that it "harm[s] consumers and prop[s] up inefficient corporations," relying on "economics . . . long [since] discarded to the dustbin of history."²¹ Its supporters, on the other hand, argue that the aggregation of economic power itself poses threats that the consumer welfare standard systematically fails to recognize — including threats to democracy writ large.²²

Can the neo-Brandeisian vision of antitrust law improve consumer privacy as is hoped? This Article takes a skeptical view. Somewhat counterintuitively, the structuralism and interventionism that define the New Brandeis movement risk undermining consumer privacy as much as they promise to enhance it. To some extent, this is a privacy-specific problem, but it also suggests broader issues with the neo-Brandeisians' intentions of using authority over competition to pursue broader social goals.

The Article proceeds as follows. Part II provides a brief primer on privacy in general and the area of personal data in particular, an area where the literature presents an unusual disconnect between stated and revealed preferences among consumers. Despite strong stated preferences for privacy, most consumers readily exchange access to personal

2021/12/06/lina-khans-battle-to-rein-in-big-tech [https://perma.cc/M6R4-CU5Z] ("Khan, Kanter, and a handful of other anti-monopoly advocates have been referred to as members of a 'New Brandeis movement' . . ."); Jacob M. Schlesinger, *The Return of the Trustbusters*, WALL ST. J. (Aug. 27, 2021), <https://www.wsj.com/articles/the-return-of-the-trustbusters-11630076102> [https://perma.cc/QH9M-AC7N] (applying the neo-Brandeisian label to policy-makers like Khan and Kanter).

19. See *infra* notes 136–37 and accompanying text.

20. See, e.g., Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, PENN WHARTON PUB. POL'Y INITIATIVE, Sept. 2018, at 1–2 ("The [consumer welfare standard] stands for the proposition that antitrust policy should encourage markets to produce two things for the benefit of consumers: (1) output that is as high as is consistent with sustainable competition, and (2) prices that are accordingly as low. . . . Market structure is relevant to antitrust policy only insofar as monopolies and oligopolies harm consumers by reducing output, stifling innovation, or yielding higher prices.")

21. Joshua D. 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, 296–97 (2019).

22. See, e.g., Barry Lynn, *With Kanter, Khan, Wu, and the Rest of Biden's Trustbusting Team, We're Looking at a New Era of Democracy for All Americans, From the Bottom Up*, OPEN MKTS. INST. (July 20, 2021), <https://www.openmarketsinstitute.org/publications/with-kanter-khan-wu-and-the-rest-of-bidens-trustbusting-team-were-looking-at-a-new-era-of-democracy-for-all-americans-from-the-bottom-up> [https://perma.cc/4TKJ-DFL9] ("[T]oday's monopolists pose the greatest domestic political threat to Americans since the Civil War."); Khan, *supra* note 17, at 740 ("[C]oncentration of economic power also consolidated political power . . . enabling a small minority to amass outsized wealth, which they could then use to influence government.").

information for almost trivial monetary gains — intrinsically complicating the relationship between privacy and market competition. Additional features of personal data, ranging from consumer-side externalities to firm-side economies of scale, further suggest that privacy and market competition are not necessarily linked. Turning to antitrust theory, Part III explains the history behind — and key differences between — the approach advocated by the New Brandeis school and the consumer welfare standard currently represented in caselaw. In brief, the New Brandeis school focuses strongly on firm size and market concentration, including a particular emphasis on removing barriers to entry. In contrast to the consumer welfare standard, this structuralism is more skeptical of efficiency-based justifications for large firms or concentrated markets, like lower prices or enhanced quality. With this in mind, Part IV identifies three major problems for the New Brandeis school in using antitrust law as a privacy policy lever. First, there is a problem of smallness: personal data privacy is likely not better served by a multiplicity of small, independent firms. Second, there is a problem of haphazardness: leveraging authority over competition to pursue freestanding goals like privacy is apt to create issues regarding clarity, uniformity, and competence in antitrust law. Finally, there is a problem of lopsidedness: market competition over privacy, to the extent that it can exist, will further legitimize low privacy protections for poor and marginalized groups.

II. PRIVACY, PERSONAL DATA, AND MARKETS

Privacy is far from a unitary concept. Samuel Warren and Louis Brandeis’s groundbreaking article — generally considered the foundation of American privacy law²³ — defines the core of privacy as “the right to be let alone.”²⁴ This relatively simple formulation would later animate Brandeis’s famous dissent in *Olmstead v. United States*,²⁵ in turn leading not only to the “reasonable expectation of privacy” test for Fourth Amendment searches and seizures,²⁶ but also the protection of reproductive autonomy previously established in *Griswold v. Connecticut*²⁷ and *Roe v. Wade*.²⁸ Looking beyond constitutional rights, federal and state statutes further complicate the idea of privacy. Laws

23. See, e.g., Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1296 (2010) (“Their short article is considered by scholars to have established not just the privacy torts but the field of privacy law itself.”).

24. Warren & Brandeis, *supra* note 2, at 193.

25. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

26. See *Katz v. United States*, 389 U.S. 347, 350 n.6 (1967); *id.* at 360–61 (Harlan, J., concurring).

27. 381 U.S. 479, 494–99 (1965) (Goldberg, J., concurring).

28. 410 U.S. 113, 152 (1973).

prohibiting employers from requiring HIV testing for applicants,²⁹ laws creating data fiduciary obligations for the federal government³⁰ or private companies,³¹ and even laws preventing the unauthorized use of someone's likeness in commerce³² are all nominally aimed at the same thing, however nebulously defined: safeguarding privacy.

Many scholars have attempted to weave these distinct threads into a useful and coherent tapestry. Focusing exclusively on privacy torts, William Prosser offered a frequently cited four-part taxonomy: (1) intrusion upon seclusion or solitude, (2) public disclosure of embarrassing facts, (3) publicity that creates a false light, and (4) appropriation of name or likeness.³³ Jerry Kang, with considerable influence as well, organized the whole of privacy law along three broad dimensions: (1) physical space, (2) choice, and (3) personal information.³⁴ More recently, Daniel Solove has divided privacy concerns into four distinct areas, a model centered on data subjects and the flow of their information: "(1) information collection, (2) information processing, (3) information dissemination, and (4) invasions."³⁵ While the usefulness of these classifications depends on the particular context, their divergence further highlights the "chameleon-like"³⁶ or "constantly shifting"³⁷ nature of privacy.

When discussing Google, Facebook, and the rest of Big Tech, however, the most relevant area of privacy seems clear: collecting, using, and transferring personal data. Personal data is "any information relating to an identified or identifiable natural person"³⁸ — in other words, everything from a person's shopping tendencies to their phone number to their blood type. The growth and dominance of Big Tech have coincided with an unprecedented increase in the acquisition and monetization of consumers' personal information.³⁹ It is this area of privacy that

29. See, e.g., WIS. STAT. ANN. § 103.15(2) (West 2023).

30. See Privacy Act of 1974, 5 U.S.C. § 552a (2021).

31. See, e.g., 15 U.S.C. §§ 6801, 6805 (2021); Health Insurance Portability and Accountability Act of 1996 § 221, 42 U.S.C. 1320a-7e (2021).

32. See, e.g., N.Y. CIV. RTS. LAW §§ 50, 51 (McKinney 2022).

33. William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

34. Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 STAN. L. REV. 1193, 1202–03 (1998).

35. Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 489 (2006).

36. Lillian R. BeVier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J. 455, 458 (1995).

37. Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1090 (2002).

38. Regulation (EU) 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC (General Data Protection Regulation), art. 4(1), 2016 O.J. (L 119) 1 [hereinafter GDPR].

39. See Timothy Morey, Theodore Forbath & Allison Schoop, *Customer Data: Designing for Transparency and Trust*, HARV. BUS. REV., May 2015, at 3, 4, <https://hbr.org/2015/05/>

antitrust intervention is being proposed to address and on which this Article focuses. It is also, however, an area where the literature on consumer preferences gives cause for skepticism.

A. The Privacy Paradox and Consumer Demand

Although heterogenous, consumers typically state a high preference for privacy. For example, surveys from the Pew Research Center show that more than 90% of American adults consider it “important” *who* can get *what* information about them, with supermajorities considering it “very important.”⁴⁰ Comparable data from Consumer Reports’ Digital Lab indicates that almost all Americans (96%) agree that “more should be done to ensure that companies protect the privacy of consumers.”⁴¹ The comprehensive Berkeley Consumer Privacy Surveys show similarly strong attitudes across many different contexts.⁴² Perhaps most strikingly, the Berkeley surveys show that large majorities would specifically support laws (1) “giv[ing] people the right to know everything that a website knows about them” (69%); (2) “requir[ing] websites and advertising companies to delete all stored information about an individual, if requested to do so” (92%); or (3) simply forcing advertisers to “immediately” delete all information on users’ internet activity (63%).⁴³

Gallup poll data likewise shows that the vast majority of internet users (83%) are either “very concerned” or “somewhat concerned” about the privacy of their personal information and activities online.⁴⁴

customer-data-designing-for-transparency-and-trust [https://perma.cc/H6Q9-YK6M] (“With the explosion of digital technologies, companies are sweeping up vast quantities of data about consumers’ activities, both online and off.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-22-106096, CONSUMER DATA: INCREASING USE POSES RISKS TO PRIVACY (Sept. 13, 2022), https://www.gao.gov/products/gao-22-106096 [https://perma.cc/GHP8-7QZE] (“As internet usage has exploded over the years, consumers’ personal data, online behavior, and locations are increasingly being tracked.”).

40. Mary Madden & Lee Rainie, *Americans’ Attitudes About Privacy, Security and Surveillance*, PEW RSCH. CTR. (May 20, 2015), https://pewresearch.org/internet/2015/05/20/americans-attitudes-about-privacy-security-and-surveillance/ [https://perma.cc/TJ4R-X5F5].

41. *Privacy Front & Center: Meeting the Commercial Opportunity to Support Consumers’ Rights*, CONSUMER REPS. (2020), https://thedigitalstandard.org/downloads/CR_PrivacyFrontAndCenter_102020_vf.pdf [https://perma.cc/X3QG-H92C].

42. See, e.g., Chris Jay Hoofnagle, Jennifer M. Urban & Su Li, *Privacy and Advertising Mail*, BERKELEY CTR. L. & TECH., Dec. 2012, at 1; Jennifer M. Urban, Chris Jay Hoofnagle & Su Li, *Mobile Phones and Privacy*, BERKELEY CTR. L. & TECH., July 2012, at 1; Chris Jay Hoofnagle, Jennifer M. Urban & Su Li, *Mobile Payments: Consumer Benefits & New Privacy Concerns*, BERKELEY CTR. L. & TECH., Apr. 2012, at 1. See generally *Berkeley Consumer Privacy Survey*, BERKELEY LAW, https://www.law.berkeley.edu/research/bclt/research/privacy-at-bclt/berkeley-consumer-privacy-survey [https://perma.cc/4A54-2GZ5].

43. Chris Jay Hoofnagle & Jennifer M. Urban, *Alan Westin’s Privacy* *Homo Economicus*, 49 WAKE FOREST L. REV. 261, 307 (2014).

44. *Computers and the Internet*, GALLUP (Oct. 2013 data), https://news.gallup.com/poll/1591/computers-internet.aspx [https://perma.cc/2Z6G-PKTH].

In particular, most consumers express that same concern about “invasion[s] of privacy” when using Facebook (74%) and Google (65%).⁴⁵ Further, 61% percent of internet users specifically say that “the methods internet advertisers use to target ads” are not justified against the “invasion[s] of privacy involved,” even if “they keep costs down so users can visit websites for free.”⁴⁶ In one sense, there appears to be a general consensus: consumers say they care a great deal about privacy and are dissatisfied with the status quo.⁴⁷

Consumers repeatedly *state* this high preference for privacy, but the preferences revealed through actual consumer behavior are more complicated. Though the details vary, an overwhelming number of experiments and observational studies confirms that consumers are apparently willing to shortchange their own privacy, often for very little (if anything) in return. Consider the following representative results from the literature:

- (1) When purchasing various mobile apps, the average consumer is only willing to make “a one-time payment of \$2.28 to conceal their online browser history, \$4.05 to conceal their list of contacts, \$1.19 to conceal their location, . . . and \$3.58 to conceal the contents of their text messages.”⁴⁸
- (2) Despite rating automated content analysis of emails as a “7.63 out of 10 on an intrusiveness scale” on average, just 35% of consumers are willing to pay any amount of money for an email service that doesn’t do so — and among that minority, the median willingness to pay was only “\$15 per year.”⁴⁹
- (3) Although 76% of Google users “say they would prefer for Google *not* to collect their information,” almost 86% of

45. *Id.* (Apr. 2018 data).

46. *Id.* (Dec. 2010 data).

47. Indeed, legal scholars have been noting these widespread privacy attitudes as background for more than two decades now. *See, e.g.*, Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1375 (2000) (“There is much disagreement about what comes next, but there is also a growing (if still inchoate) consensus that *something* needs to be done.”); Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1285 (2000) (footnotes omitted) (“People react to this in different ways. Some (although fewer than the Direct Marketing Association would have us believe) seem to appreciate the individual attention. Others find it chilling.”).

48. Scott J. Savage & Donald M. Waldman, *The Value of Online Privacy* 29 (2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2341311 [https://perma.cc/8H9H-FNQA].

49. Lior Jacob Strahilevitz & Matthew B. Kugler, *Is Privacy Policy Language Irrelevant to Consumers?*, 45 J. LEGAL STUD. 69, 78 (2016).

Google users are “unwilling to pay for privacy on Google’s search engine.”⁵⁰

- (4) Even when highly personal information (such as the “[n]umber of sex partners the subject has had”) is involved, “individuals almost always cho[ose] to sell their information and almost never elect to protect their information even for values at little as \$0.25.”⁵¹
- (5) Roughly 50% of Europeans would be willing to undergo 24/7 geolocation monitoring via their cell phones for a full calendar year in exchange for €100 or less, with 75% willing for €400 or less.⁵²

Again, this is only a small sample of a rather considerable body of research, spanning many years and different contexts.⁵³

50. Caleb S. Fuller, *Is the Market for Digital Privacy a Failure?*, 180 PUB. CHOICE 353, 365 (2019).

51. Jens Grossklags & Alessandro Acquisti, *When 25 Cents Is Too Much: An Experiment on Willingness-to-Sell and Willingness-to-Protect Personal Information*, SIXTH WORKSHOP ON ECON. INFO. SEC. 3, 8 (2007), <https://econinfosec.org/archive/weis2007/papers/66.pdf> [<https://perma.cc/7NSJ-LXAU>].

52. Dan Cvrcek, Marek Kumpost, Vashek Matyas & George Danezis, *The Value of Location Information: A European-Wide Study*, in SECURITY PROTOCOLS 112, 118 fig.1 (Bruce Christianson, Bruno Crispo, James A. Malcolm & Michael Roe eds., 2006).

53. See, e.g., Susanne Barth, Menno D.T. de Jong, Marianne Junger, Pieter H. Hartel & Janina C. Roppelt, *Putting the Privacy Paradox to the Test: Online Privacy and Security Behaviors Among Users with Technical Knowledge, Privacy Awareness, and Financial Resources*, 41 TELEMATICS & INFORMATICS 55, 65 (2019) (“[D]espite the fact users still claim to be concerned about the potential misuse of their personal data, they remain unwilling to invest either the time and effort or the money necessary to protect their privacy.”); Alastair R. Beresford, Dorothea Kübler & Sören Preibusch, *Unwillingness to Pay for Privacy: A Field Experiment*, 117 ECON. LETTERS 25, 25 (2012) (“Participants bought at most one DVD from one of two competing online stores. One store consistently required more sensitive personal data than the other, but otherwise the stores were identical. In one treatment, DVDs were one Euro cheaper at the store requesting more personal information, and almost all buyers chose the cheaper store.”); NICOLA JENTZSCH, SÖREN PREIBUSCH & ANDREAS HARASSER, EUR. NETWORK & INFO. SEC. AGENCY, STUDY ON MONETISING PRIVACY: AN ECONOMIC MODEL FOR PRICING PERSONAL INFORMATION 6 (2012) (finding that about one-third of consumers would be willing to pay a greater movie ticket price in exchange for less intrusive personal data collection from the seller); Bernardo Reynolds, Jayant Venkatanathan, Jorge Gonçalves & Vassilis Kostakos, *Sharing Ephemeral Information in Online Social Networks: Privacy Perceptions and Behaviours*, 2011 INTERACT PT. III 204, 211 (“In fact, there was little correlation between participants’ broader concern about privacy on Facebook and their actual posting practices: both the number of postings and the portion of those posts visible to a large audience appear to be independent of general privacy attitudes”); I.P.L. Png, *On the Value of Privacy from Telemarketing: Evidence from the “Do Not Call” Registry* 6 (2007) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1000533 [<https://perma.cc/9MJE-5EF6>] (deriving an estimated household demand for privacy from telemarketing calls as only “\$8.25 per year” on average); Hal R. Varian, Fredrik Wallenborg & Glenn Woroch, *The Demographics of the Do-Not-Call List*, 3 INST. ELEC. & ELECTRONICS ENGRS SEC. & PRIV. 24, 28 (2005) (“[C]onsumers can remove themselves from most lists in other ways [such as] by sending the Direct Marketing Association US\$5 per year. . . . About

This apparent conflict between consumers' stated and revealed preferences has been labeled a "privacy paradox."⁵⁴ Although further scholarship has not persuasively undermined the descriptive account above,⁵⁵ there is considerable disagreement as to the appropriate policy response. Some suggest that the low valuations of privacy expressed through revealed preferences should be vindicated through a relatively hands-off approach to privacy regulation.⁵⁶ In short, if consumers prefer cheap but intrusive services over more costly but discreet ones, then rigorous privacy regulation would not actually advance consumers' interests. Others suggest instead that the high valuations of privacy expressed through stated preferences should be given primacy, because cognitive limitations, deliberate behavioral manipulation, and outright misinformation are the actual causes behind consumers' low-privacy choices.⁵⁷ The apparent revealed preferences, in other words, should not be afforded much weight given the significant constraints and challenges real-world consumers face in privacy decision-making. Compromise positions suggest that the supposed paradox is really a myth — the result of comparing specific contextual privacy choices with generalized privacy attitudes, exacerbated by the inherent slipperiness of the concept of privacy.⁵⁸

48 million more people signed up on the national [Do-Not-Call] list, which was free. . . . [T]hose additional 48 million people presumably valued the freedom from being called at something more than US\$1 per year.”); Sarah Spiekermann, Jens Grossklags & Bettina Berendt, *E-Privacy in 2nd Generation E-Commerce: Privacy Preferences Versus Actual Behavior*, 2005 PROC. THIRD ACM CONF. ON ELEC. COM. 38, 45 (“We conducted an experiment in which we compared self-reported privacy preferences of 171 participants with their actual self-disclosing behavior during an online shopping episode. . . . [P]articipants displayed a surprising readiness to reveal private and even highly personal information. . . . includ[ing] many non-legitimate and unimportant personal questions. Participants also had to sign that they agreed to the selling of their data to an anonymous entity.”).

54. Patricia A. Norberg, Daniel R. Horne & David A. Horne, *The Privacy Paradox: Personal Information Disclosure Intentions Versus Behaviors*, 41 J. CONSUMER AFFS. 100, 101 (2007) (coining the term and analyzing the phenomenon at length); see, e.g., Barth et al., *supra* note 53.

55. *But see* Spyros Kokolakis, *Privacy Attitudes and Privacy Behaviour: A Review of Current Research on the Privacy Paradox Phenomenon*, 64 COMPUTS. & SEC. 122, 125–26 (2015) (collecting and evaluating such studies); Angela G. Winegar & Cass R. Sunstein, *How Much Is Data Privacy Worth? A Preliminary Investigation*, 42 J. CONSUMER POL’Y 425, 426 (2019).

56. See, e.g., James C. Cooper & Joshua D. Wright, *The Missing Role of Economics in FTC Privacy Policy*, in *CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY* (Jules Polonetsky, Evan Selinger & Omer Tene eds., 2017); Fuller, *supra* note 50, at 370–72.

57. See, e.g., Susanne Barth & Menno D.T. de Jong, *The Privacy Paradox – Investigating Discrepancies Between Expressed Privacy Concerns and Actual Online Behavior – A Systematic Literature Review*, 34 *TELEMATICS & INFORMATICS* 1038, 1045–47 (2017) (collecting research); Ari Waldman, *Cognitive Biases, Dark Patterns, and the “Privacy Paradox.”* 31 *CURRENT OP. PSYCH.* 105, 105 (2020); Jay P. Kesan, Carol Hayes & Masooda N. Bashir, *A Comprehensive Empirical Study of Data Privacy, Trust, and Consumer Autonomy*, 91 *IND. L.J.* 267, 271–72 (2016).

58. See, e.g., Daniel J. Solove, *The Myth of the Privacy Paradox*, 89 *GEO. WASH. L. REV.* 1, 6–7 (2021).

There is doubtless some truth to each position. Moreover, for purposes of this Article, they may be reconciled as follows: When most consumers are given the freedom to choose between competing privacy options under real-world decision-making constraints, they tend to exchange access to personal information for relatively small monetary gains. This may be because consumers genuinely place little value on their own privacy, but the truth is only revealed when they actually have to part with money. On the other hand, this may be because of limitations like imperfect information and transaction costs — consumers simply can't "learn enough about privacy risks to make informed decisions about . . . the ways in which personal data will be combined, aggregated, and analyzed over the years by thousands of organizations."⁵⁹ It is likely a combination of both, but either kind of dynamic complicates and undermines the relationship between market competition and privacy.

B. Further Economics of Personal Data

The privacy paradox is a significant reason to doubt the efficacy of competition as a privacy policy lever, but it is not alone in that regard. On the consumer side, privacy decisions exhibit both micro- and macro-level externalities, and such decisions are naturally sticky due to duplicative disclosures and switching costs between firms. On the firm side, there are considerable economies of scale with respect to collecting, using, and protecting personal data — and product quality itself exhibits certain inverse relationships to user privacy.

Beginning with externalities, consumers' privacy decisions do not solely affect their own personal data. Elsewhere, I have described the phenomenon of "vicarious surveillance": one consumer's low-privacy market choice is externalized onto other persons because of their interactions and connections.⁶⁰ For example, imagine a hypothetical market for email services with multiple privacy options. Some providers might offer a high-privacy, subscription-based model, while others offer a low-privacy, free model based on monetizing the data obtained by automatically scanning the users' emails. Even if someone subscribes to the high-privacy service, any email sent to or received from a low-privacy user will still be mined for data by the other service provider — potentially revealing a great deal about the subscriber. Indeed, the Cambridge

59. *Id.* at 5.

60. See Matthew Sipe, *The Market for Privacy*, YALE J.L. & TECH. ONLINE (Dec. 2013), <https://yjolt.org/blog/market-privacy> [<https://perma.cc/7KVK-XYNK>] (coining the term "vicarious surveillance").

Analytica scandal⁶¹ worked on precisely this basis; only 270,000 Facebook users actually downloaded the surveilling app, but access to their “news feed, timeline, posts, and messages” enabled Cambridge Analytica “to infer valuable information about more than 50 million Facebook users, which it deployed for designing personalized political messages and advertising.”⁶²

Network technologies and platform services are particularly susceptible to this kind of vicarious surveillance, but consider as well data that intrinsically links people, like genetic information. One person’s use of a genealogical service like 23andMe effectively discloses information about even distant relations. This is far from hypothetical; the infamous Golden State Killer was ultimately caught by precisely such means, with police matching crime scene evidence to a far-flung cousin’s genealogical-service sample.⁶³ The connections between genes, health, and behavior suggest that many kinds of data would exhibit similar effects merely on different scales. All these forms of vicarious surveillance drastically reduce the incentive for an individual to pay a premium for high-privacy providers because their data is still subject to the choices of less privacy-sensitive consumers. As individuals on the margin shift accordingly from high-privacy providers to low-privacy providers, the incentive only reduces further until the market for privacy perhaps unravels entirely.⁶⁴

These externalities also exist on a macro level in the form of shifting culture. With social media, for example, it becomes more difficult to opt out of (or even minimize) engagement the more ubiquitous it becomes. Consider how adolescents now report feeling significant pressure to post content about their lives online to obtain their peers’ approval.⁶⁵ In equal measure, consider how employers now routinely investigate social media presence and rely on social media networks as part of their hiring process.⁶⁶ A non-trivial share of U.S. employers

61. See generally Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y. TIMES (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> [<https://perma.cc/K7GP-9YK5>].

62. Daron Acemoglu, Ali Makhdoumi, Azarakhsh Malekian & Asuman Ozdaglar, *Too Much Data: Prices and Inefficiencies in Data Markets*, 14 AM. ECON. J. MICROECON. 218, 219 (2019).

63. Natalie Ram, *Genetic Privacy After Carpenter*, 105 VA. L. REV. 1357, 1360–61 (2019) (describing the ramifications of the Golden State Killer case and similar uses of genetic resources in law enforcement).

64. For the seminal treatment of unwinding market dynamics, looking at an analogous dynamic in the market for used cars, see generally George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

65. See, e.g., Monica Anderson & Jingjing Jiang, *Teens’ Social Media Habits and Experiences*, PEW RSCH. CTR. (Nov. 28, 2018), <https://www.pewresearch.org/internet/2018/11/28/teens-and-their-experiences-on-social-media/> [<https://perma.cc/L9L3-L3BU>].

66. See, e.g., *71% of Hiring Decision-Makers Agree Social Media is Effective for Screening Applicants*, EXPRESS EMP. PROS. (Oct. 13, 2020), <https://www.expresspros.com/News>

(21%) indicate that they are unlikely even to consider a candidate who doesn't have a social media presence.⁶⁷ Through mechanisms like these, a broad culture of oversharing can penalize the privacy-conscious — as can a broad culture of convenience. As tastes shift, taxis are supplanted by ride-sharing apps, brick-and-mortar stores are replaced by online shopping, and more entertainment consumption is moved onto digital platforms. These technological shifts, ultimately driven by individual consumer choices, have naturally made the collection of personal data much cheaper and easier than it otherwise would be. And, to the extent that older paradigms are squeezed out of the market entirely, even wary consumers will still eventually be driven to the new ones.

Moreover, an individual consumer's privacy choices across different firms are naturally synchronous and sticky. In part, this is because of the phenomenon of duplicative disclosures: personal data is unique to the person, not the service or platform, so disclosure of a piece of information to one low-privacy firm naturally reduces the incentive to shield that same piece of information from other firms. To take an extreme example, one can imagine a world with only one cell phone service provider constantly tracking all its users' locations and routinely selling that data to any interested third parties. Such a user then has very little reason to pay a premium to avoid, say, a rideshare app like Uber or Lyft from also tracking and selling their location data. Where the same data is already being bought, sold, and analyzed, the marginal cost of disclosing it again is fairly low. In other words, if your front door is already missing, you will not be willing to pay for locks on your windows. Even in less extreme cases, the dynamic is the same; it is the lowest-privacy service a consumer uses that largely determines how much they should value protecting similar data elsewhere. In turn, that means it only takes a lack of substitutes in a few markets (perhaps one) to unravel the demand for privacy across many others by synchronizing privacy at a low level.

Even where there are substitutes in a given market, consumers face significant switching costs with respect to personal data — making their choices sticky. First and foremost, making an informed comparison between firms requires engaging with multiple complex terms of service, opaque defaults, and affirmative user settings.⁶⁸ Even where consumers can overcome those decision-making costs, they often have no ability to compel their current firm to delete their data when they

room/America-Employed/71-of-Hiring-Decision-Makers-Agree-Social-Media-is-Effective-for-Screening-Applicants.aspx [https://perma.cc/QU3Q-7XJL] (relying on survey data commissioned from The Harris Poll).

67. *Id.*

68. *See, e.g., supra* notes 57–58 (addressing some of the practical difficulties and cognitive limitations that bound informed privacy decision-making).

switch to a new one — undermining a great deal of the incentive to switch for privacy purposes in the first place. All switching might accomplish, in some cases, is allowing two firms to hold the consumer’s personal data instead of one. Where the user is also unable to copy their data from one firm to another, there may be further costs to switching still — that is, losing all the potential upside of their data collected so far. Other regimes such as the European Union (“EU”) specifically enshrine rights of erasure and portability,⁶⁹ but the United States currently does not. As a result, U.S. consumers face higher costs and receive lower benefits from actually making a privacy-related switch between firms.

Turning from consumers to firms, the collection and use of personal data exhibit major economies of scale. To start, digital platforms like Facebook, Amazon, and Google require high initial fixed costs to develop but very low marginal costs per additional user or transaction.⁷⁰ Put differently, the average cost of generating personal data from users tends to decrease with firm size. Moreover, network effects make their services more valuable as the number of other users and transactions grows.⁷¹ As a result, users will generally be more willing to part with their data for larger firms’ services. These firms can also frequently capitalize on economies of scope when integrating additional products into their ecosystems.⁷² When Amazon entered the fresh grocer market, for example, it could use the data it already held on shelf-stable food product sales to help predict aspects of consumer demand and make targeted recommendations for its preexisting user base.⁷³ Fundamentally, personal data is more useful in the aggregate:

The monetary, economic and social value of personal data is likely to be governed by non-linear, increasing returns to scale. The value of an individual record, alone, may be very low but the value and usability of the record increases as the number of records to compare it with increases. These network effects have

69. GDPR, *supra* note 38, recitals 65, 68.

70. See Yan Carrière-Swallow & Vikram Haksar, *The Economics and Implications of Data*, INT’L MONETARY FUND, no. 13, 2019, at 1, 9, <https://www.elibrary.imf.org/view/journals/087/2019/013/article-A001-en.xml> [<https://perma.cc/2D7N-57ES>].

71. JASON FURMAN, HM TREASURY, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 35 (Mar. 2019), <https://www.gov.uk/government/publications/unlocking-digital-competition-report-of-the-digital-competition-expert-panel> [<https://perma.cc/7Q7G-LMJ6>].

72. *Id.* at 32.

73. Eric Anderson & Florian Zettelmeyer, *How Amazon Will Use Analytics To Shake Up the Supermarket Industry*, FORBES (Sept. 6, 2017), <https://www.forbes.com/sites/forbesleader/shipforum/2017/09/06/how-amazon-will-use-analytics-to-shake-up-the-supermarket-industry/?sh=950eb5d5be9e> [<https://perma.cc/3G2A-EMKZ>] (“On the first day of its acquisition of Whole Foods, Amazon lowered the store’s prices on beef, organic eggs, and avocados.”).

implications for policy because the value of the same record in a large database could be much more efficiently leveraged than the same record in a much smaller data set.⁷⁴

The nonrival nature of personal data also allows for increasing returns to scale when combined with a firm's other inputs; more complementary capital equals more potentially advantageous combinations.⁷⁵ All of these dynamics will tend to push a market driven by personal data towards a relatively smaller number of firms.

Equally important, the *protection* of personal data exhibits economies of scale. To some extent, this is an intrinsic feature of privacy — all else being equal, a greater number of eyes on the same piece of personal information is a greater privacy intrusion. For a simple example, consider the balkanization of the video streaming market. When Netflix held a near-monopoly position, consumers only needed to disclose their credit card information, address, viewing behavior, etc., to a single firm to obtain most of the market's content. Today, an equivalently content-hungry consumer must make such disclosures to perhaps a dozen separate firms.⁷⁶ Privacy regulators, it should be noted, experience analogous economies of scale; it is considerably easier to police a few large, well-resourced, and enduring entities than it is to play whack-a-mole with an endless number of small ones. On one hand, larger firms may be more able to engage in government capture, resisting efforts towards privacy regulation in the first place. On the other hand, larger firms may also be better positioned to resist government overreach in order to *protect* consumers' privacy. It is difficult to imagine, for example, a firm

74. OECD, EXPLORING THE ECONOMICS OF PERSONAL DATA: A SURVEY OF METHODOLOGIES FOR MEASURING MONETARY VALUE, OECD DIGITAL ECONOMY PAPERS NO. 220, at 34 (2013); *see also* ALLEN GRUNES & MAURICE STUCKE, BIG DATA AND COMPETITION POLICY ¶¶ 2.04, 2.16 (2016) (highlighting “volume” and “variety” as two of the core principles of data valuation).

75. Charles I. Jones & Christopher Tonetti, *Nonrivalry and the Economics of Data*, 110 AM. ECON. REV. 2819, 2820 (2020) (“Because capital is rival, each firm must have its own building, each worker needs her own desk and computer, and each warehouse needs its own collection of forklifts. But if capital were nonrival, it would be as if every auto worker in the economy could use the *entire* industry's stock of capital at the same time. Clearly this would produce tremendous economic gains. This is what is possible with data.”).

76. *See* Derek Baine, *How Many Streaming Services Can People Consume? OTT Services & vMVPDs Continue to Soar*, FORBES (Dec. 22, 2021), <https://www.forbes.com/sites/derekbaine/2021/12/22/how-many-streaming-services-can-people-consume-ott-services--v-mvpds-continue-to-soar/?sh=7bdaf4f131bb> [<https://perma.cc/3MHD-2TYV>] (“There are close to 50 services in North America alone, from well-known brands like Amazon Prime, Apple TV+, Disney+, HBO Now, Netflix, Paramount+ & Peacock to some you probably have never heard of like Break Movies, BritBox, Docurama, Feeln, Snagfilms and Viki.”).

with less clout than Apple successfully resisting federal investigators' demands to weaken product security and install abusable backdoors.⁷⁷

Moreover, the technologies and procedures for robust data protection tend to generate returns to scale. Intuitively, the fixed costs of systematically implementing such protection — ranging from physical hardware to cybersecurity personnel — are quite high but once implemented, the cost of putting one more consumer's data under the aegis will be rather low.⁷⁸ As a result, small businesses “represent prime attack targets for many hackers, who favor highly automated, repeatable attacks against these more vulnerable targets.”⁷⁹ Indeed, since the EU adopted its robust GDPR privacy regime, it is small businesses who have faced the greatest struggle in complying (and who have exited markets as a result).⁸⁰ Scholars have found analogous effects of privacy

77. See Tim Cook, *A Message to Our Customers*, APPLE (Feb. 16, 2016), <https://www.apple.com/customer-letter/> [<https://perma.cc/SYQ7-SGKR>]; Leander Kahney, *The FBI Wanted a Back Door to the iPhone. Tim Cook Said No*, WIRED (Apr. 16, 2019, 12:43 PM) <https://www.wired.com/story/the-time-tim-cook-stood-his-ground-against-fbi/> [<https://perma.cc/D82X-R9AD>]; Alina Selyukh, *A Year After San Bernardino And Apple-FBI, Where Are We On Encryption?*, NPR (Dec. 3, 2016), <https://www.npr.org/sections/alltechconsidered/2016/12/03/504130977/a-year-after-san-bernardino-and-apple-fbi-where-are-we-on-encryption> [<https://perma.cc/2XWT-7KR4>].

78. See, e.g., Noah J. Phillips, Comm'r, Fed. Trade Comm'n, *Keep It: Maintaining Competition in the Privacy Debate*, Remarks at the Internet Government Forum USA (July 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1395934/phillips_-_internet_governance_forum_7-27-18.pdf [<https://perma.cc/UM2S-R97N>] (“That’s not ironic—it’s economic, exactly how economies of scale work. Resources devoted to compliance can be scaled, and could have been spent on innovation, wages, and so on.”); James Campbell, Avi Goldfarb & Catherine Tucker, *Privacy Regulation and Market Structure*, 24 J. ECON. & MGMT. STRATEGY 47, 47 (2015) (“Therefore, though privacy regulation imposes costs on all firms, it is small firms and new firms that are most adversely affected. . . . [T]his negative effect will be particularly severe for goods where the price mechanism does not mediate the effect, such as the advertising-supported internet.”).

79. *Verizon 2011 Data Breach Investigations Report: Breaches Increased Dramatically While Data Loss Was at All-Time Low*, VERIZON (Apr. 19, 2011), <https://www.verizon.com/about/news/verizon-2011-data-breach-investigations-report-breaches-increased-dramatically-while-data-loss> [<https://perma.cc/8D69-DPRA>]; see also Edward Segal, *Small Businesses Are More Frequent Targets of Cyberattacks Than Larger Companies*, FORBES (Mar. 16, 2022), <https://www.forbes.com/sites/edwardsegal/2022/03/30/cyber-criminals/?sh=4d0de5de52ae> [<https://perma.cc/Y9DF-PXXB>].

80. See, e.g., Aryamala Prasad, *Unintended Consequences of GDPR: A Two-Year Look-back*, GEO. WASH. REG. STUD. CTR. (Sept. 2, 2020), <https://regulatorystudies.columbian.gwu.edu/unintended-consequences-gdpr> [<https://perma.cc/3QF3-WHRX>] (“While the [GDPR] has empowered citizens, it has also negatively affected small businesses and increased market concentration.”); Garrett A. Johnson, Scott K. Shriver & Samuel G. Goldberg, *Privacy & Market Concentration: Intended & Unintended Consequences of the GDPR 1* (Mar. 2020) (unpublished manuscript), https://www.ftc.gov/system/files/documents/public_events/1548288/privacycon-2020-garrett_johnson.pdf [<https://perma.cc/Q5YP-VP7B>] (“[The GDPR] reduced data sharing online, but had the unintended consequence of increasing market concentration”); see also 2019 GDPR SMALL BUSINESS SURVEY, GDPR.EU (May 2019), <https://gdpr.eu/wp-content/uploads/2019/05/2019-GDPR.EU-Small-Business-Survey.pdf> [<https://perma.cc/LKD8-URME>] (noting that small businesses “have the least capacity to conform to new regulations,” and finding that at least half of small businesses are not actually in compliance with the GDPR).

regulation in the few U.S. markets heavily subject to them, like finance and healthcare.⁸¹ Economies of scope are also a factor here; a closed, vertically integrated system naturally presents fewer opportunities for breaches and errors than one in which data must be regularly transferred between and stored among separate entities (perhaps with varying protocols as well). Putting these together, a market with numerous small entities may be less suitable for protecting personal data than a market with fewer large ones.

Finally, consider how a firm's use of personal data can potentially enhance its products or services, putting privacy in a complicated relationship with quality and, in turn, price and competition. Scholars have already recognized that intrusions on privacy can be considered part of the price that a firm charges.⁸² For example, Facebook does not charge its users any money; instead, using information gathered from those users' activity, Facebook is able to sell highly targeted (and hence, far more valuable) advertising space to third parties on its platform.⁸³ The reduction in privacy is, in that sense, part of the price of admission for users to Facebook's network. Meanwhile, other scholars have suggested that privacy (or lack thereof) should be considered a component of the quality of the good or service.⁸⁴ To take the same example, a user with a strong privacy preference might have a worse subjective experience with Facebook's product due to its data-collection practices — not

81. See ALEX MARTHEWS & CATHERINE TUCKER, ECON. STUD. BROOKINGS, PRIVACY POLICY AND COMPETITION 12–15 (Dec. 2019), <https://www.brookings.edu/wp-content/uploads/2019/12/ES-12.07.19-Marthews-Tucker.pdf> [<https://perma.cc/XFV6-C5SW>].

82. See, e.g., Michal S. Gal & Daniel L. Rubinfeld, 80 ANTITRUST L.J. 521, 527 (2016) (“Finally, the ‘price’ of the good that is offered for free is often seen in non-monetary forms, such as information that is revealed about consumer preferences. . . . Google serves as an example: data on consumer preferences gained through the provision of free search services serve as inputs in the market for information on consumer preferences.”); John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 166–67 (2015) (“[I]nformation can also be surrendered (i.e., paid) by customers in exchange for the object sought. . . . Customers frequently surrender information as payment in exchange for access to . . . products like webmail, search, social networking, and creative-content services. This personal information serves as a form of currency, taking the place of money.”).

83. See Len Sherman, *Why Facebook Will Never Change Its Business Model*, FORBES (Apr. 16, 2018), <https://www.forbes.com/sites/lensherman/2018/04/16/why-facebook-will-never-change-its-business-model/?sh=7c720a1c64a7> [<https://perma.cc/SEZ2-3FGL>] (“By now, it’s widely understood that Facebook’s voracious appetite for user data is driven by their business model which charges advertisers for access to precisely targeted segments of their massive consumer database. No one knows more about more consumers than Facebook.”).

84. See, e.g., Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1009 (2013) (“Just as a car buyer might choose a Volvo over a Ford because the Volvo is said to have better crash impact protection than the Ford, so too might a search engine user choose DuckDuckGo over Google because of the privacy DuckDuckGo offers.”); Peter Swire, *Protecting Consumers: Privacy Matters in Antitrust Analysis*, CTR. FOR AM. PROGRESS (Oct. 19, 2007), <https://www.americanprogress.org/article/protecting-consumers-privacy-matters-in-antitrust-analysis/> [<https://perma.cc/R7Z3-3QB6>] (“[P]rivacy harms can lead to a reduction in the *quality of a good or service*, which is a standard category of harm that results from market power. Where these sorts of harms exist, it is a normal part of antitrust analysis to assess such harms and seek to minimize them.”).

unlike a consumer discovering that the soda they purchased tastes bad due to the use of cheap, inferior ingredients.

Put differently, for data-hungry business models, privacy cannot be easily reduced to a single dimension of competition. Equally essential but more challenging, privacy can't be reduced to a single *polarity* either, like “more is better” and “less is worse.” Collecting and using personal data may be part of the effective price the firm charges, but it also contributes to a decrease in the actual monetary price. In a similar fashion, collecting and using personal data may have an adverse impact on quality for users that would prefer less intrusion, but it also contributes to an increase in other aspects of quality:

By collecting more data about their users, publishers can improve their products Do more searches on Google, and Google learns more about you. Combine your search data with what Google knows from your Gmail and other interactions with Google properties, as well as reports from tracking cookies placed by its display advertising network, and Google has a pretty good idea of what you like. Google can use this information to provide you with better search and map results, as well as more relevant ads, both of which will help Google's bottom line.⁸⁵

These kinds of benefits are in addition to indirect improvements to quality, such as ad revenue streams reinvested in developing the underlying product, or increasing the number of efficient exchanges created by genuinely useful, targeted results.⁸⁶ When these benefits are present, it becomes even more difficult to characterize a low-privacy service provider as necessarily capitalizing on a lack of competition. This is not, in other words, the straightforward case of a producer switching to objectively inferior inputs but charging the same old price because it has no rivals, thereby increasing its profits at the expense of consumer welfare. When a firm instead increases its price and uses it to enhance

85. James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 GEO. MASON. L. REV. 1129, 1130 (2013).

86. *See id.* at 1136–37 (“[T]he higher revenue streams from targeted ads allow publishers to provide higher quality platforms and content for the same price of \$0. [Also,] targeted ads generate more revenue only because they are more effective at matching buyers and sellers — and absent fraud or duress, a sale represents a value-creating exchange.”). Professor Howard Beales, former Director of the Bureau of Consumer Protection at the FTC, has made a similar argument empirically. *See* Howard Beales, *The Value of Behavioral Targeting* 3 (Apr. 8, 2010) (study commissioned by Network Advertising Initiative), https://www.ftc.gov/sites/default/files/documents/public_comments/privacy-roundtables-comment-project-no.p095416-544506-00117/544506-00117.pdf [<https://perma.cc/Q8GR-YKQW>] (“[Targeted advertising] is more successful than standard run of network advertising, creating greater utility for consumers”).

quality, it may just as easily be in response to the presence of competitive threats.

To summarize, increased market competition among Big Tech is unlikely to yield greater personal data privacy for consumers. Under real-world decision constraints, consumers frequently exchange their privacy for very low dollar amounts — suggesting that, at least in some contexts, firms providing more robust privacy protection would actually be at a competitive disadvantage. Moreover, consumers’ low-privacy decisions exhibit both micro- and macro-level externalities, which in turn make high-privacy choices less attractive to other consumers. This is exacerbated further still by dynamics that suggest an individual consumer’s own low-privacy choices in one market will lead to similarly low choices in other markets. Their low-privacy choices are also sticky once made, meaning consumers are less likely to switch between competitors on privacy when they exist. On the firm side, there are major economies of scale with respect to the acquisition, use, and protection of personal data, directly undermined by reductions in market concentration. Finally, for some goods and services, privacy protection is in tension not only with price, but also with other aspects of product quality — robust competition over those other aspects may itself provoke a reduction in privacy.

III. ANTITRUST THEORY, FROM BRANDEIS TO BORK AND BACK

The statutes governing U.S. antitrust law — the Sherman Antitrust Act of 1890,⁸⁷ the Clayton Antitrust Act of 1914,⁸⁸ and the Federal Trade Commission Act of 1914⁸⁹ — are not models of textual specificity. In particular, the Sherman Act remains the core of antitrust law today, with two central proscriptions: § 1 makes illegal “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce”;⁹⁰ and § 2 makes it illegal to “monopolize, or attempt to monopolize, or . . . conspire . . . to monopolize”⁹¹ Other sections address certain procedural or jurisdictional issues,⁹² as well as some specific subject-matter carveouts,⁹³ but they do not provide any further clarity on the nature or key terms of §§ 1 and 2. Of course, a literal interpretation of either section creates immediate problems. For one, all contracts

87. 15 U.S.C. §§ 1–7 (2020).

88. 15 U.S.C. §§ 12–27 (2020).

89. 15 U.S.C. § 45 (2020).

90. 15 U.S.C. § 1 (2020).

91. 15 U.S.C. § 2 (2020).

92. *See, e.g.*, 15 U.S.C. § 9 (2020) (“Jurisdiction of Courts; Duty of United States Attorneys; Procedure”).

93. *See, e.g.*, 15 U.S.C. § 17 (2020) (“Antitrust Laws Not Applicable to Labor Organizations”).

“restrain” trade or commerce — by definition, the two contracting parties are bound to follow a certain course of conduct to avoid incurring the costs of breach.⁹⁴ For another, a true monopoly requires one hundred percent market share⁹⁵ — meaning no firm, even Standard Oil or U.S. Steel, could really be said to have “monopolized” their industry.

Accordingly, although the Supreme Court attempted fidelity to the Sherman Act’s literal text early on,⁹⁶ it was relatively quick to change its approach.⁹⁷ For over a century now, courts have instead adopted a “common-law,” almost “constitutional” approach to applying the Act.⁹⁸ That is, over time and through precedent, the courts have produced an evolving framework of tests, presumptions, and mitigating factors wholly absent from the text of the Sherman Act itself. In other words, it is not legislative action that tells American antitrust law’s history. That history is told instead through the changes in economic and political theory that came to be accepted — or rejected — through caselaw.

94. *See* *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”); *see also* Matthew Sipe, *Patent Privateers and Antitrust Fears*, 22 MICH. TELECOMM. & TECH. L. REV. 191, 223 n.174 (2016).

95. *See, e.g.*, D.N. DWIVEDI, PRINCIPLES OF ECONOMICS 247 (2d ed. 2009) (“[A] monopoly market is one in which there is only one seller of a product having no close substitute.”); U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES 18 n.9 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf> [<https://perma.cc/KGA8-TGD8>] (defining a “pure monopoly” as a market with Herfindahl-Hirschman Index of 10,000, meaning a single firm with market share of 100%); R.S. Khemani & D.M. Shapiro, *Glossary of Statistical Terms*, ORG. FOR ECON. COOP. & DEV., <https://stats.oecd.org/glossary/detail.asp?ID=3262> [<https://perma.cc/3PVE-9MFG>] (“Monopoly is a situation where there is a single seller in the market.”).

96. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 328 (1897) (emphasis added) (“When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several states, etc., the plain and ordinary meaning of such language is *not* limited to that kind of contract alone which is an unreasonable restraint of trade, but *all* contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by [C]ongress.”).

97. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911) (observing that the Sherman Act’s text is “broad enough to embrace every conceivable contract or combination which could be made,” and thus holding that it “necessarily call[s] for the exercise of judgment” by applying the “standard of reason which had been applied at the common law”).

98. *See, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (“From the beginning the Court has treated the Sherman Act as a common-law statute.”); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (“[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act”); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972) (comparing the Sherman Act to “the Magna Carta” and “the Bill of Rights”); *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 600 (1936) (“We have said that the Sherman Anti-trust Act . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions.”).

The first major epoch, running from the early to mid-1900s, is best characterized as populist in nature⁹⁹ — a reaction to the emergence of gigantic trusts in oil, rail, steel, and other industries.¹⁰⁰ Caselaw from this period evinces a sharp distrust of concentration of power, especially economic power, as well as an abiding concern with protecting individual liberty through free and fair trade:

In business or trading combinations, [trusts] may even temporarily, or perhaps permanently, reduce the price of the article traded in or manufactured, by reducing the expense inseparable from the running of many different companies for the same purpose. Trade or commerce under those circumstances may nevertheless be badly and unfortunately restrained by driving out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings. Mere reduction in the price of the commodity dealt in might be dearly paid for by the ruin of such a class and the absorption of control over one commodity by an all-powerful combination of capital.¹⁰¹

In *United States v. Aluminum Co. of America*, for example, Judge Learned Hand observed that “great industrial consolidations are inherently undesirable, regardless of their economic results . . . because of the helplessness of the individual before them.”¹⁰² As a result, a firm could rightly be condemned under the antitrust laws for merely growing — for “anticipat[ing] increases in . . . demand” and “be[ing] prepared to supply them.”¹⁰³ In *Brown Shoe Co. v. United States*, Chief

99. See, e.g., ANDREW I. GAVIL, JONATHAN B. BAKER & WILLIAM KOVACIC, ANTITRUST LAW IN PERSPECTIVE 69 (3d ed. 2017) (“This early association of antitrust with populist themes has remained an enduring feature of public debate over antitrust policy, and remains an important source of the continuing popular appeal of antitrust enforcement, especially against large firms.”); KLOBUCHAR, *supra* note 10, at 81, 119; cf. 21 CONG. REC. 2456–57 (1890) (statement of Sen. Sherman) (“If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor we should not submit to an autocrat of trade . . .”).

100. See generally Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605, 609–24 (2012) (outlining the development and deployment of trusts as a novel legal entity at the turn of the century, as well as its influence on early Sherman Act caselaw).

101. *Trans-Missouri*, 166 U.S. at 323.

102. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

103. *Id.* at 431 (“Nothing compelled [defendant] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened . . .”).

Justice Warren emphasized the need “to promote competition through the protection of viable, small, locally owned businesses,” even if “occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”¹⁰⁴

Many jurists in the populist antitrust period echoed these same themes,¹⁰⁵ but the work and philosophy of Justice Louis Brandeis had a uniquely powerful influence. Even before his nomination to the Supreme Court in 1916 — when he was simply “a lawyer by profession” — Brandeis had already advocated at length for stronger checks against the consolidation of economic power.¹⁰⁶ Speaking to Congress in 1912 regarding the titanic U.S. Steel Corporation, he was unequivocal: “We can not maintain democratic conditions in America if we allow organizations to arise in our midst with [this] power.”¹⁰⁷ As part of a series of essays in 1913 and 1914, he coined the phrase “curse of bigness” to describe what he saw as an inevitable panoply of evils accompanying market concentration.¹⁰⁸ He was, moreover, a principal architect of the FTC — arguing that a stronger administrative apparatus

104. *Brown Shoe Co. v. United States*, 370 U.S. 294, 345 (1962).

105. For further high-profile examples, see, for example, *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) (“The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. [It is] a charter of freedom”); *FTC v. Morton Salt Co.*, 334 U.S. 37, 42–43 (1948) (“[W]hile certain purchasers were enjoying one or more of respondent’s standard quantity discounts, some of their competitors made purchases in such small quantities that they could not qualify Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer’s quantity purchasing ability.”); *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 371 (1963) (“We are clear, however, that a merger . . . is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress . . .”).

106. *Control of Corporations, Persons, and Firms Engaged in Interstate Commerce Before the S. Comm. On Interstate Commerce*, 62d Cong. 1146–48 (1913) (Statement of Louis D. Brandeis, Esq. Attorney at Law, of Boston, Mass.). Though he chose not to introduce himself as such, Brandeis was actually President Woodrow Wilson’s chief economic adviser at the time. THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 81–82 (1984).

107. *United States Steel Corporation: Hearings Before the House Comm. On Investigation of United States Steel Corporation*, 62d Cong. 2862 (1912) (Statement of Mr. Louis D. Brandeis).

108. Louis D. Brandeis, *A Curse of Bigness*, *HARPER’S WKLY.*, Jan. 10, 1914, at 18 (“Size, we are told, is not a crime. But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put. And it is size attained by combination, instead of natural growth, which has contributed so largely to our financial concentration.”). The full collection of Brandeis’s essays from this series can be freely accessed via the Louis D. Brandeis School of Law Library special collections page. *Other People’s Money by Louis D. Brandeis*, LOUIS D. BRANDEIS SCH. L. LIBR., <https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/other-peoples-money-by-louis-d.-brandeis> [<https://perma.cc/8JDL-ZQXF>].

was needed because, in his view, the courts had *still* not gone far enough in checking economic power.¹⁰⁹

Shortly after joining the Court, Brandeis wrote one of the most cited antitrust opinions of all time, *Chicago Board of Trade v. United States*.¹¹⁰ There, he set forth the classic articulation of the rule-of-reason framework for restraints of trade — a framework still cited and applied today, albeit weighted and approached differently.¹¹¹ Elsewhere, he presaged the anticompetitive potential of overly enforced intellectual property rights.¹¹² In dissent, he continued to criticize the Court at times for what he perceived to be an insufficiently aggressive stance against monopoly.¹¹³ And regarding bigness, he never wavered:

There is a widespread belief that the existing unemployment is the result, in large part, of the gross inequality in the distribution of wealth and income which giant corporations have fostered; that by the control which the few have exerted through giant corporations individual initiative and effort are being paralyzed, creative power impaired and human happiness lessened; that the true prosperity of our past came not from big business, but through the courage, the energy, and the resourcefulness of small men; that only by releasing from corporate control the faculties of the unknown many, only by reopening to them the opportunities for leadership, can confidence in our future be restored and the existing misery be overcome; and that only through participation by the many in the responsibilities and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.¹¹⁴

109. See MCCRAW, *supra* note 106, at 82 (“The most influential critic of trusts during his generation, Brandeis served from 1912 until 1916 as Woodrow Wilson’s chief economic adviser and was regarded as one of the architects of the FTC. Above all else, Brandeis exemplified the anti-bigness ethic without which there would have been no Sherman Act, no antitrust movement, and no Federal Trade Commission.”).

110. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918); see also Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 734 (2012) (explaining the significance of *Chicago Board of Trade* within antitrust jurisprudence).

111. See *infra* Section IV.B (outlining the modern rule-of-reason approach).

112. *Carbice Corp. v. Am. Pat. Dev. Corp.*, 283 U.S. 27, 32–33 (1931).

113. See, e.g., *Bedform Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n*, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting) (“The Sherman Law was held in *United States v. United Shoe Machinery Co.*, 247 U.S. 32, . . . to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America.”).

114. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 580 (1933) (Brandeis, J., dissenting).

Even after leaving the Court in 1939, his influence persisted — particularly through his successor, Justice William Douglas. Brandeis’s writing on size and competition shaped Douglas’s thinking and jurisprudence in turn,¹¹⁵ with his opinions continuing to rail against the “problem of bigness” for decades after the former’s departure.¹¹⁶

This epoch of populist antitrust — of suspicion against bigness itself — arguably reached its “high-water mark”¹¹⁷ in *United States v. Von’s Grocery Co.*, where the Court prohibited the merger of two grocery stores with less than ten percent combined market share.¹¹⁸ As Justice Potter Stewart observed at the time in dissent, “[t]he sole consistency” in antitrust jurisprudence had become “the Government always wins.”¹¹⁹ But the increasingly sophisticated industrial organization economics of the 1950s and 1960s had already begun to soften antitrust law’s harder edges.¹²⁰ In particular, the greater use of modeling and empirics in antitrust cases — though first in service of market structuralism — ultimately paved the way for a new era: the Chicago School.

Chicago School adherents argued, in brief, that a clearer limiting principle for antitrust adjudication could be found in the economic concept of efficiency.¹²¹ That is, the goal of antitrust ought to be in

115. See generally Orbach & Rebling, *supra* note 100, at 630–32; C. Paul Rogers III, *The Antitrust Legacy of Justice William O. Douglas*, 56 CLEV. ST. L. REV. 895, 905–06 (2008).

116. See, e.g., *United States v. Columbia Steel Co.*, 334 U.S. 495, 535 (1948) (Douglas, J., dissenting) (“We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. The Curse of Bigness shows how size can become a menace — both industrial and social.”); *United States v. Griffith*, 334 U.S. 100, 107 (1948) (“[M]onopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised.”); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 540 (1973) (Douglas, J., concurring) (“[The] argument in favor of the efficiency of monopoly proceeds upon the assumption, in the first place, . . . that with increase of size comes increase of efficiency. If any general proposition could be laid down on that subject, it would, in my opinion, be the opposite.”).

117. Dennis A. Yao, Comm’r, Fed. Trade Comm’n, Challenges in Merger Analysis: The 1992 Merger Guidelines and Beyond, Proposed Remarks Before the Illinois State Bar Association and the Chicago Bar Association (Dec. 2, 1992), at 3–4, <https://www.ftc.gov/news-events/news/speeches/challenges-merger-analysis-1992-merger-guidelines-beyond> [<https://perma.cc/4QUV-VRN2>]; see also BERNICE ROTHMAN HASIN, CONSUMERS, COMMISSIONS, AND CONGRESS: LAW, THEORY, AND THE FEDERAL TRADE COMMISSION 1968-85, at 48 (1987); KY P. EWING, JR., COMPETITION RULES FOR THE 21ST CENTURY: PRINCIPLES FROM AMERICA’S EXPERIENCE 128 (2d ed. 2006).

118. 384 U.S. 270, 279 (1966).

119. *Id.* at 301 (Stewart, J., dissenting).

120. The economic insights provided by Carl Kaysen and Donald Turner are of singular prominence in this period. CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 22 (1959); see William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413, 1414 (1990) (describing the importance and historical context of Kaysen and Turner’s book).

121. See Wright et al., *supra* note 21, at 304 (“[I]f firms lost customers and sales to more efficient competitors, this was ultimately a good thing — and certainly not a basis upon which to condemn that more efficient competitor.”).

fostering competition's inherent power to encourage innovation and drive out waste — to “provide[] society with the maximum output that can be achieved at any given time with the resources at its command.”¹²² Accordingly, bigness itself was not the enemy, because “concentration might reflect a natural progression towards more efficient . . . market structures, induced by the desire to achieve economies of scale.”¹²³ Judge Robert Bork is perhaps the jurist most closely and immediately associated with the Chicago School of thought,¹²⁴ but he was far from alone.¹²⁵ Indeed, this efficiency-promoting conception of the antitrust laws went from entirely “novel” and heterodox in the 1960s to “the conventional wisdom of the federal courts” by the late 1970s.¹²⁶

This shift from focusing on market structure to focusing on market outcomes, like price and quantity, fundamentally altered antitrust law. One by one, major cases walked back various bright-line prohibitions on behavior that had been based primarily on fears of concentration of power, so long as firms could demonstrate a positive impact on actual economic welfare.¹²⁷ Vertical territorial division, for example, went from “so obviously destructive of competition that [its] mere existence” was intolerable,¹²⁸ to a perfectly valid method of “stimulat[ing] . . . interbrand competition” and “achiev[ing] certain efficiencies in . . . distribution.”¹²⁹ Likewise, manufacturers setting maximum downstream prices for retailers was once viewed as something “crippl[ing] the freedom of traders,”¹³⁰ intrinsically “injurious to the public.”¹³¹ Now, courts note its “procompetitive . . . effects” that “benefit consumers [through low prices,] regardless of how those prices are set.”¹³² Even horizontal price fixing could no longer be condemned immediately: allowing groups of composers and performers, for example, to offer blanket licenses to their collective music library facilitates markets,

122. Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 365 (1965).

123. GAVIL ET AL., *supra* note 99, at 72.

124. See generally ROBERT H. BORK, *THE ANTITRUST PARADOX* (1978).

125. See GAVIL ET AL., *supra* note 99, at 72 (noting Frank Easterbrook, Douglas Ginsburg, Richard Posner, Antonin Scalia, and Stephen Williams as other particularly prominent Chicago School judges and justices).

126. Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225, 227 (2006).

127. See generally Matthew Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709, 723–26 (2018).

128. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967).

129. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51–52, 54 (1977).

130. *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968) (quoting *Kiefer-Stewart Co. v. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)).

131. *Id.* at 154.

132. *State Oil Co. v. Khan*, 522 U.S. 3, 14–15 (1997) (quoting *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 340, 343 (1990)).

transactions, and user experiences that would otherwise be impossible.¹³³

Further refinement and debate has continued since the emergence of the Chicago School. The work of Harvard School theorists like Philip Areeda, Donald Turner, and Justice Stephen Breyer added a great deal of decision theory to antitrust law, a concerted effort to improve the administrability of its rules and the ability of its institutions to implement them.¹³⁴ As economists continue to hone the tools of game theory, it too enjoys a more prominent position in antitrust law.¹³⁵ In particular, while the Chicago School focused on overall efficiency and total welfare — meaning, the aggregate welfare of consumers and producers¹³⁶ — modern antitrust law has focused specifically on consumer welfare. Put differently, antitrust law today is largely agnostic about efficiency gains that benefit only producers and are not passed along to consumers. Thus, under the modern consumer welfare standard, antitrust law has tried to promote essentially two things in any given market: high output and low prices.¹³⁷ Critically, these outcomes are not necessarily inconsistent with the presence of few, large firms in a market — so long as their efficiency gains are passed along to consumers. Firms like Amazon are, in many ways, the apotheosis of this antitrust framework. Despite its tremendous size and dwindling competition, Amazon has successfully “evaded government scrutiny” up to the present by “fervently devoting its business strategy and rhetoric to reducing prices for consumers.”¹³⁸

133. See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979) (“[T]he blanket license developed . . . out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights. . . . A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided.”).

134. See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 14.

135. See, e.g., Dennis W. Carlton, Robert H. Gertner & Andrew M. Rosenfield, *Communication Among Competitors: Game Theory and Antitrust*, 5 GEO. MASON L. REV. 423 (1997). See generally GAVIL ET AL., *supra* note 99, at 75.

136. See, e.g., Kenneth Hayer, *Consumer Welfare and the Legacy of Robert Bork*, 57 J.L. & ECON. 20 (2014) (“Bork’s use of the term ‘consumer welfare’ is unfortunate and confusing in this context. . . . [B]y consumer welfare, Bork meant total welfare. . . .”); John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 199 (2008); see KLOBUCHAR, *supra* note 10, at 135; Steven C. Salop, *Question: What Is the Real and Proper Antitrust Standard? Answer: The True Consumer Welfare Standard*, 22 LOYOLA CONSUMER L. REV. 336, 336 (2010) (describing “confusion” caused “from Judge Robert Bork’s usage of the term ‘consumer welfare’ in referring to aggregate welfare”).

137. See Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, 6 WHARTON PUB. POL’Y INITIATIVE ISSUE BRIEFS, no. 8, Sept. 18, 2018, at 1, 1.

138. Khan, *supra* note 17, at 716.

Enter today's neo-Brandeisians, who argue that this is precisely how antitrust law has gone awry. In short, they believe that the earlier focus on structuralism was right all along. As FTC Chair Lina Khan explains, the focus on metrics like high output and low prices tends to ignore other consumer interests like “quality, variety, and innovation,” let alone “our interests as workers, producers, entrepreneurs, and citizens[.]” all of which are naturally threatened by “concentrations of power.”¹³⁹ Jonathan Kanter, Assistant Attorney General for the Antitrust Division, has expressed similar views¹⁴⁰ including a particular skepticism of antitrust's consumer welfare standard.¹⁴¹ Tim Wu (former Special Assistant to the President for Technology and Competition Policy via the National Economic Council) is likewise unambiguous in his criticism of the consumer welfare standard and the inherent “curse of bigness.”¹⁴² Senator Amy Klobuchar, Chair of the Subcommittee on Antitrust, Competition Policy, and Consumer Rights, has also become a vocal champion of these ideas.¹⁴³ As represented by such

139. *Id.* at 737; see also Lina Khan, Editorial, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018) (“The fixation on efficiency, in turn, has largely blinded enforcers to many of the harms caused by undue market power, including on workers, suppliers, innovators, and independent entrepreneurs — all harms that Congress intended for the antitrust laws to prevent.”).

140. See, e.g., *Questions for the Record: Jonathan Kanter, Nominee to Be Assistant Attorney General of the Antitrust Division Before the S. Comm. on the Judiciary*, 117th Cong. 1 (2021), <https://www.judiciary.senate.gov/imo/media/doc/Kanter%20Responses%20to%20Questions%20for%20the%20Record.pdf> [<https://perma.cc/Q2YA-3GQ8>] (statement of Jonathan Kanter, Then-Nominee Assistant Att’y Gen.) (“In the past, I have voiced concerns that the application of the consumer welfare standard has been inconsistent, vague, and insufficient to keep pace with market realities. Effective antitrust enforcement requires a deep understanding of market realities and facts to determine whether the conduct at issue harms competition and the competitive process.”). See generally Schlesinger, *supra* note 18.

141. See, e.g., Jonathan Kanter, U.S. Assistant Att’y Gen., Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines (Jan. 18, 2022) (transcript available at Department of Justice Office of Public Affairs News website), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines> [<https://perma.cc/DP4X-TQKN>] (echoing the Attorney General's remarks that “too many industries have become too consolidated over time[.]” noting “the harms of anticompetitive consolidation across the many dimensions of the modern economy[.]” and critiquing existing DOJ/FTC guidance as “overstat[ing] the potential efficiencies of vertical mergers and fail[ing] to identify important relevant theories of harm.”).

142. TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 9–10 (2018); see also Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1658–59 (2020) (book review) (“Wu's *The Curse of Bigness* is structured around three key tenets: (1) that antitrust and antimonopoly are central to America's political tradition and critical safeguards of a democratic republic (pp. 16–19); (2) that the structure of our economy inextricably shapes our experience as citizens (pp. 39–44); and (3) that the decades-long project to defang antitrust is the product of an intellectual revolution that redefined how we assess competition through adopting ‘consumer welfare’ as the law's only goal (pp. 88–91, 135).”).

143. See, e.g., KLOBUCHAR, *supra* note 10, at 284 (“Our nation's antitrust laws should be functional and promote robust competition. Statutory improvements to those laws should highlight a return to curbing . . . behavior that leads to market concentration and consolidation.”); Competition and Antitrust Law Enforcement Reform Act of 2021, S.225, 117th Cong.

policymakers, the neo-Brandeisian movement stands for at least the following principles when contrasted against the consumer welfare approach: (1) large concentrations of power, including economic power, are inherently deleterious to society and generally require breakup;¹⁴⁴ (2) reduced prices, increased output, and other direct benefits to consumer welfare are not necessarily sufficient to justify those concentrations or the barriers to entry that enable them;¹⁴⁵ and (3) broader social and political goals, such as strengthening the interests of labor, should be embraced by antitrust law rather than kept conceptually separate.¹⁴⁶

To be clear, although neo-Brandeisians occupy some of the highest positions with respect to antitrust enforcement and policymaking, their views have not yet prevailed in any substantial sense. Despite aggressive efforts, they have yet to achieve major victories in the courts — let alone push through legislation or promulgate regulations¹⁴⁷ — that would suggest any durable shift in the framework of antitrust law. Indeed, comparisons have already been made to the FTC’s efforts in the

§ 2(a)(6) (introduced by Sen. Klobuchar) (“[M]arket power and undue market concentration contribute to the consolidation of political power, undermining the health of democracy in the United States . . .”); *id.* at § 2(a)(15) (“[I]n recent years, some court decisions and enforcement policies have limited the vitality of [antitrust law] to prevent harmful consolidation by . . . focusing inordinately on the effect of an acquisition on price in the short term, to the exclusion of other potential anticompetitive effects . . .”).

144. *See, e.g.*, WU, *supra* note 142, at 22 (“Concentrated private power can serve as a threat to the Constitutional design, and the enforcement of the antitrust law can provide a final check on private power. This, by itself, provides an independent rationale for enforcement of the antitrust laws.”).

145. *See, e.g.*, Khan, *supra* note 17, at 716 (“This analysis reveals that the current framework in antitrust — specifically its equating competition with ‘consumer welfare,’ typically measured through short-term effects on price and output — fails to capture the architecture of market power in the twenty-first century marketplace.”).

146. *See, e.g.*, *Oversight of Federal Enforcement of the Antitrust Laws: Hearing Before the S. Judiciary Comm. Hearing on Competition Pol’y, Antitrust, and Consumer Rts.*, 118th Cong. (2022) (statement of Jonathan Kanter, U.S. Assistant Att’y Gen.), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary> [<https://perma.cc/E78Z-S79T>] (discussing antitrust’s potential to enhance labor interests, privacy protection, the rate of innovation, and other broad goals “that go beyond price”).

147. *See, e.g.*, Sonia Kuester Pfaffenroth & Matthew Tabas, *Antitrust Agency Insights: Developments at the US Antitrust Enforcement Agencies—First Quarter 2022*, ARNOLD & PORTER (Apr. 6, 2022), <https://www.arnoldporter.com/en/perspectives/publications/2022/04/antitrust-agency-insights> [<https://perma.cc/C9EU-VE9E>] (“[A]fter initial fanfare, the FTC’s competition rulemaking efforts have been quiet . . .”); Matthew Perlman, *Mid-Year Update: No Antitrust Redux Yet Despite Stack of Bills*, LAW360 (July 13, 2022, 5:34 PM), <https://www.law360.com/articles/1510974/mid-year-update-no-antitrust-redux-yet-despite-stack-of-bills> [<https://perma.cc/K4KZ-9EQX>]. Most recently, the FTC has proposed a new rule banning employers from imposing noncompete agreements on workers, but relying on standard welfare- and efficiency-based arguments in doing so. *See Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition*, FED. TRADE COMM’N (Jan. 5, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/noncompete_nprm_fact_sheet.pdf [<https://perma.cc/D82Z-3J6Z>] (listing harms from noncompetes as “decrease[d] wages, reduce[d] benefits, and worse[] working conditions,” and a key benefit of the proposed rule as saving “consumers up to \$148 billion annually on health care costs”).

1970s to expand antitrust enforcement through novel legal theories;¹⁴⁸ those efforts were roundly rejected by the courts and Congress alike.¹⁴⁹ This is not to suggest that the neo-Brandeisians won't eventually succeed, but rather to emphasize that they face an uphill battle. Accordingly, the next Part discusses how privacy considerations interact with antitrust doctrine — both as it exists now, and as it might be reshaped in the years to come.

IV. WHERE ANTITRUST MEETS PRIVACY

Concerning personal data privacy, the neo-Brandeisian school of antitrust faces three central problems. First, it faces a problem of smallness: Personal data privacy is likely not better served by a multiplicity of small, independent firms. In other words, there may be an inherent tension between the neo-Brandeisians' view of how competitive markets should look, and their goal for enhanced consumer privacy through competition. Second, it faces a problem of haphazardness: leveraging authority over competition to pursue privacy goals is apt to create issues regarding clarity, uniformity, and competence in antitrust law. Finally, it faces a problem of lopsidedness: market competition over privacy, to the extent that it can exist, will tend to enhance privacy for the powerful at the expense of the powerless. This should be undesirable on its own terms, given the vulnerability of marginalized people to privacy abuses. Lopsidedness also appears inconsistent with the neo-Brandeisians' own position and role within a larger movement concerned with democracy and distributive justice.

A. The Problem of Smallness

The dynamics discussed in Part II strongly suggest that greater market competition will not necessarily yield greater personal data privacy protections — on the contrary, it appears likely to do the exact opposite. Consider again, for example, the “privacy paradox.” When most consumers are free to choose between competing privacy options

148. See, e.g., Bryan Koenig, *FTC's Khan More Worried About Inaction than Blowback*, LAW360 (Apr. 22, 2022), <https://www.law360.com/articles/1486611/ftc-s-khan-more-worried-about-inaction-than-blowback> [<https://perma.cc/YST4-T4JC>] (“Khan argued that the FTC should be much more worried about allowing dangerous corporate concentration . . . and other consumer harms to fester, than it should be about engendering the kind of congressional pushback of the 1970s that Khan's critics say her policies risk.”).

149. See GAVIL ET AL., *supra* note 99, at 430 (“[T]he FTC's record of appellate litigation involving applications of Section 5 that go beyond prevailing interpretations of the other antitrust laws is sobering. One needs to go back to the 1960s to find cases in which the FTC succeeded . . . Before the 1960s, the list of FTC appellate successes is short, as well.”); J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, FED. TRADE COMM'N (May 30, 2003), <https://www.ftc.gov/news-events/news/speeches/ftcs-use-unfairness-authority-its-rise-fall-resurrection> [<https://perma.cc/2M24-LDKP>].

under real-world decision-making constraints, they tend to exchange access to personal information for relatively small monetary gains. To repeat a particularly stark example, only 35% of consumers are willing to pay any amount of money for an email service that doesn't use automated content analysis and, even among that minority, the median willingness to pay is a scant "\$15 per year."¹⁵⁰ Under such circumstances, a lack of rival firms is not required for an email provider to push content analysis on its user base. Instead, an email provider would need a lack of rivals *to protect* users' privacy — for example, by using a subscription model instead of a data-collection-and-sale model. Where rivals do exist, given a low willingness to pay for privacy, a firm attempting to implement such a model would quickly lose market share to its free rivals. And to reiterate, the literature suggests similar results across a tremendous number of digital markets, from mobile apps and web searches to online retail and entertainment.¹⁵¹

Granted, the precise nature of the privacy paradox is contested — but it is also not alone in undermining the relationship between competition and privacy.¹⁵² The micro- and macro-level externalities of consumers' low-privacy decisions make high-privacy choices less attractive to other consumers, so even markets that begin with diverse privacy offerings seem apt to unwind towards a uniformly low privacy level. High switching costs also suggest that consumers will be unlikely to change firms for privacy-related reasons, even where substitutes exist. Moreover, an individual consumer's low-privacy choices in one market may lead to similarly low choices in other markets — such that just one thin market for privacy can unravel many others, even in unrelated goods and services. On the firm side, the economies of scale with respect to acquiring and using data suggest that much of Big Tech may be akin to natural monopolies — that is, the natural end result of competitive forces, not their absence. The economies of scale with respect to protecting personal data are troubling as well, suggesting that the cost of privacy protection itself has an inverse relationship with firm size. Finally, for some products, there are direct tradeoffs between privacy protection and other aspects of product quality, such that robust competition over the latter can contribute to a decrease in the former.

All of this indicates that a market with many small firms does not necessarily better serve personal data privacy. Instead, fewer, larger firms may actually be better positioned to enhance consumers' privacy at lower cost. Two concrete examples of how this privacy problem of smallness can manifest under antitrust law follow: first, in

150. Strahilevitz & Kugler, *supra* note 49, at 78.

151. *See supra* notes 48–53 and accompanying text.

152. *See supra* Section II.B.

distinguishing between competitive and uncompetitive markets; and second, in implementing remedies.

Distinguishing between competitive and uncompetitive markets is critical to antitrust enforcement in general — and in particular, as a threshold determination for prohibiting certain kinds of unilateral firm behavior. Section 2 of the Sherman Act makes it a felony for a firm to “monopolize any part of” interstate commerce or commerce with other nations.¹⁵³ The longstanding judicial gloss on that language is that a § 2 violation has essentially two elements: “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power[.]”¹⁵⁴ Today, mere possession of a monopoly (or simply monopoly power) is no crime in and of itself,¹⁵⁵ but it remains an essential prerequisite to finding liability under § 2.

In turn, monopoly power — now typically called “market power” interchangeably — is generally defined as the power to profit off of limited competition.¹⁵⁶ For example, the ability to profitably charge “higher than competitive prices” would indicate market power.¹⁵⁷ Along the same lines, market power can enable a firm to reduce the quality of its output relative to price, cutting corners to increase profits.¹⁵⁸ Market power also encompasses the ability to exclude other

153. 15 U.S.C. § 2 (2012). Attempts, combinations, and conspiracies to “monopolize” are felonies as well. *Id.*

154. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

155. *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (“It does not follow because ‘Alcoa’ had such a monopoly, that it ‘monopolized’ the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it.”).

156. *See, e.g., GAVIL ET AL.*, *supra* note 99, at 32 (“Market power in economics refers to the ability to profit by circumscribing some dimension of competition We also will follow the contemporary convention . . . of not distinguishing between market power and monopoly power”); Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 *GEO. L.J.* 241, 249 (1987) (“The core concept underlying the notion of market power or monopoly power is a firm’s ability to increase profits and to harm consumers by charging prices above competitive levels.”). The different terms are, however, sometimes still used to emphasize the comparative burdens under § 2 versus § 1. That is, the showing required for “[m]onopoly power under § 2” is “something greater than market power under § 1.” *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992); *see also* PHILIP AREEDA, LOUIS KAPLOW, AARON EDLIN & C. SCOTT HEMPHILL, *ANTITRUST ANALYSIS* 354 (8th ed. 2022) (“Monopoly power . . . often is understood as a significant degree of market power.”).

157. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 590 (1986); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (“More precisely, a firm is a monopolist if it can profitably raise prices substantially above a competitive level. Where evidence indicates that a firm has in fact profitably done so, the existence of monopoly power is clear.”); *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (“Monopoly power is the power to control prices”).

158. *See, e.g., Nat’l Macaroni Mfrs. Ass’n v. FTC.*, 345 F.2d 421, 423 (7th Cir. 1965) (“[T]he principal domestic manufacturers of macaroni products, acting through Association, entered into and carried out agreements . . . for the purpose of . . . eliminat[ing] quality competition in macaroni products.”); *In re Qualcomm Antitrust Litig.*, 328 F.R.D. 280, 301 (N.D. Cal. 2018) (“Plaintiffs have proposed a valid theory and methodology for showing, based on

competitors, such as by raising their costs, thereby “causing them to restrain their output” and lose market share.¹⁵⁹ Market power derives from a variety of sources. High barriers to market entry can confer market power,¹⁶⁰ as can brand loyalty among consumers.¹⁶¹ Government regulation — patents and copyrights, for example — is another potential source of market power.¹⁶² These sources all provide opportunities for a firm to raise prices or reduce output without the threat of other firms coming along and snapping up all of their customers. Whatever the source, this central principle behind market power is always the

common evidence, that Qualcomm’s overcharge was passed through to all class members in the form of higher quality-adjusted prices.”); U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 95, at 2 (“Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation.”).

159. Krattenmaker et al., *supra* note 156, at 249; *see, e.g., Microsoft*, 253 F.3d at 58 (“Microsoft’s pattern of exclusionary conduct could only be rational ‘if the firm knew that it possessed monopoly power.’” (quoting *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 37 (D.D.C. 2000))); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (“In short, Visa U.S.A. and MasterCard have demonstrated their [market] power in the network services market by effectively precluding their largest competitor from successfully soliciting any bank as a customer for its network services and brand.”); GAVIL ET AL., *supra* note 99, at 49 (“Examples include unilateral efforts to exclude rivals through cost-raising strategies or predatory pricing, as well as coordinated efforts to restrict a rival’s competitive options . . .”).

160. *See, e.g., Microsoft*, 253 F.3d at 55 (“That barrier . . . stems from two characteristics of the software market: (1) most consumers prefer operating systems for which a large number of applications have already been written; and (2) most developers prefer to write for operating systems that already have a substantial consumer base. This . . . ensures that applications will continue to be written for the already dominant Windows, which in turn ensures that consumers will continue to prefer it over other operating systems.”).

161. *See* LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 2.4e, at 43 (2d ed. 2000) (“When market power is properly defined as power over price, it is clear that sellers of branded products often exercise market power. Just as a pure monopolist, the seller of a branded good may face an inelastic demand curve, allowing it to raise price without losing offsetting sales revenues . . . A seller with a powerful brand, for example, may have brand-loyal consumers who will absorb price increases rather than switch to a different brand.”).

162. To be clear, intellectual property rights do not always convey market power. *See, e.g., Ill. Tool Works, Inc. v. Ind. Ink, Inc.*, 547 U.S. 28 (2006) (rejecting an automatic presumption of market power in antitrust cases for patent holders). Nevertheless, it is obvious that the exclusivity associated with intellectual property rights can do so under certain circumstances. *See, e.g., Herbert Hovenkamp, Response: Markets in IP and Antitrust*, 100 GEO. L.J. 2133, 2139 (2012) (“A few pioneer patents do confer significant market power, particularly if they are broadly interpreted. For example, the Wright Brothers’ patent was able to shut out alternative aircraft in the United States for some time thanks to a broad interpretation under the doctrine of equivalents.”); Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 ARIZ. L. REV. 837, 876 (2007) (“[W]e can expect that firms who win the innovation race would be able to exercise market power. This is precisely what IP laws are designed to achieve given the risks of failure and the risks of appropriation by others.”). *See generally* Richard Schmalensee, *Another Look at Market Power*, 95 HARV. L. REV. 1789, 1795–96 (1982); U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY* 4 (2017), <https://www.justice.gov/atr/IPguidelines/download> [<https://perma.cc/Q3CL-N2WN>] (“As in other antitrust contexts, however, an intellectual property owner could illegally acquire or maintain market power.”).

same: less-than-robust competition gives firms the power to get away with behavior that they otherwise could not.

The neo-Brandeisians have explicitly argued, in public fora¹⁶³ and litigation alike,¹⁶⁴ that the generally low privacy levels offered by Big Tech indicate their market power. In other words, the observation that generally low privacy levels prevail in these markets has at least partially informed the threshold determination that they are not competitive. For the reasons previously given, the implicit assumption that privacy follows competition is suspect, and thus may increase the risk of false positives under § 2. To the extent this assumption is deployed more widely in antitrust enforcement (for example, in determining whether to permit a given merger because it takes place in a more or less competitive market¹⁶⁵), this risk propagates in turn.

Where violations are found, implementing appropriate remedies is another critical task for antitrust enforcement. Consider the other element of a § 2 violation — “willful acquisition or maintenance of

163. See, e.g., Lina M. Khan, Chair, Fed. Trade Comm’n, Statement of Chair Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021) (on file with FTC), https://ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_khan_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf [<https://perma.cc/E3SX-UHDF>] (“Monopoly power, in turn, can enable firms to degrade privacy without ramifications”); *Questions for the Record: Jonathan Kanter, Nominee to Be Assistant Attorney General of the Antitrust Division Before the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Jonathan Kanter, Then-Nominee Assistant Att’y Gen.) (“[E]ffective use of antitrust enforcement can address a wide range of competitive harms in tech, including harms related to privacy”); Tim Wu, *Five Questions for Tim Wu on Big Tech, Antitrust, and the Consumer Welfare Standard*, AM. ENTER. INST. (Feb. 19, 2019), <https://www.aei.org/economics/5-questions-for-tim-wu-on-big-tech-antitrust-and-the-consumer-welfare-standard/> [<https://perma.cc/U2AX-44ZH>] (“[A]s a consequence of not facing direct competition, they’ve been able to get away with a lot more in terms of privacy [harms].”).

164. See, e.g., Complaint at 48, *FTC v. Facebook, Inc.*, No. 20-cv-03590 (D.D.C. Jan. 13, 2021) (“The benefits to users of additional competition include . . . data protection privacy options for users, including, but not limited to, options regarding data gathering and data usage practices.”); Complaint at 64, *New York v. Facebook, Inc.*, No. 20-cv-03589 (D.D.C. Dec. 9, 2020) (“After Facebook achieved monopoly power, the company . . . degraded the privacy protections and privacy options”); Complaint at 7, *United States v. Google LLC*, No. 20-cv-03010 (D.D.C. Oct. 20, 2020) (“Google is now the unchallenged gateway to the internet As a consequence, . . . American consumers are forced to accept Google’s policies, privacy practices, and use of personal data”); INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 8, at 7 (“[T]hese firms wield their [market] dominance in ways that . . . degrade Americans’ privacy online”); Gilad Edelman, *Antitrust and Privacy Are on a Collision Course*, WIRED (Apr. 12, 2021), <https://www.wired.com/story/antitrust-privacy-on-collision-course/> [<https://perma.cc/EGD6-XNPF>] (“That argument against Facebook illustrates the leading theory of how antitrust and data privacy intersect: As you turn up the competition dial, you get more privacy, because companies will try to woo customers”); see also Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist’s Journey Towards Pervasive Surveillance in Spite of Consumers’ Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 44 (2019).

165. See generally 15 U.S.C. § 18 (2021) (“No person shall acquire . . . the whole or any part of the stock or other share capital . . . , the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.”).

[market] power.”¹⁶⁶ In relevant part, when one firm possesses market power, they are not permitted to use that market power to exclude incumbent competitors or potential new rivals from the market.¹⁶⁷ Remedies in § 2 cases thus focus on what kind of access is needed to meaningfully participate in the market at issue: access to physical structures;¹⁶⁸ access to production inputs;¹⁶⁹ access to digital platforms;¹⁷⁰ and even access to consumers themselves.¹⁷¹ To be sure, antitrust law has long been wary of micromanaging cooperation and sharing among competitors, but it still reaffirms access as the solution when it is a pre-requisite for competition itself.¹⁷²

This poses a problem: rivals to Big Tech will need access to massive quantities of personal data in order to successfully compete. Indeed, litigants have already begun to use competition law as a tool for personal data access. For example, in *hiQ Labs, Inc. v. LinkedIn Corp.*, plaintiff hiQ had offered “people analytics” services to companies, such as identifying which “employees [are] at the greatest risk of being recruited away” or where “skill gaps [exist] in their workforces.”¹⁷³ It performed this service by scraping data from LinkedIn’s network — “name[s], job title[s], work history, and skills” — and feeding it into its own proprietary predictive algorithm.¹⁷⁴ For half a decade, LinkedIn

166. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

167. *See generally* GAVIL ET AL., *supra* note 99, at 437 (describing “the basic goal” of § 2 of the Sherman Act as “curb[ing] the power of individual, dominant corporate enterprises, particularly unreasonably exclusionary behavior”).

168. *See, e.g.*, *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (regarding telecom companies and wireline telephone networks); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (regarding skiing companies and the mountains in Aspen, Colorado); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (regarding power companies and a hydroelectric dam); *United States v. Terminal R.R. Ass’n of St. Louis*, 224 U.S. 383 (1912) (regarding railway companies and the principal bridge used to cross the Mississippi River and enter St. Louis).

169. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451 (1992) (regarding third-party repair services and replacement copier parts); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985) (regarding stationery retailers and wholesale stationery).

170. *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (regarding third-party applications and the Microsoft Windows operating system).

171. *See, e.g.*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003) (regarding credit card networks and card-issuing banks).

172. *See Trinko*, 540 U.S. at 408 (citations omitted) (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing — a role for which they are ill suited Thus, as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’ However, ‘[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.’ Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2.” (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Aspen Skiing*, 472 U.S. at 601)).

173. *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 991 (9th Cir. 2019).

174. *Id.*

allowed hiQ to do so, but eventually sent the company a cease-and-desist letter threatening legal action; this change in terms coincided with LinkedIn's own efforts to develop analogous analytics services that it could market to companies.¹⁷⁵ LinkedIn defended its decision as a matter of upholding its users' privacy interests,¹⁷⁶ while hiQ countered with claims of unfair competition in violation of California law.¹⁷⁷ Looking to § 2 precedent, the district court issued an injunction against LinkedIn,¹⁷⁸ which the Ninth Circuit upheld on appeal.¹⁷⁹ Thus, for the sake of ensuring robust competition, access to personal data, likely beyond the scope of what actual users intended or imagined, was mandated.¹⁸⁰

This tension between maintaining privacy and maintaining competition — between permitting access and permitting monopolization — will only occur more frequently.¹⁸¹ For over a decade now, competition-law scholars have emphasized that the modern tech giants' vast hoards of personal data are a major reason why their monopoly positions are so durable.¹⁸² Indeed, European competition authorities have

175. *Id.* at 991–92 (“In June 2017, LinkedIn’s Chief Executive Officer . . . explained that LinkedIn hoped to ‘leverage all this extraordinary data we’ve been able to collect by virtue of having 500 million people join the site.’ [He] mentioned as possibilities providing employers with data-driven insights about what skills they will need to grow and where they can find employees with those skills. Since then, LinkedIn has announced a new product, Talent Insights, which analyzes LinkedIn data to provide companies with such data-driven information.”).

176. *Id.* at 994 (“LinkedIn asserts that the injunction threatens its members’ privacy and therefore puts at risk the goodwill LinkedIn has developed with its members. As the district court observed, ‘the fact that a user has set his profile to public does not imply that he wants any third parties to collect and use that data for all purposes.’”).

177. *Id.* at 995.

178. *hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1117–19 (N.D. Cal. 2017) (observing that “California law looks to the Sherman Act for guidance,” and relying on *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), to support its decision).

179. *hiQ Labs, Inc.*, 938 F.3d at 1005 (Among other things, hiQ had sought a declaratory judgment that, if it were to continue scraping data without permission, its conduct still would not violate the Computer Fraud and Abuse Act as LinkedIn had claimed in its cease-and-desist letter). The decision was vacated and remanded by the Supreme Court for further consideration in light of its recent decision interpreting the CFAA in *Van Buren v. United States*, 141 S. Ct. 1648 (2021). *LinkedIn Corp. v. hiQ Labs, Inc.*, 141 S. Ct. 2752, 2752 (2021).

180. In a very similar case, Twitter was enjoined against preventing PeopleBrowsr — a datamining and analytics company selling its services to various corporate and government entities — from accessing its stream of user data. *See PeopleBrowsr, Inc. v. Twitter, Inc.*, No. C-12-6120, 2013 WL 843032, at *1–2 (N.D. Cal. Mar. 6, 2013) (order granting Plaintiffs’ motion to remand).

181. *See generally* Erika M. Douglas, *Monopolization Remedies and Data Privacy*, 24 VA. J.L. & TECH. 1 (2020) (observing that antitrust “remedies may unwittingly cause privacy harms that outweigh the benefits to consumers from restored competition,” collecting cases, and acknowledging the shortcomings of proposed solutions).

182. *See, e.g.*, Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 70, 74 (2016); Nathan Newman, *Search, Antitrust and the Economics of the Control of User Data*, 31 YALE J. REGUL. 401, 401 (2014); Howard A. Shelanski, *Information, Innovation, and Competition Policy for*

already begun seeking data-access remedies in a particularly high number of cases,¹⁸³ and U.S. authorities may follow their lead. In a dispute that appears “increasingly likely” to generate a DOJ suit, for example, Tile alleges that Apple’s denial of equal access to users’ location data constitutes an anticompetitive barrier.¹⁸⁴ Tile makes Bluetooth-tracking tags and stickers that can be attached to objects like phones, wallets, and keys to help prevent users from losing them.¹⁸⁵ It alleges that Apple, which introduced its own competing “FindMy” app and AirTags product, puts them at a relative disadvantage through privacy settings: a third-party tracking product like Tile would be blocked, whereas Apple’s own apps and products would be permitted.¹⁸⁶ Tile thus seeks weaker default privacy settings — which most users will not change¹⁸⁷ — in the name of competition. Moreover, Tile repeated these claims as part of its testimony before Congress in the hearings over competition law in the digital era.¹⁸⁸ Perhaps unsurprisingly, the current

the Internet, 161 U. PA. L. REV. 1663, 1679 (2013); Damien Geradin & Monika Kuschewsky, *Competition Law and Personal Data: Preliminary Thoughts on a Complex Issue*, 2 CONCURRENTS 1, 2 (2013); Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 775 n.18 (2010).

183. See, e.g., Margrethe Vestager, Comm’r of Competition, Eur. Comm’n, *Defending Competition in a Digitised World*, Address at the European Consumer and Competition Day (Apr. 4, 2019) (“[A]s data becomes increasingly important for competition, it may not be long before the Commission has to tackle cases where giving access to data is the best way to restore competition.”); DIGIT. COMPETITION EXPERT PANEL, U.K. DEP’T OF TREASURY, UNLOCKING DIGITAL COMPETITION 74 ¶ 2.81 (2019) (“[I]n some markets, the key to effective competition may be to grant potential competitors access to privately-held data.”). See generally Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, YALE L.J. F. 647, 668 n.85 (Jan. 18, 2021) (collecting European cases and authorities).

184. Josh Sisco, *Apple Faces Growing Likelihood of DOJ Antitrust Suit*, POLITICO (Aug. 26, 2022), <https://www.politico.com/news/2022/08/26/justice-department-antitrust-apple-00053939> [<https://perma.cc/V8YG-WHQN>].

185. See TILE, *How It Works*, <https://www.thetileapp.com/en-us/how-it-works> [<https://perma.cc/83MJ-5XY7>].

186. See Sisco, *supra* note 184.

187. See, e.g., Markus Tschersich & Reinhardt A. Botha, *Understanding the Impact of Default Privacy Settings on Self-Disclosure in Social Network Services*, 2013 PROC. NINETEENTH AMS. CONF. ON INFO. SYS. 1, 1 (2013), <https://core.ac.uk/download/pdf/301360212.pdf> [<https://perma.cc/5J7X-XR3Z>] (observing that “users tend to use default settings,” including “default privacy settings” in particular); Michael J. Kasdan, *Is Facebook Killing Privacy Softly? The Impact of Facebook’s Default Privacy Settings on Online Privacy*, 2 N.Y.U. INTEL. PROP. & ENT. L. LEDGER 107, 113 (2011) (noting “the significant power of default settings in affecting user behavior and outcomes,” to the point where “defaults are often determinative”); Michelle Madejski, Maritza Johnson & Steven M. Bellovin, *The Failure of Online Social Network Privacy Settings*, COLUM. U. COMP. SCI. TECH. REPS., 2011, at 1 (finding that, almost universally, social network users’ “privacy settings are incorrect” relative to their “privacy attitudes and intentions” — but “a majority of users cannot or will not fix such errors”).

188. See Cat Zakrzewski, *Tile Will Accuse Apple of Worsening Tactics It Alleges Are Bullying, a Day After iPhone Giant Unveiled a Competing Product*, WASH. POST (Apr. 21, 2021), <https://www.washingtonpost.com/technology/2021/04/21/tile-will-accuse-apple-tactics-it-alleges-are-bullying-day-after-iphone-giant-unveiled-competing-product/> [<https://perma.cc/>

push for antitrust legislation in the United States includes changes that would make these claims much more easily actionable under the Sherman Act, for example by expanding essential facilities doctrine.¹⁸⁹

Merger review presents analogous remedial issues: If the FTC or DOJ challenges a merger as anticompetitive, a typical negotiated solution will include divestiture,¹⁹⁰ perhaps with some form of asset sharing.¹⁹¹ For data-hungry industries, this fragmentation naturally creates the possibility for more eyes on personal data and more personal data changing hands. Imagine, for example, a scenario in which Google must divest a portion of its business, such as Google Maps, to obtain permission to consummate some other acquisition. For the newly created Maps Co. to truly “operate autonomously,” as required to satisfy the antitrust authorities, it would surely need the vast store of map-search and location data that Google has amassed to date.¹⁹² So now, two separate entities — with their own potentially divergent goals — have accessed this set of personal data. Depending on one’s views, this may constitute a reduction in privacy in and of itself: being seen and known by two independent actors rather than one. If Google retains a copy of the data set, then this is an even greater intrusion. Either way, what if Maps Co. has a different, more skeptical attitude towards privacy than Google? There are many possible scenarios in which consumers’ expectations may be upended as a result of the divestiture.

V2N3-VNE3] (“[Tile] contends Apple is giving its own trackers advantages on the iPhone that other device makers don’t enjoy, which makes their finding capabilities more precise and the devices easier to set up.”).

189. See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 8, at 397–98 (footnote omitted) (“[T]he Subcommittee recommends that Congress consider revitalizing the ‘essential facilities’ doctrine, the legal requirement that dominant firms provide access to their infrastructural services or facilities on a nondiscriminatory basis. To clarify the law, Congress should consider overriding judicial decisions that have treated unfavorably essential facilities-and refusal to deal-based theories of harm.”).

190. *Divestiture*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The loss or surrender of an asset or interest.”).

191. See, e.g., FED. TRADE COMM’N, NEGOTIATING MERGER REMEDIES 4 (Jan. 2012), https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remedies_stmt.pdf [<https://perma.cc/RU4J-L3Z4>] (“Anticompetitive horizontal mergers are most often remedied by a divestiture . . .”); U.S. DEP’T OF JUST., MERGER REMEDIES MANUAL 12 (Sept. 2020), <https://www.justice.gov/atr/page/file/1312416/download> [<https://perma.cc/RQH4-4EC9>] (“When the remedy requires divestiture of intangible assets, often an issue arises as to whether the merged firm can retain rights to these assets, such as the right to operate under the divested patent. . . . In such cases, the [Antitrust] Division may require the merging parties to divest the intangible asset, and then require the purchaser to license it back to the merged firm.”); Douglas, *supra* note 181, at 18 (observing that, despite “administrability concerns” and questions of “institutional competency,” “data access remedies . . . play[] a prominent role in settlement agreements”).

192. FED. TRADE COMM’N, *supra* note 191, at 5 (stating that the transacting firms “should be prepared to show that the [divested] business unit contains all components necessary to operate autonomously,” and listing as examples “access to key inputs,” “research and development capability,” “intellectual property,” and “technology, including know-how and trade secrets”).

The antitrust authorities may also require that data assets be shared on a more ongoing basis, further heightening these risks. To take a real example, Google wanted to acquire ITA Software Inc., a company that had developed and licensed flight search software to a variety of airlines, travel agents, and third-party travel search sites.¹⁹³ To ensure that competition remained robust in the comparative flight search market, part of Google's settlement with the antitrust authorities included ongoing obligations to provide the same service — including access to newly generated search data — to ITA's old licensors.¹⁹⁴ Likewise, in approving the merger of Nielsen and Arbitron, two firms engaged in “the sale of . . . audience measurement services,” the FTC required divestment of key technology and equipment — as well as ongoing obligations to share audience-member data with the acquirer of those divested assets.¹⁹⁵ As noted above, these kinds of data-sharing arrangements effectively double extant privacy intrusions. There are also serious problems relating to notice and consent, particularly as such remedies increasingly involve more sensitive personal information.¹⁹⁶ Moreover, each transaction, each tradeoff, and each new firm involved is another opportunity for a misstep — for a data breach or interception, or for the introduction of errors to the data.

All else being equal, the neo-Brandeisian vision of antitrust tends to demand a larger number of competitors in any given market than the consumer welfare standard alone would.¹⁹⁷ At the same time, neo-Brandeisians are explicitly concerned with privacy as an ancillary goal of antitrust law. As previously outlined, however, an increase in the

193. See Competitive Impact Statement at 1, *United States v. Google Inc.*, No. 11-cv-00688 (D.D.C. Apr. 8, 2011).

194. Final Judgment at 13–15, *United States v. Google Inc.*, No. 11-cv-00688 (D.D.C. Oct. 5, 2011) (providing that “Defendants shall honor the terms of all QPX Agreements in effect as of the entry of this Final Judgment,” and allowing for negotiated license extensions); *id.* at 27 (“Defendants shall also incorporate such Availability Information into QPX results generated for all OTIs who are party to a QPX Agreement . . .”).

195. *In re Nielsen Holdings N.V. & Arbitron Inc.*, 2014 WL 869523, at *7–8 (Feb. 24, 2014) (obligating the merging firms to provide the divested entity “a perpetual, royalty-free license” for the use of “1. Television Data; 2. Radio Data; and 3. Calibration Panel Data,” for “a period of no less than eight (8) years from the date of divestiture”).

196. See Douglas, *supra* note 181, at 79 (“Requiring consumer consent to remedial data disclosure may reduce unintended privacy harm to consumers, but this is likely to come at the cost of reduced effectiveness in restoring competition and reduced administrability of the remedy.”).

197. This follows automatically from their rejection of many efficiency-based justifications for concentration, but may also be seen explicitly in their proposals to create presumptive thresholds for violations linked to firm size. See, e.g., Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 9 (“[E]xclusionary conduct shall be presumed to . . . be a violation . . . if the exclusionary conduct is undertaken . . . by a person or by a group . . . [with] market share of greater than 50 percent as a seller or a buyer in the relevant market”); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. § 3(d) (making it unlawful for any platform with “at least 50,000,000 . . . monthly active users” or “at least 100,000 . . . monthly active business users” to engage in further mergers or acquisitions).

number of market competitors may not necessarily yield an increase in consumer privacy. With respect to Big Tech in particular, there are many reasons to suspect it would actually cause the opposite outcome. On the front end, this contradiction lies dormant in the neo-Brandeisians' uncritical use of low privacy as an indicator of market power. On the back end, this contradiction presents serious remedial challenges for the neo-Brandeisians' simultaneous goals of creating numerous autonomous competitors and enhancing consumer privacy.

B. The Problem of Haphazardness

As explained in Part III, the statutory texts underlying antitrust law are extremely broad. Here, it's worth demonstrating how contemporary antitrust doctrine — animated by the consumer welfare standard — cabins that breadth and mitigates the law's potential vagueness. The neo-Brandeisian project of pursuing privacy policy through antitrust enforcement is apt to erode these very same safeguards, risking real harm to the entire field of antitrust law as a result. Examples in the previous Section focused on how the law restricts unilateral conduct; here, the law governing multi-firm conduct is particularly illustrative.

Recall that § 1 of the Sherman Act declares “[e]very contract, combination . . . , or conspiracy, in restraint of” interstate commerce illegal.¹⁹⁸ Again, early caselaw took a literal approach to this text, truly finding every restraint of trade to be illegal.¹⁹⁹ But courts quickly shifted to a more flexible standard of “reasonableness” — meaning only “unreasonable” restraints of trade would be prohibited by § 1.²⁰⁰ Nominally, this is a bifurcated standard: a few types of restraint remain illegal “per se,” in the sense that they are irrebuttably presumed to be unreasonable, whereas other restraints are subject to a full “rule of reason” analysis.²⁰¹ The latter is a much broader inquiry, considering the full market context of the restraint at issue and potential justifications for its existence:

198. 15 U.S.C. § 1 (2021).

199. *See* *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 328 (1897) (“When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress.”).

200. *See* *Standard Oil Co. v. United States*, 221 U.S. 1, 87 (1911).

201. *See generally* GAVIL ET AL., *supra* note 99, at 141 (describing the “per se categories” of conduct as creating an “irrebuttable presumption of unreasonableness,” in contrast to the “more complete rule of reason analysis” requiring proof “that a given restraint was in fact unreasonable”); *see* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (observing that per se rules treat certain “categories of restraints [of trade] as necessarily illegal,” thereby “eliminat[ing] the need to study the reasonableness of an individual restraint in light of the real market forces at work”).

To determine that question [of reasonableness] the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.²⁰²

In practice, however, the distinction between per se and full rule-of-reason analysis is highly blurred.²⁰³ For example, price fixing among direct competitors is consistently described by courts as a per se violation²⁰⁴ — as no less than “the supreme evil of antitrust.”²⁰⁵ But the Supreme Court has long been at pains to distinguish between “price fixing in a literal sense” and “price fixing in the antitrust sense,” with only the latter constituting an actual per se violation.²⁰⁶ In making that distinction, courts will consider facts quite at home in a full rule-of-reason analysis: “the effect and . . . the purpose of the practice,” “efficiency” concerns, and even “[pro]competitive” justifications.²⁰⁷ Put differently, the analysis of any restraint of trade under § 1 is ultimately a question of reasonableness.

Under today’s consumer welfare standard, the outer boundary on this analysis — what prevents it from becoming entirely standardless — is a focus on competition itself. That is, to be counted in the analysis, a proffered justification for coordinated behavior must be pro-competitive; it must improve the “competitive conditions” of the

202. *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918). Even today, this remains the classic articulation of how to proceed under the rule of reason. *See, e.g.*, *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 n.10 (2010); *see also* 1 RUDOLPH CALLMAN, CALLMAN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 4:37 (Louis Altman & Malla Pollack eds., 4th ed. 2022) (“Modern attempts to refine or further develop the rule of reason, as announced by Justice Brandeis in 1918, are virtually nonexistent.”).

203. *See* Matthew G. Sipe, *The Sherman Act and Avoiding Void-for-Vagueness*, 45 FLA. ST. U. L. REV. 709, 725 (2018) (“[C]ase law increasingly demands that courts apply the same holistic, case-by-case analysis embodied by the rule of reason in order to apply the ‘per se’ label in the first place. Put differently, the detail . . . of the rule of reason ha[s] been transformed into a *threshold inquiry* for per se cases[. . .] per se step zero . . .”); *see* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1229 (2008) (“[C]ourts must apply the rule of reason in order to determine whether the per se rule applies.”).

204. *See, e.g.*, *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 351 (1982); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 341 (1897); *see* Lemley & Leslie, *supra* note 203, at 1225 (“Horizontal price fixing represents the epitome of per se illegal conduct.”).

205. *United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015) (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)).

206. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979)).

207. *See Broad. Music, Inc.*, 441 U.S. at 19–20.

underlying market.²⁰⁸ Justifications that rely solely on freestanding, non-competition-related values, even demonstrable improvements to general health and welfare, do not count.²⁰⁹ For example, in *National Society of Professional Engineers v. United States*, the Court had to determine whether the Society's Code of Ethics, which effectively prohibited competitive and transparent bidding on engineering projects, violated § 1 of the Sherman Act.²¹⁰ The Society's principal justification was directed squarely at the general welfare of society: "[C]ompetitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering . . . [, and] the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare."²¹¹ Auction theory confirms that this is, at minimum, a genuinely plausible risk of allowing competitive bidding on such projects.²¹² Nevertheless, the Court rejected this justification — not as outweighed on the merits, but rather as inappropriate for consideration under § 1 at all:

208. See *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978) ("The Rule of Reason . . . has been used to give the [Sherman] Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."); see also *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 105 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 240 (1918) (permitting a restraint under the rule of reason, because "within the narrow limits of its operation[,] the rule helped to improve market conditions"); cf. John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 *IND. L.J.* 501, 540–41 (2019) (further specifying that cognizable procompetitive justifications are limited to those that alleviate forms of market failure). See generally Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 *ANTITRUST L.J.* 713 (2014).

209. See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 *S. CAL. L. REV.* 733, 748 (2012) (outlining how the Supreme Court "sharply refocused the Sherman Act inquiry on competitive effects," creating the "foundation of the modern rule of reason"); Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications Under Section 1 of the Sherman Act*, 13 *YALE L. & POL'Y REV.* 137, 139 (1995) ("[T]he weight of authority supports rejection of non-economic justifications.").

210. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 692 ("In this case[,] we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer.").

211. *Id.* at 685.

212. This is essentially an instance of the "winner's curse," a phenomenon where the winning bidder in an auction is likely to have had the most optimistic outlook as compared to the rest of the bidders — and hence is likely to have committed some kind of error, such as overestimating the actual value of the item being auctioned. See generally Richard Thaler, *Anomalies: The Winner's Curse*, 2 *J. ECON. PERSPS.* 191 (1988). Applied to this context, the winner's curse suggests that the winning (i.e., lowest) bidder on an engineering contract may have underestimated the actual cost of the project, and hence would be incentivized to cut corners to keep within an otherwise impossible budget constraint. See, e.g., Muaz O. Ahmed, Islam H. El-Adaway, Kalyn T. Coatney & Mohamed S. Eid, *Construction Bidding and the Winner's Curse: Game Theory Approach*, *J. CONSTR. ENG'G & MGMT.* 142, 142 (2016).

It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. . . . Petitioner's ban on competitive bidding . . . must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is *nothing less than a frontal assault on the basic policy of the Sherman Act*. The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . Even assuming occasional exceptions to the presumed consequences of competition, *the statutory policy precludes inquiry into the question whether competition is good or bad*.²¹³

Put differently, § 1 defendants can't justify a restraint on competition by arguing that their goal is to fight against the results of competition itself.

As another example, a group of public defenders were not able to justify their collective strike for higher pay by arguing that "quality of representation [would] improve when rates are increased," even though the Court recognized that such a result would obviously follow from the restraint and generally benefit society.²¹⁴ Nor could the NCAA attempt to justify its collective restriction on licensing televised college football games by arguing that doing so protects and encourages live game attendance:

At bottom[,] the NCAA's position is that ticket sales for most college games are unable to compete in a free market[, and] . . . because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act.²¹⁵

213. *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 694–95 (emphases added).

214. *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411, 423 (1990) ("It is, of course, true that the city purchases respondents' services because it has a constitutional duty to provide representation to indigent defendants. It is likewise true that the quality of representation may improve when rates are increased. Yet neither of these facts is an acceptable justification for an otherwise unlawful restraint of trade.")

215. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 116–17 (1984).

Contrast the Court’s flat rejections in these cases with its more welcoming treatment of truly pro-competitive justifications. For example, blanket licensing for music is successfully justified because it is more “efficient” — it removes previously insurmountable transaction costs for bulk music use, thereby creating new market opportunities.²¹⁶ Manufacturers setting their dealers’ maximum retail prices (essentially, vertical price fixing) can similarly be justified as a means of “prevent[ing] . . . dealers from exploiting a monopoly position,” solving a problem created by a lack of competition at the retail level.²¹⁷ Likewise, vertical territory divisions can be justified as enabling “efficient marketing” and “efficient distribution,” greatly promoting “*interbrand* competition” even if “*intra*brand competition” is reduced.²¹⁸ In short, § 1 analysis demands that offsetting justifications relate to the healthy functioning of markets — the functioning of competition itself — not to the health or welfare of society writ large.

Consider now the two ways in which privacy concerns could become relevant to a § 1 case. First, privacy intrusions could be part of the restraint of trade itself. For instance, a group of competing email service providers might agree to start engaging in greater user-data tracking, collection, and sales. Second, privacy protection could be part of the justification given for a restraint of trade. To invert the previous example, a group of competing email service providers might agree to switch from data-collection business models to paid-subscription business models, with enhanced user privacy given defensively as the reason for the collective switch. For at least the reasons given in Part II, restraints of trade that are adverse to personal data privacy seem unlikely to occur in many digital markets. If competition itself already yields low privacy, there is little incentive for firms to open themselves up to antitrust liability by pursuing it through collusion. The potential upside is likely more than outweighed by the tremendous risks that firms face when engaging in collusive conduct.²¹⁹ But privacy as justification for collusion (that is, privacy-enhancing restraints of trade) is a very plausible scenario — firms already seek to coordinate on best practices and standards in a variety of contexts, privacy included. For a

216. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21 (1979).

217. *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997) (quoting *Barkat U. Khan v. State Oil Co.*, 93 F.3d 1358, 1362 (7th Cir. 1996)); *see also* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 891–92 (2007) (allowing minimum vertical price restraints to be justified, as the “most efficient way” to reduce certain transaction costs and avoid “forcing [firms] to cut back . . . services to a level lower than consumers would otherwise prefer”).

218. *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 53–55 (1977) (emphases added).

219. Originally, violations of the Sherman Act were “misdemeanor[s],” punishable “by fine not exceeding five thousand dollars,” by “imprisonment not exceeding one year,” or both. 26 Stat. 209 (1890). After multiple enhancing amendments in 1955, 1974, and 1990, criminal violations of the Sherman Act now constitute felonies exclusively, punishable by up to ten years of imprisonment and one million dollars in fines (if not a corporation). 69 Stat. 281 (1955); 88 Stat. 1706 (1974); 104 Stat. 2880 (1990); 15 U.S.C. §§ 1, 2 (2021).

recent example, Google and Apple explicitly coordinated to create a uniform Exposure Notification System for COVID-19 across iPhones and Androids, with built-in privacy protocols that restricted data collection and access.²²⁰

The outer boundaries currently placed on antitrust doctrine would largely foreclose such justifications, however, if they arose defensively in litigation. To start, if a court analyzes the restraint under a true per se framework, then it may be impossible for any proffered justifications to save it.²²¹ Although the line between per se and rule-of-reason analysis has become blurred, the strict per se approach retains at least some viability when it comes to horizontal price fixing, market division, and boycotts.²²² The general readiness of courts to apply the per se label to horizontal price fixing in particular creates a problem for many firm-led attempts to collectively increase privacy protections. Consider the hypothetical presented above: A group of competing email service providers collectively agree to switch from data-collection to paid-subscription business models. The firms have thus agreed to set the price of their services — in effect, forbidding one price mechanism entirely (by fixing the terms of user privacy) and setting a clear, monetary price floor above zero. Both practices — forbidding price-adjacent terms or discounts²²³ and setting price floors²²⁴ — have already been labeled as

220. See GOOGLE, *Exposure Notifications: Help Slow the Spread of COVID-19, with One Step on Your Phone*, <https://www.google.com/covid19/exposurenotifications/> [<https://perma.cc/7Q6A-2Z9A>]; APPLE, *Privacy-Preserving Contact Tracing*, <https://covid19.apple.com/contacttracing> [<https://perma.cc/7Q8Q-3BCZ>].

221. See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (“However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”); see also note 201 and accompanying text.

222. See generally *N. Pac. Ry. Co.*, 356 U.S. at 5 (“Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, . . . division of markets, . . . [and] group boycotts . . .”); GAVIL ET AL., *supra* note 99, at 143 (noting that “the Supreme Court’s use of per se analysis in the modern era” is typically categorized as “price-fixing, division of markets, and group boycotts”). For relatively modern examples of each, see *Catalano, Inc. v. Tager Sales, Inc.*, 446 U.S. 643, 650 (1980) (price fixing); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (market division); and *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 432, 436 (1990) (group boycott).

223. See, e.g., *Catalano, Inc.*, 446 U.S. at 648–49 (“An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional per se rule against price fixing. While it may be that the elimination of a practice of giving variable discounts will ultimately lead in a competitive market to corresponding decreases in the invoice price, that is surely not necessarily to be anticipated. It is more realistic to view an agreement to eliminate credit sales as extinguishing one form of competition among the sellers.”).

224. See, e.g., *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 223 (1940) (“In this case, the result was to place a floor under the market — a floor which served the function of increasing the stability and firmness of market prices. . . . [M]arket manipulation in its various manifestations is . . . a force which distorts those prices, a factor which prevents the determination of those prices by free competition alone. . . . [T]hese buying programs were a species of price-fixing or manipulation.”).

or analogized to price fixing in other cases, thereby receiving per se condemnation.²²⁵ If a court were to apply these precedents, the email service providers' privacy justification, however honest and well-intentioned, could not save them from § 1 liability.

Even if the per se label is not immediately applied to firms' collective efforts to enhance user privacy, their justifications for doing so likely fall outside the scope of what can properly be considered under the rule of reason. As the Court has repeatedly explained,²²⁶ the text of the Sherman Act precludes inquiry into whether the results of free and open competition are good or bad; neither firms nor courts are permitted to second guess consumers' revealed market preferences. There is a limited role for improving the functioning of the market itself, but the Sherman Act presumes that privacy levels will ultimately be determined by market forces and, to the extent they exist, other regulatory regimes.

An analogy can be drawn here to the field of patent law, which has already seen this play out in the context of standard-setting organizations ("SSOs") and licensing commitments. SSOs are voluntary industry groups that exist to develop and promote industry standards that improve product interoperability — such as the 3G, 4G, and 5G standards that many cell phone manufacturers have adopted over time, allowing their different phones to all communicate with the same conforming cell towers.²²⁷ When weighing the costs and benefits of using different technologies in a standard, SSOs will ask members to disclose any relevant patents the members may have.²²⁸ Those with relevant patents are typically asked to agree to certain royalty arrangements in advance, such as royalty caps, in exchange for their technology's inclusion in the standard.²²⁹ The idea is to prevent a potential "hold-up" problem down the line, wherein one or more of the patent owners might begin to charge an exorbitant royalty rate after its

225. One might also argue that, insofar as privacy intrusions were the price paid by users, this hypothetical restraint is effectively imposing a price ceiling (of zero) as well — yet another practice that receives per se condemnation. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 348 (1982) ("Our decisions foreclose the argument that the agreements at issue escape per se condemnation because they are horizontal and fix maximum prices. [Our prior decisions] place horizontal agreements to fix maximum prices on the same legal — even if not economic — footing as agreements to fix minimum or uniform prices.").

226. See *supra* notes 210–15 and accompanying text.

227. See, e.g., *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 303–04 (3d Cir. 2007) (addressing the 3G standard created by an SSO and the competing standards).

228. See Anne Layne-Farrar, A. Jorge Padilla & Richard Schmalensee, *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 ANTITRUST L.J. 671, 672 (2007).

229. See Joseph Farrell, John Hayes, Carl Shapiro & Theresa Sullivan, *Standard Setting, Patents, and Hold-up*, 74 ANTITRUST L.J. 603, 605–11 (2007).

technology has been incorporated into a standard, and the implementers are thereby effectively locked in.²³⁰

Section 1, however, stands in the way. SSOs are constrained in their ability to engage in meaningful *ex ante* negotiations with respect to licensing terms precisely because of fears of antitrust liability. Those fears are not unfounded; an SSO requiring all standard-implicating patent owners to license at a specific rate could very well be characterized as engaging in horizontal price fixing.²³¹ As a result, SSOs use “licensing obligations [that] are left intentionally vague to avert price-fixing liability.”²³² So, these obligations take the form of nebulous “FRAND” commitments: the patentee is asked to agree to license on “fair, reasonable, and nondiscriminatory terms.”²³³ Those commitments, such as they are, then spawn considerable litigation and dispute over their meaning and enforceability, undermining their principal goal of providing much-needed assurance and stability for investment.²³⁴ It is difficult to imagine a group of, say, social-network service providers faring much better. For example, if Facebook and Google were to agree explicitly on using only certain data-collection practices relating to advertising engagement, that could very well be considered a form of price fixing²³⁵ — leading to *per se* condemnation or, under a rule-of-reason analysis, uncertainty at best as to whether their pro-consumer justification will be given weight. So instead, they can agree at most to

230. See *id.* at 609; J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations*, 5 J. COMPETITION L. & ECON. 123, 125–26 (2009).

231. See, e.g., Mark A. Lemley, *Standardizing Government Standard-Setting Policy for Electronic Commerce*, 14 BERKELEY TECH. L.J. 745, 753 (1999) (“The Antitrust Division of the Department of Justice has even taken action against the European Telecommunications Standards Institute for compelling members to relinquish [infringement claims] in the standards it promulgates.”); Patrick D. Curran, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983, 1000–01 (2003) (arguing that an SSO should be concerned about the possibility of being found liable under several antitrust theories); see also U.S. DEP’T OF JUST. & FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 5.1, at 15 (1995) (“[H]orizontal restraints [arising from joint patent ventures] often will be evaluated under the rule of reason. In some circumstances, however, that analysis may be truncated . . . some restraints may merit *per se* treatment, including price fixing . . .”).

232. Curran, *supra* note 231, at 983; see also Jorge L. Contreras, *Fixing FRAND: A Pseudo-Pool Approach to Standards-Based Patent Licensing*, 79 ANTITRUST L.J. 47, 51–52 (2013) (observing that many SSOs “go so far as to prohibit discussions of [more specific] royalties and other licensing terms at [] meetings”).

233. See Layne-Farrar et al., *supra* note 228, at 671.

234. See, e.g., Contreras, *supra* note 232, at 95–97 (indexing the major FRAND disputes from 1995–2012); David Arsego, *The Problem with FRAND: How the Licensing Commitments of Standard-Setting Organizations Result in the Misvaluing of Patents*, 41 BROOKLYN J. INT’L L. 257, 260 (2015).

235. Unlike the SSO example, this would require an intermediate conceptual step: treating privacy intrusions as part of the “price” (or quality-adjusted price) of search-engine and social-network services. That being said, this conceptual step has already become fairly standard in competition discourse. See *supra* notes 82–84 and accompanying text.

deliberately murky terms that do little to actually bind them, thereby leaving in place all the usual economic incentives to disregard user privacy.

This limiting principle of antitrust may therefore be frustrating to those concerned with consumer privacy. Although the preceding discussion has focused on § 1, recall that § 2 claims likewise ask the courts to consider the effects on and outcomes of competition — no more, no less.²³⁶ Just as § 1 weighs only the pro- and anticompetitive effects of restraints of trade, § 2 requires a demonstration of willful acquisition or maintenance of market power (defined as the power associated with limited competition).²³⁷ Analysis under neither part of the Sherman Act currently accommodates a more general analysis of the common good. To paraphrase the precedent described earlier, the Sherman Act presumes that competition is *the* good worth pursuing.

This is a challenge for the neo-Brandeisians, and it is without an easy solution. Declining to prosecute when firms raise pro-privacy justifications for collective behavior sidesteps § 1 doctrine to some extent, but it still leaves the door open for private suits, which neither the FTC nor the DOJ has authority to block. Given the risk of treble damages, even this reduced exposure seems likely to chill some collective efforts. Nor does it solve the parallel problem under § 2: the need to demonstrate a link between the alleged harm and impaired competition. Instead, the neo-Brandeisians could directly seek to expand antitrust doctrine — stretching it to cover a broader array of potential harms and justifications. Changes in theory have reshaped the contours of antitrust doctrine in the past, and the new guard of antitrust enforcers indeed appears primed to consider and embrace novel interpretations and strategies.²³⁸ But limiting antitrust analysis to a single dimension — competition — is necessary for judges to practicably and reliably adjudicate disputes.

Observe that, absent such a limitation, the Sherman Act would permit adjudicators to essentially decide whether any given economic practice is “good” or “bad” for society as a whole — leaving it entirely up to them to determine what those concepts mean in any particular context. Imagine, for example, that a group of cigarette manufacturers collectively agree to stop advertising any discounts or volume sales on

236. See *supra* notes 153–57 and accompanying text.

237. See *supra* notes 153–57 and accompanying text.

238. See, e.g., FED. TRADE COMM’N, POLICY STATEMENT REGARDING THE SCOPE OF UNFAIR METHODS OF COMPETITION UNDER SECTION 5 OF THE FTC ACT (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf [<https://perma.cc/9CGF-6B2E>] (“[T]his statement makes clear that Section 5 [of the FTC Act] reaches beyond the Sherman and Clayton Acts to encompass various types of unfair conduct that tend to negatively affect competitive conditions.”). It’s worth noting that this is the exact strategy that led to blowback from courts and Congress alike in the 1970s. See *supra* note 149.

their products. Their justification is simple: Although their profits will likely increase due to the reduction in competition on sales, they will also likely reduce the actual consumption of cigarettes as prices rise, thereby diminishing the adverse health effects caused by smoking. Competition itself has been harmed, but society is arguably better off by at least one objective metric. Should the restraint be permitted? What if they were fast-food restaurants rather than cigarette manufacturers? The possibilities are truly endless; any group of manufacturers in the world could attempt to justify an output-reducing or price-increasing restraint of trade by arguing that doing so *also* reduced their pollution footprint and energy consumption.²³⁹

A court hardly seems the appropriate forum to balance these kinds of open-ended tradeoffs or competing conceptions of the common good — and it would generally be up to the courts to do so. Neither the FTC nor the DOJ enjoys deference²⁴⁰ to their interpretations of the antitrust laws.²⁴¹ Likewise, although the FTC possesses substantive

239. The environmental, social, and corporate governance (“ESG”) movement has already begun to make these hypotheticals quite real and poses a serious challenge for the neo-Brandesians to articulate where the outer boundaries of competition law lie. *See, e.g.*, Sheila Adams, *Navigating the Fast-Evolving Global ESG Antitrust Terrain*, LAW360 (Dec. 9, 2022, 6:13 PM), <https://www.law360.com/articles/1554770/navigating-the-fast-evolving-global-esg-antitrust-terrain> [<https://perma.cc/DN4C-KC65>]; Letter from U.S. Sen. Tom Cotton et al., to Kenneth J. Markowitz, Partner, Akin Gump Strauss Hauer & Feld (Nov. 3, 2022), https://www.grassley.senate.gov/imo/media/doc/cotton_grassley_et_altolawfirmsesgcollusion.pdf [<https://perma.cc/NXA8-FRLZ>] (The ESG movement creates a “collusive effort to restrict the supply of coal, oil, and gas, which is driving up energy costs across the globe and empowering America’s adversaries abroad. Over the coming months and years, Congress will increasingly use its oversight powers to scrutinize the institutionalized antitrust violations being committed in the name of ESG, and refer those violations to the FTC and the Department of Justice.”).

240. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (“First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

241. *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1199–200 (2008) (“Like the Antitrust Division, the FTC has little power to create antitrust norms but merely enforces the norms created by the generalist Article III courts that review FTC decisions. . . . In practice, the deference seems to be minimal.”); Sanford N. Caust-Ellenbogen, *Blank Checks: Restoring the Balance of Powers in the Post-Chevron Era*, 32 B.C. L. REV. 757, 817 (1991) (“*Chevron* is also inapplicable in situations involving parallel enforcement modes, such as the antitrust laws.”). It’s worth noting that § 5 of the FTC Act has broad language similar to that of the Sherman Act, prohibiting “unfair or deceptive acts or practices in or affecting commerce” 15 U.S.C. § 45(a) (2021). But in practice, the scope of § 5 has been pegged to “conduct that would violate the Sherman Antitrust Act.” *A Brief Overview of the Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM’N (May 2021), <https://www.ftc.gov/about-ftc/what-we-do/enforcement->

rulemaking authority with respect to its other key statutory charge (protecting consumers from “unfair or deceptive acts”),²⁴² it likely does not possess that same authority over competition law.²⁴³ What little caselaw exists on this point strongly suggests that “it is for the courts, not the commission, ultimately to determine as a matter of law what [anticompetitive practices] include.”²⁴⁴ Today’s Court appears even less likely to seriously entertain a sudden and unprecedented expansion of the FTC’s administrative authority, absent legislative action.²⁴⁵ In particular, a majority of the Court has expressed a renewed interest in nondelegation doctrine,²⁴⁶ an interest in direct conflict with such an expansive interpretation of the FTC’s rulemaking authority. Perhaps the most comparable delegation that can be found in caselaw — the

authority [<https://perma.cc/VT3G-TB7L>]. Even there, the FTC’s record of receiving deference is mixed and controversial at best. *Compare* Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005) (“While we afford the FTC some deference as to its informed judgment that a particular commercial practice violates [§ 5 of] the FTC Act, we review issues of law de novo.”), and *Lieberman v. FTC*, 771 F.2d 32, 37 (2d Cir. 1985) (denying *Chevron* deference explicitly), with *Mattox v. FTC*, 752 F.2d 116, 123–24 (5th Cir. 1985) (granting *Chevron* deference). *Cf.* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 759 (1999) (declining to address the application of *Chevron* deference).

242. 15 U.S.C. § 45(a)(1) (2021); *see id.* § 57(a) (“[T]he Commission may prescribe (A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce . . . , and (B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce”). *But see id.* § 57(a)(2) (emphasis added) (“The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of *competition* in or affecting commerce.”).

243. *See Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 91 n.103 (1989) (“[W]e are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions on specific types of business conduct.”); Richard J. Pierce, Jr., *The Rocky Relationship Between the Federal Trade Commission and Administrative Law*, 83 GEO. WASH. L. REV. 2026, 2040 (2015) (“[The FTC] has no power to issue rules to implement the Sherman or Clayton Acts . . .”).

244. *FTC v. Gratz*, 253 U.S. 421, 427 (1920).

245. *Cf.* *West Virginia v. EPA*, No. 20-1530, slip op. at 17 (June 30, 2022) (“[O]ur precedent teaches that there are ‘extraordinary cases’ . . . in which the ‘history and the breadth of the authority that the agency has asserted,’ and the ‘economic and political significance’ of that assertion, provide a ‘reason to hesitate before concluding that Congress’ meant to confer such authority.” (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000))).

246. Nondelegation is a constitutional doctrine obligating Congress to provide, at minimum, “an intelligible principle” when it delegates rule-making authority to an agency. *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). For the Court’s renewed interest, *see Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (citation omitted) (“Nevertheless, since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”); *id.* at 2131–48 (Gorsuch, J., dissenting) (arguing explicitly for a more muscular version of nondelegation doctrine moving forward, joined by Roberts, C.J. and Thomas, J.); *Paul v. United States*, 142 S. Ct. 342, 342 (2019) (mem.) (Kavanaugh, J., respecting denial of certiorari) (“I write separately because Justice Gorsuch’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases.”).

National Industrial Recovery Act's grant of executive authority to create "codes of fair competition"²⁴⁷ — was struck down on precisely those grounds in *A.L.A. Schechter Poultry Corp. v. United States*.²⁴⁸ In doing so, the *Schechter Poultry* Court explicitly distinguished the statute at issue from the FTC's grant of authority, but only on the grounds that the FTC is "a quasi-judicial body" operating "in particular instances, upon evidence, in light of particular competitive conditions."²⁴⁹ This distinction, of course, would disappear entirely in the context of prospective rulemaking rather than adjudication. Under current law, there does not appear to be a way around judicial primacy with respect to antitrust.

The courts' lack of institutional competence to decide, unfettered, whether any given economic practice is good or bad for society as a whole should be sufficiently obvious, but equally pressing are the problems of notice and clarity. Critics have frequently attacked rule-of-reason analysis as "vague,"²⁵⁰ "uncertain,"²⁵¹ and "standardless,"²⁵² with resulting high error costs and risks of chilling beneficial market activity.²⁵³ Those critics likely overstate the drawbacks of the rule of reason, in part because they overlook (or precede the courts' clearer embrace of) the limiting principle of focusing on competition itself. Without that limiting principle to provide predictability and structure, however, those critics are surely right — as Justice Thurgood Marshall warned, antitrust analysis becomes an aimless "ramble through the wilds."²⁵⁴

247. National Industrial Recovery Act of 1933, Pub. L. 73-67, § 3, 48 Stat. 195 (1933).

248. 295 U.S. 495, 541–42 (1935).

249. *Id.* at 533.

250. See, e.g., Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984) ("Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.")

251. See, e.g., Alan Devlin & Michael Jacobs, *Joint-Venture Analysis After American Needle*, 7 J. COMPETITION L. & ECON. 543, 546 (2011) ("Full-blown rule-of-reason analysis subjects defendants to considerable expense and uncertainty."); Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 473 (2012) ("This lack of clear guidance has led to uncertain and inconsistent outcomes under the rule of reason both at the Supreme Court and lower court levels."); ABA ANTITRUST SECTION, MONOGRAPH NO. 23, THE RULE OF REASON 102 (1999) ("[T]he rule of reason — and its application in particular cases — has remained imprecise and unpredictable . . .").

252. See, e.g., Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 322–28 (1986).

253. This is a particularly grave concern for antitrust cases, in which felony convictions and automatic treble damages hang in the balance. See 15 U.S.C. §§ 1, 2, 15(a) (2021); see, e.g., *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (discussing the risk of false positives under the Sherman Act, and how they might "chill the very conduct the antitrust laws are designed to protect").

254. *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 609–10 n.10 (1972) ("Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act. Should Congress ultimately determine that predictability is unimportant in this area of the law, it can, of course,

It is no exaggeration to say that undermining the clarity of antitrust law puts its very existence in jeopardy. Not long ago, the Court reiterated its skepticism towards economic proscriptions lacking specificity, offering *United States v. L. Cohen Grocery Co.*²⁵⁵ as an exemplary case in applying void-for-vagueness doctrine.²⁵⁶ That case, in turn, featured precisely the kind of untethered prohibition that the antitrust laws would become if non-competition-related justifications were up for consideration:

Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below, in its opinion, to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.²⁵⁷

As I have argued previously, the antitrust laws are perilously close to invalidation on void-for-vagueness grounds as is.²⁵⁸ The Court today is perhaps at its most receptive to such arguments; trying to stretch antitrust law any further may only tear it to shreds.

The merger review process offers one last example of how pursuing non-competition-related goals like privacy via antitrust law risks haphazardness. Unlike Sherman Act violations — where enforcement efforts are generally reactive — mergers and acquisitions are reviewed proactively, under the Hart-Scott-Rodino amendments²⁵⁹ to the

make *per se* rules inapplicable in some or all cases, and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.”).

255. 255 U.S. 81 (1921).

256. *Johnson v. United States*, 576 U.S. 591, 602–04 (2015) (discussing *L. Cohen Grocery Co.*).

257. *L. Cohen Grocery Co.*, 255 U.S. at 89–90 (emphasis added).

258. See generally Sipe, *supra* note 127 (arguing that the Sherman Act is already particularly vulnerable to being found unconstitutionally void for vagueness).

259. Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1390 (1976).

Clayton Act.²⁶⁰ Any firms intending a capital transaction above a certain size²⁶¹ must first seek and obtain preclearance from the DOJ and FTC, which review the transaction for potential anticompetitive effects.²⁶² In brief, the agencies first conduct a preliminary review — which most transactions pass — and then, if need be, one agency will proceed deeper with a “second request” for more information.²⁶³ Litigation is rare; in the vast majority of instances where the agency challenges the transaction, it will either be abandoned by the firms or modified to address the agency’s concerns through settlement.²⁶⁴

Open-ended negotiation thus takes the place of bounded litigation, making it easier for merger review to be used as a privacy lever. Time is of the essence for the firms being reviewed, and so the agencies can “leverage” their authority over competition into *de facto* authority over other areas like privacy through settlement.²⁶⁵ When reviewing

260. Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12–27 (2021) (“No person . . . shall acquire, directly or indirectly, the whole or any part of the stock or other share capital . . . , the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.”).

261. *See* Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 86 Fed. Reg. 7870 (Feb. 2, 2021). In a typical case, the relevant threshold transaction size would be \$92 million. *Id.*

262. *See generally* FED. TRADE COMM’N, WHAT IS THE PREMERGER NOTIFICATION PROGRAM?: AN OVERVIEW 1 (2009), <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf> [<https://perma.cc/58WX-UYPP>].

263. *See id.*; *see also* U.S. DEP’T OF JUST., ANTITRUST DIVISION MANUAL, at III-27 (5th ed. 2021). For example, in FY2019, there were 2,089 reported transactions under the HSR amendments; only sixty-one generated second requests. U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019, at 5 (2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019_0.pdf [<https://perma.cc/8FWV-GJSN>].

264. *See* U.S. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 263, at 2–3; *see also* William E. Kovacic & David A. Hyman, *Regulatory Leveraging: Problem or Solution?*, 23 GEO. MASON L. REV. 1163, 1167 (2016) (“Most merger-related litigation has been replaced by negotiated settlements, resulting in either outright approval, divestitures, or conduct remedies.”).

265. *See* Kovacic & Hyman, *supra* note 264, at 1165–66. Competition authorities in Europe, for example, have already done so in multiple cases and routinely express the view that examining privacy is within their purview. *See, e.g.*, Eric Auchard, *EU Competition Chief to Eye ‘Big Data’ Concerns in Merger Probes*, REUTERS (Jan. 17, 2016), <http://www.reuters.com/article/us-europe-data-competition-idUSKCN0UV0ZG> [<https://perma.cc/F4P4-8T6E>]; Press Release, Bundeskartellamt, Bundeskartellamt Initiates Proceeding Against Facebook on Suspicion of Having Abused Its Market Power by Infringing Data Protection Rules (Mar. 2, 2016), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html [<https://perma.cc/36DP-S4Z2>] (“There is an initial suspicion that Facebook’s conditions of use are in violation of data protection provisions. Not every law infringement on the part of a dominant company is also relevant under competition law. However, in the case in question Facebook’s use of unlawful terms and conditions could represent an abusive imposition of unfair conditions on users. The Bundeskartellamt will examine, among other issues, to what extent a connection exists between the possibly dominant position of the company and the use of such clauses.”); Facebook/WhatsApp (Case No COMP/M.7217) Commission Decision C (2014) 7239 [2014], Eur. Comm’n, ¶ 174 (Mar. 10,

Google’s proposed acquisition of DoubleClick in 2007²⁶⁶ for example, FTC personnel hotly debated “whether the merger review should be used as an excuse/pretext/justification to delve into Google’s data protection and privacy policies.”²⁶⁷ In the end, the FTC did not explicitly pursue such tactics, stating its belief that “the Commission lack[s] legal authority to require conditions to this merger that do not relate to anti-trust.”²⁶⁸

Even if merger authorities did adopt a more aggressive approach concerning privacy considerations, it’s worth emphasizing how those efforts would be intrinsically cabined. Consumer privacy could not be reviewed or regulated universally, but rather only for firms that engage in transactions requiring approval: mergers and acquisitions above a certain cap. Any firm would be free to continue its poor privacy practices, so long as it structures and plans its capital movement carefully. Perversely, the result might be that the incumbent digital giants effectively enjoy an additional entry barrier against new competitors. They can continue their practices undisturbed, secure in their advantages of incumbency. Up-and-comers seeking to merge and grow in order to compete with larger firms, on the other hand, may be held to a higher — and more costly — standard of behavior.

Equally concerning, the de facto lack of a limiting statutory or regulatory framework will render the merger review process much less predictable, chilling even beneficial economic activity.²⁶⁹ Even if the leveraging is cabined to privacy alone — a generous assumption,²⁷⁰ given the tendencies of mission creep and agency self-

2014); European Commission Press Release IP/16/4284, Mergers: Commission Approves Acquisition of LinkedIn by Microsoft, Subject to Conditions (Dec. 6, 2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_4284 [<https://perma.cc/EQL8-P7YT>].

266. Press Release, Fed. Trade Comm’n, FTC Closes Google/DoubleClick Investigation (Dec. 20, 2007), <https://www.ftc.gov/news-events/press-releases/2007/12/federal-trade-commission-closes-googledoubleclick-investigation> [<https://perma.cc/K7RH-XMY9>].

267. Kovacic & Hyman, *supra* note 264, at 1171. Professor William Kovacic writes in part from his own experience, having served as an FTC Commissioner when Google was seeking approval for the acquisition. *Id.* at 1163 n.*.

268. *Statement of Federal Trade Commission Concerning Google/DoubleClick: FTC File No. 071-0170*, FED. TRADE COMM’N (Dec. 20, 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf [<https://perma.cc/GD4P-ZKUA>].

269. See generally Kovacic & Hyman, *supra* note 264, at 1179–81. Cf. Kenneth G. Elzinga, *The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1200 (1977) (“[When] the antitrust laws proceed[] along principles so uncertain, and in directions so unpredictable, [they will] exert a chilling effect on legitimate business enterprise.”).

270. Cf. Commissioner Maureen K. Ohlhausen & Alexander P. Okuliar, *Competition, Consumer Protection, and the Right [Approach] to Privacy*, 80 ANTITRUST L.J. 121, 153 (2015) (“A blended approach to antitrust that encompasses normative privacy concerns would also provide cover for the injection of other noncompetition factors into the analysis. . . . [This] could shift antitrust law’s focus away from efficiency and alter its relatively predictable and transparent application.”).

aggrandizement — the result will still treat transactions with the same competitive valence differently. How much privacy may be traded for how much competition? The outcome of every transaction review is left strictly confined to its facts, to say nothing of how changing administrations (whose precise views on privacy will no doubt vary) further complicate the mix. Exacerbating matters, these decisions will be made largely through settlement rather than litigation or formal proceedings, reducing transparency and accountability alike.²⁷¹

In short, using antitrust to pursue non-competition-related goals — as the neo-Brandeisians intend with respect to privacy — undermines critical safeguards against overbreadth, uncertainty, and vagueness in the law. At best, there are obvious harms to markets and their participants; at worst, there is a real risk of harm to the field, up to and including outright invalidation of its underlying statutory framework. There is a certain irony, then, in the neo-Brandeisians' claim that antitrust law prioritizes "short-term interests" over the long-term "health of the market as a whole."²⁷² Insofar as they continue to incorporate policy goals in tension with competition into antitrust law, it is they who risk short-term gains at the expense of long-term viability.

C. *The Problem of Lopsidedness*

Assuming competition over privacy between many firms can stably exist, promoting such competition would still seem to conflict with the neo-Brandeisians' larger, progressive goals. Recall that the neo-Brandeisian movement is concerned with concentrations of economic power because of, among other things, their oppressive potential to foster inequality and undermine democracy. But competition over privacy — in contrast to regulating privacy itself — invites these very same harms. Imagine a hypothetical market for map apps, featuring robust competition over privacy options. Consumers can choose paid subscription options that keep their location data discreet, or they can pay less (perhaps even nothing) if they accept an option that collects and sells that data. For those with less ability to pay, however, it will not be much of a choice at all. In other words, antitrust law's success as a privacy lever comes with a significant cost: access to privacy will largely be determined by an individual's wealth.²⁷³

271. *Id.*

272. See, e.g., Khan, *supra* note 17, at 716.

273. Comparable critiques have been made with respect to enhancing personal data privacy through intellectual property rights over personal data. See, e.g., Amy Kapczynski, *The Cost of Price: Why and How to Get Beyond Intellectual Property Internalism*, 59 UCLA L. REV. 970, 978 (2012) ("I show that the institutional approach of IP is in significant tension with distributive values. The most obvious reason, which is in some sense well known and visible

This gap in effective scope of privacy between rich and poor would not be a new phenomenon by any means.²⁷⁴ At the same time, using antitrust law to enforce a marketplace of divergent privacy levels — as opposed to developing a more robust framework of *sui generis* minimum privacy protections²⁷⁵ — legitimizes and widens that gap. It would do so, moreover, at precisely the time when technological trends render those with less wealth especially vulnerable to privacy-related harms. Poor Americans tend to have weaker digital literacy skills,²⁷⁶ including “lower usage of privacy-enhancing strategies,”²⁷⁷ while the use of big data is only increasing.²⁷⁸ The result is that the personal information of poor Americans can be wielded against them with disturbing ease by various actors — from pitching “predatory financial products” to “limit[ing] their employment and educational opportunities.”²⁷⁹ Even widespread privacy violations, like identity theft or

even from an internalist perspective, is that IP uses price to ration access to information goods. Price can be a problematic way of distributing goods that are important to justice because the existing distribution of resources may be unjust.”)

274. See generally JOHN GILLIOM, *OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY* (2001) (providing firsthand accounts of welfare-related surveillance from low-income mothers in Appalachian Ohio); Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOKLYN L. REV. 1389, 1389–90 (2012) (examining how the poor “endure a barrage of information-collection practices that are far more invasive and degrading than those experienced by their wealthier neighbors,” due to government welfare administration and surveillance practices common to low-wage employers); Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 406 (2003) (outlining how the physical realities of poverty — crowded spaces and greater reliance on public infrastructure — mean that “[r]elative wealth makes a difference in search and seizure” protections despite facially wealth-neutral precedent); Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 405–08 (2010) (contrasting the privacy intrusions attached to low-income government benefits against the relative ease of obtaining higher-income government benefits like mortgage deductions and child care credits).

275. See, for example, the European Union’s more comprehensive efforts towards protecting personal data. GDPR, *supra* note 38.

276. See Eszter Hargittai, *Second-Level Digital Divide: Differences in People’s Online Skills*, 7 FIRST MONDAY (2002), <https://firstmonday.org/ojs/index.php/fm/article/view/942> [<https://perma.cc/HE94-XYV3>]; Paul DiMaggio, Eszter Hargittai, Coral Celeste & Steven Shafer, *From Unequal Access to Differentiated Use: A Literature Review and Agenda for Research on Digital Inequality*, in SOCIAL INEQUALITY 355 (Kathryn Neckerman, ed., 2004).

277. Mary Madden, Michele Gilman, Karen Levy & Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53, 53, 123 (2017) (“[L]ow-income Americans express greater concerns regarding data collection in a variety of contexts, but they are more likely to access the Internet from less secure mobile devices, and to report lower usage of privacy settings and protective strategies.”)

278. See generally FED. TRADE COMM’N, *BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? UNDERSTANDING THE ISSUES* (2016), <https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf> [<https://perma.cc/9H7C-C5B7>].

279. Madden et al., *supra* note 277, at 65–67; see also Joseph W. Jerome, *Buying and Selling Privacy: Big Data’s Different Burdens and Benefits*, 66 STAN. L. REV. ONLINE 47, 51 (2013) (“Most of the biggest concerns we have about big data — discrimination, profiling, tracking, exclusion — threaten the self-determination and personal autonomy of the poor more than any other class.”)

spreading inaccurate data, fall more harshly on the poor “due to a lack of resources to seek redress” and the myriad interactions between government and commercial systems.²⁸⁰ In a world where privacy comes at a premium price, these concerns are only exacerbated.

The neo-Brandeisians should also find it troubling how legitimizing a wealth-privacy gap intersects with other marginalized identities. For example, because they are caught between the requirements for government assistance and the potential threat of Child Protective Services investigations, “the legal and social condition of poor mothers is one that is devoid of privacy.”²⁸¹ As a result, they are especially unlikely to be willing to pay for enhanced privacy in the marketplace, and especially vulnerable to privacy abuses. To varying degrees, the same can be said for women as a whole,²⁸² and further examples of intersectional harm abound:

[S]urveillance . . . is a gateway, ‘but for’ cause for the disproportionate degree to which [B]lack, Latinx, and Muslim communities are criminalized and subject to carceral punishment. . . . Similarly, . . . surveillance apparatuses not infrequently out information regarding people’s sexuality, gender identity, and HIV status, potentially subjecting people to discrimination on the basis of that information. . . . [M]arginalized communities are most in need of privacy in order to avoid downstream discrimination and other negative consequences²⁸³

Moreover, data collected from marginalized groups may serve as the fodder for biased machine learning or the trigger for applying discriminatory algorithms.²⁸⁴ In short, robustly competitive markets over privacy would be regressive in many ways.

280. Madden et al., *supra* note 277, at 62–64 (“In sum, surveillance of the poor is broader, more invasive, and more difficult to redress than surveillance of other groups, and the overlap among government, commercial, and institutional data flows creates unique challenges for maintaining the accuracy and security of records.”).

281. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 9 (2017).

282. See generally Gianclaudio Malgieri & Gloria González Fuster, *The Vulnerable Data Subject: A Gendered Data Subject?*, 13 *EUR. J.L. & TECH.* (Sept. 27, 2021), <https://www.ejlt.org/index.php/ejlt/article/view/843/1057> [<https://perma.cc/9PYH-ACH5>] (discussing the literature describing how “women are more vulnerable [to privacy abuses] — i.e., subject to adverse effects — than men in many contexts: workplace, education, etc.”).

283. SCOTT SKINNER-THOMPSON, *PRIVACY AT THE MARGINS* 2 (2021) (emphasis added).

284. See generally RUHA BENJAMIN, *RACE AFTER TECHNOLOGY* 10 (2019) (“[W]hen automated systems from employment, education, healthcare, and housing come to make decisions about people’s deservedness for all kinds of opportunities, then tech designers are erecting a digital caste system, structured by existing racial inequities These tech advances . . . could not exist without data produced through histories of exclusion and discrimination.”).

Nor, in all likelihood, would Justice Brandeis himself have tolerated competition over (and the resulting uneven distribution of) data privacy. In his seminal article with Samuel Warren, privacy is described not as a “private property” right to be bought and sold, but rather “the principle . . . of an inviolate personality.”²⁸⁵ Further, Brandeis recognized the importance of privacy to democracy itself,²⁸⁶ as have many scholars since.²⁸⁷ Given the neo-Brandeisians’ stated interest in improving the health of democracy through antitrust policy,²⁸⁸ it would thus seem counterproductive and inconsistent to not just tolerate but actively encourage a market-based allocation of consumer privacy.

V. CONCLUSION

The New Brandeis movement is well represented across the most important antitrust positions in the federal government, and it is already reflected in ongoing litigation and proposed regulation regarding the digital giants that define our era. But the movement is also a marked departure from prevailing antitrust theory and caselaw, which places consumer welfare — as measured by market efficiency, output, and prices — at its center. Neo-Brandeisians instead focus on market concentration itself, exhibit skepticism toward efficiency-based justifications, and hope to use competition law to pursue additional policy goals like consumer privacy. At the same time, privacy and competition are

285. Warren & Brandeis, *supra* note 2, at 205.

286. See, e.g., Erin Coyle, *Sunlight and Shadows: Louis D. Brandeis on Privacy, Publicity, and Free Expression in American Democracy*, 33 *TOURO L. REV.* 211, 214 (2017) (“Brandeis’ focus on promoting self-fulfillment and self-governance in an ideal democracy is apparent in his writings about seemingly incongruent topics: protecting privacy against prying journalists and government agents, protecting individuals from corporate and political corruption, and protecting freedom to speak and participate in self-government in a democratic society.”). See generally PHILIPPA STRUM, *BRANDEIS ON DEMOCRACY 197–98* (1995) (“[Privacy] dovetailed with his emphasis on communication and discussion of ideas, for without privacy there could be no real freedom of speech. The right of the individual not to have his or her privacy violated by the government thus was a central element in his theory of democracy.”).

287. See, e.g., ALAN F. WESTIN, *PRIVACY AND FREEDOM* 26 (1967) (“Just as a social balance favoring disclosure and surveillance over privacy is a functional necessity for totalitarian systems, so a balance that ensures strong citadels of individual and group privacy and limits both disclosure and surveillance is a prerequisite for liberal democratic societies.”); Paul M Schwartz, *Privacy and Democracy in Cyberspace*, 52 *VAND. L. REV.* 1609, 1611 (1999) (“The lack of appropriate and enforceable privacy norms poses a significant threat to democracy in the emerging Information Age.”).

288. See *supra* note 22 and accompanying text; see also WU, *supra* note 142, at 139 (“That’s why the struggle for democracy now and in the progressive era must be one centered on private power . . . so as to enable human flourishing in a nation of rough economic equals.”); Jonathan Kanter, Assistant Att’y Gen., Antitrust Div. of the Dep’t of Just., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york> [<https://perma.cc/7HPQ-YW67>] (“Competition brings benefits that include . . . the flow of information and news, which is vital to the health of a functioning democracy.”).

not necessarily in a positive relationship with each other. On the contrary, from the “privacy paradox” to externalities to economies of scope and scale, many digital spaces appear to have a negative relationship between privacy and competition — creating a significant challenge for the neo-Brandeisians. Reducing market concentration may lead to or require greater privacy intrusions; importing privacy concerns into antitrust risks undermining the law’s viability itself; and legitimizing competition over privacy is apt to disproportionately hurt vulnerable populations. With that in mind, some modest suggestions follow for antitrust enforcers and policymakers going forward.

Sui generis regulation must be the first and primary lever for privacy policy. The challenges noted above are easily avoided where there is a robust and freestanding privacy regime. Antitrust law can then work to reduce market concentration without undermining privacy, because firms will face privacy obligations that are independent from competitive forces. Clarity and predictability in antitrust law will be preserved, because privacy-competition tradeoffs need not be adjudicated on an ad hoc basis by courts; obeying the freestanding privacy regime becomes a well-cabined justification for anticompetitive behavior, as has been the case with other regimes already. And the worst distributional issues are neatly avoided, because a uniform baseline has been imposed, even if some competition over additional privacy exists. The various forms of legislation that Congress is now considering are promising,²⁸⁹ and the political will behind these efforts is perhaps at its zenith. That being said, previous attempts to pass sui generis privacy legislation have repeatedly failed, political turnover has just occurred, and even successful legislation may be incomplete by design or due to necessity of compromise.

Regardless of why, if antitrust law is ultimately relied upon as a second-best leading lever for privacy, the neo-Brandeisians must work to minimize the damage from using it as such. They should focus their efforts on the clearest possible instances of anticompetitive behavior undermining privacy and avoid suggesting or assuming a connection between the two without actual supporting evidence. They should also consider using antitrust law — and, in the case of the FTC, consumer-protection law — to improve the connection between competition and privacy as a preliminary goal. At least some of the reasons why competition and privacy are in tension can be reduced or removed. Ending behaviorally manipulative practices would likely lessen the apparent

289. See, e.g., American Data Privacy and Protection Act, H.R. 8152, 117th Cong. (2022); Online Privacy Act of 2021, H.R. 6027, 117th Cong. (2021); Data Privacy Act, H.R. 5807, 117th Cong. (2021). See generally Müge Fazlioglu, *US Federal Privacy Legislation Tracker*, INT’L ASS’N PRIV. PROS. (Dec. 2022), https://iapp.org/media/pdf/resource_center/us_federal_privacy_legislation_tracker.pdf [<https://perma.cc/HM75-HAXM>] (compiling a comprehensive list).

“privacy paradox,” as would improving transparency and comprehensibility of firms’ data use. Establishing data portability and erasure rights, mandating high-privacy defaults, and even educational outreach on managing privacy would all improve the connection to competition. In the long run, this will better enable antitrust law to carry out privacy policy without the attendant harms outlined above.

The neo-Brandeisians may still be confronted, however, with unavoidable tradeoffs between competition and privacy, particularly given their aggressive and interventionist stance. Accordingly, they have an obligation to provide articulable principles for adjudicating those tradeoffs. The question of how much competition may be exchanged for how much privacy (or vice versa) can’t be answered through case-by-case litigation or, even worse, opaque and imbalanced merger review. To the extent that rulemaking is permissible in this space, clear rules regarding the competition-privacy tradeoff would be an excellent use of that authority. Failing that, a declaration of enforcement priority and decision-making procedure akin to the Horizontal or (now-revoked) Vertical Merger Guidelines would still go a long way. What kinds of anticompetitive behavior are potentially justified in the name of privacy? Conversely, what kinds of privacy harms are an acceptable cost of reduced market concentration? These are questions without objective answers. They are ultimately value judgments, and economic actors cannot be expected to predict the neo-Brandeisians’ choices out of thin air.