Rulemaking to Bar Self-Preferencing by Technology Platforms

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26 STAN. TECH. L. REV. 143 (2023)

ABSTRACT

This Note explores how antitrust law, through FTC rulemaking, can address issues created by technology firms engaging in self-preferencing. This Note specifically examines how these firms harm competition by leveraging their position as a major platform, while also using that platform to compete in downstream markets. For example, Apple content can be watched on an Apple TV through a subscription to Apple TV+. An Amazon Echo speaker can be purchased on Amazon.com and shipped using Fulfillment by Amazon. There are competitors to Apple content (like Hulu) or Amazon products (like Sonos speakers), but those competitors must list on Apple or Amazon's platform. Similarly, app developers and publishers rely on Meta, and websites like Yelp rely on Google, for these platforms have unparalleled reach. Big technology firms can entrench their power through unfair, anticompetitive, and exploitative practices when downstream competitors have limited realistic alternatives.

There have been increasing calls to 'regulate big tech.' In this era, Apple, Alphabet (Google), Amazon, and Meta (Facebook) are facing scrutiny for their data privacy policies, content moderation decisions, and anticompetitive behaviors. These issues overlap, but crucially, are also distinct. While cultural norms, government consent decrees, and private lawsuits primarily shape how these platforms operate in the United States, 'antitrust law' is increasingly being turned to for a legal remedy to these issues. However, because the types of problems presented are categorically distinct, regulators need to clearly establish what is and what is not *unlawful. For example, legal proposals aimed*

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* J.D., Stanford Law School, 2022. My deepest thanks to Professor Mark Lemley for his encouragement and guidance since this piece started as a short reflection paper in his *Intellectual Property and Antitrust Law* course, to a research paper, and now a Note. Many thanks as well to Professor Anne Joseph O'Connell, Professor Barbara van Schewick, Daphne Keller, Professor Phillip Malone, and Tom Rubin. I would not have been able to write this Note had I not taken their courses, read their publications, and talked with them about complicated legal issues. Thank you to the Stanford Technology Law Review editorial team for their generous support, feedback, and edits. The opinions expressed in this Note are mine only and do not reflect the opinions or views of anyone else, including past or present employers.

at enhancing competition must navigate the implications of liability associated with content moderation.

This Note takes a practical approach on where current antitrust law could be most effective at banning self-preferencing, and therefore protecting competition and innovation when big technology platforms have exceptional access to third-party data and 'decisions' are made by a combination of software, user behavior, and algorithms. The growth-over-profits mindset of many technology firms also makes imagining 'breaking-up' big digital tech platforms difficult, when business segments behaving anticompetitively could be operating at a loss. Structural separation may be relied on one day, but an immediate and broadly applicable framework through rulemaking is needed today.

The Federal Trade Commission (FTC) has authority to enforce the existing ban on unfair methods of competition. As technology, business, and the internet innovate and evolve, so have anticompetitive practices and their impacts. This Note argues that FTC rulemaking is the most efficient and targeted method to regulate digital platforms behaving anticompetitively through self-preferencing.

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INTRODUCTION

Legislatures, regulators, and the public are increasingly concerned about the biggest technology firms' cultural dominance, effect on their respective markets, and overall impact on the economy.[1] Much thought has been given to determining whether there is a problem with the status quo and why. For those who think there is a problem, antitrust law increasingly is being turned to for potential solutions. However, in the United States, antitrust law has been narrowed, often procedurally, in order to make it harder to enforce the Sherman Act and accompanying antitrust statutes. This narrowing is often attributed to what is known as the 'Chicago School' application of antitrust law, which is a theory that shuns overdeterrence, trusts unregulated market forces, and attempts to maximize economic efficiencies (among other things).[2] Many academics are convinced that strict Chicago School-style applications of antitrust law have become too extreme and disconnected with facts on the ground and sound economic theories.[3] Other schools of thought argue that it is time to loosen the Chicago School's stranglehold on antitrust law. Though antitrust "Modernists" and "Neo-Brandesians" agree that change is needed, there is still disagreement between philosophies that want to use antitrust law to tackle high concentrations of economic power, and those that want to use antitrust law only to address specific proven harms to competition on an individualized basis.[4] Regardless of which antitrust approach is 'correct,'

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[1] *See, e.g.*, STAFF OF H. SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Comm. Print 2020), https://perma.cc/9V9H-9FYW [hereinafter COMPETITION IN DIGITAL MARKETS].

[2] *See generally*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, U. PA. L. REV. 925 (1979).

[3] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 718-19 (2017).

[4] *See generally* Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33 (2021). Professor Shapiro divides the current antirust debaters into three camps: 1) the Chicago School, 2) the Modernists, and 3) the Populists/Neo-Brandesians. Shapiro explains: the Chicago School "advocated to narrow the reach of antitrust law and raise obstacles to antitrust plaintiffs, with considerable success." *Id.* at 33. The Modernists "recognize[] that antitrust law and policy have not been vigorous enough in recent years" but "believe antitrust should continue to focus on protecting and promoting competition, which is fundamentally about economic effects." *Id.* at 33-34. Populists/Neo-Brandesians are "deeply concerned about the political power of large companies. They favor deconcentrating the economy to reduce that power and thereby open up opportunities for small businesses, benefit workers, and lessen racial and economic inequities." *Id.* at 34. Of course, these camps do not capture the full variety of views surrounding antitrust policy. "Although guided by economic analysis, the foundations of competition policy around the world differ as competition regimes developed and evolved under different political, social, and market

proposals for updating antitrust law need to adapt to the way big technology firms are structured and make money.

Given the breadth of existing academic work describing the various issues with large digital platforms and market concentration,[5] this Note assumes that we have a problem and will explain why that is the correct assumption. Instead, "[t]he real question, given the current state of market power in the United States, is how the antitrust enforcers can best protect competition, which requires a focus on general deterrence."[6] Focusing on this "real question," this Note attempts to provide solutions to problems where big technology platforms are behaving anticompetitively, and where those behaviors can be addressed with antitrust regulation. This Note also attempts to give a framework of behaviors that are problematic but are better addressed outside of antitrust law.

Lina Khan's article, *The Separation of Platforms and Commerce*, leaves little doubt that there are issues with certain platforms' "dual role . . . as both an operator of a dominant platform that hosts third-party merchants, content creators, or app developers, and as a market participant that competes with those same producers."[7] For example, Apple, which is ostensibly a technology hardware manufacturer of phones, computers, and TVs, is also becoming a TV production studio. Apple content, like Severance, can be watched on its hardware (an Apple TV) with a subscription to its platform (Apply TV+). Amazon is no longer just a platform to buy and sell goods; it also manufactures goods. Amazon products, like AmazonBasics, can be purchased on Amazon's platform,

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conditions. Enforcers differ in their views on the ability of markets to correct themselves and the benefits and risks of intervention versus nonintervention." ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF ALGORITHM-DRIVEN ECONOMY 223-24 (2016).

[5] *See, e.g.*, Khan, *supra* note 3; Herbert Hovenkamp, *The Looming Crisis in Antitrust Economics*, 101 B.U. L. REV. 489 (2021) [hereinafter Hovenkamp, *Looming Crisis*]; Shapiro, *supra* note 4; Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Computers Inhibit Competition*, 2017 U. ILL. L. REV. 1775; Mark A. Lemley & Andrew McCreary, *Exit Strategy*, 101 B.U. L. REV. 1 (2021); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973 (2019); Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952 (2021).

[6] BILL BAER, JONATHAN B. BAKER, MICHAEL KADES, FIONA SCOTT MORTON, NANCY L. ROSE, CARL SHAPIRO & TIM WU, RESORTING COMPETITION IN THE UNITED STATES 8 (Wash. Center for Equitable Growth ed., 2021), https://perma.cc/4284-35ZW.

[7] *See generally* Khan, *supra* note 5, at 984. "Drawing on a Progressive Era framework, one could argue that allowing a firm that controls an essential service or form of infrastructure to exploit that control in ways that enrich the firm and harm third-party dependents amounts to a problematic exercise of private coercion. Seen through this lens, this conduct represents the accumulation of 'arbitrary authority unchecked by the ordinary mechanisms of political accountability,' amounting to a 'political problem of domination.'" *Id.* at 1008.

Amazon.com, and shipped using Amazon's vast shipping and delivery network. These technology platforms are involved in multiple lines of businesses, and integration compels users to stay within a platform's own commerce ecosystem.

There are economic efficiencies that are traditionally associated with vertical integration, which is why antitrust law treats vertical deals with less scrutiny than horizontal ones.[8] One argument is that what Apple and Amazon are doing is not necessarily novel or anticompetitive. Cable providers sometimes cross into the business of creating television content.[9] And most retailers also host the platform on which people can buy and sell goods. However, this Note argues that the size, scope, and type of integration happening with large digital platforms is categorically different. Part of the reason is because instead of only the efficiencies traditionally associated with "vertical integration,"[10] there are significant conflicts of interest. These platforms can use—and have used—their dominant position in one market to unfairly compete in another. For example, Apple can use its dominance in hardware to unfairly compete in the market for content creation. Amazon can use its dominance as an online retail platform to unfairly compete in the market for manufacturing some goods.

Khan, who often embodies the Neo-Brandesian movement, compellingly lays out an argument for reviving structural separation as a tool to address and

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[8] *See* Matthew Lane, *Antitrust in 60 Seconds: Vertical vs. Horizontal Mergers*, DISRUPTIVE COMPETITION PROJECT (Nov. 19, 2018), https://perma.cc/47BA-SVDU.

[9] *See, e.g.*, AT&T's short but highly publicized acquisition of WarnerMedia. Jennifer Maas, *AT&T's Short, Bumpy Ride in Hollywood*, VARIETY (Mar. 11, 2022, 5:24 AM PT), https://perma.cc/QE4Q-F5TG.

[10] Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L.J. 983, 983 (2014) ("Vertical integration occurs when a firm produces or uses something internally that it might otherwise purchase from or sell to others."). Antitrust law as it traditionally is applied today presumes that vertical agreements are procompetitive. Hovenkamp explains the philosophy of Robert Bork (former Solicitor General during the Nixon administration, D.C. Circuit Court Judge, Yale Law Professor, and Chicago School prominent) as follows:

> If vertical integration creates efficiencies, then a vertically integrated firm would have cost advantages over unintegrated rivals. This might deter entry, but only as a result of increased competition. And, if vertical integration did not create any efficiencies, then it would not impede entry. Either way, vertical integration would not harm the competitive process. Bork drew similar conclusions about all forms of vertical integration, including vertical mergers and vertical integration by contract—mainly exclusive dealing, resale price maintenance, and tying.

Id.

prevent anticompetitive behavior.[11] Although the structural separation for which Khan advocates might ultimately be necessary to promote fair competition within digital marketplaces, this Note argues that targeted nondiscrimination rules should be the first order of business to lay down clear ground rules in the near term, while structural separation will take further analysis and a case-by-case approach. This Note does not take the position that policymakers should wait for Congress to act in this space, which has also been argued: In a major 2020 Congressional report titled "Investigation of Competition in Digital Markets," the House Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary recommended "that Congress consider establishing nondiscrimination rules to ensure fair competition and to promote innovation online."[12] In a report to the Committee, Professors Harry First and Eleanor Fox argued that the "FTC has rule-making power to make antitrust rules" that could "require dominant gatekeepers to apply to a rule of neutrality in operating their platforms."[13] First and Fox also argued that Congress should more clearly delegate rulemaking authority to the FTC under Section 5 of the FTC Act.[14] Structural separation and congressional action might eventually become necessary, but policymakers should use the tools at their disposal now.[15]

Outside of the legal strategic considerations, another challenge to deciding how to best regulate today's big technology platforms is the breadth of their business lines and their complex corporate structures.[16] Many of these

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[11] Khan, *Separation of Platforms*, *supra* note 5, at 1064 ("[S]ix primary justifications recur across the structural separations reviewed: (1) eliminating conflicts of interest, (2) preventing dominant firms from using protected profits to enter new markets, (3) preserving system resiliency, (4) promoting diversity, (5) limiting the concentration of power, and (6) prioritizing administrability.").

[12] COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 382.

[13] *Big Tech and Antitrust – Calling Big Tech to Account Under U.S. Law: Hearing Before the Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 7 (2020) (statement of Harry First, Charles L. Denison Professor of Law, New York University School of Law, and Eleanor Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law).

[14] *Id.* at 9.

[15] Even if Congress acts, it may do so in a misguided way, making waiting even more naïve. On the other hand, if the FTC does not wait for further Congressional authority and implements rules that the Supreme Court strikes down, the Court may seize the chance to strip the FTC of more power or, in the most extreme scenario, further expand the nondelegation doctrine generally. This Note does not take a deep dive into those potential paths and the additional hurdles they would create.

[16] *See infra* Part I.D; *see also* Khan, *Separation of Platforms*, *supra* note 5, at 1067 ("If . . . the concern is responding to dominant firms using supercompetitive profits to finance entry in an array of other markets, then the platform fact pattern becomes relevant.").

companies have segments that are operating at a net loss, which challenges the assumption that all segments can functionally operate independently. Additionally, the activities of a company that are posing the greatest threats to competition are not necessarily the parts of a company that are the most profitable.[17] These issues potentially make structural separation unworkable in some situations.

With its rulemaking authority, the FTC should create a rule barring self-preferencing[18] by dominant technology platforms when those platforms are a major commerce platform and a competitor on that platform. The problem is not only that these companies are vertically integrated, but that they use their integration to distort competition.[19] Specifically, the FTC should supplement their adjudication authority and engage in rulemaking to ensure companies are operating fairly. Currently, there are little ground rules in the United States for how today's biggest technology companies should treat other companies who both need and compete with them. Online marketplaces and stores are a key feature of the twenty-first century economy. Therefore, the FTC needs to use its authority to clarify what is considered anticompetitive conduct under antitrust laws that were passed in the twentieth century. Eventually, Congress may need to legislate, but the FTC should utilize the full extent of its power to act now. Competition is not a self-initiating process, so if we want our 'free-market economy' to produce societal-wide benefits, there need to be clear rules on how to behave fairly.

This Note will first take a dive into why antitrust law has been a clunky tool at best to address the competition issues caused by todays biggest technology firms. Part I will explore big digital technology firms' business models, how those models complicate structuring legal remedies, and the dangers of getting

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[17] For example, Amazon Basics may not be a big money maker for Amazon as a whole, but Amazon Basics can be an anticompetitive threat to manufacturers of goods that compete with an Amazon Basics' good. *See* Khan, *Separation of Platforms*, *supra* note 5, at 1070:

> Placing structural limits to address [companies from extending their existing dominance into new lines of business] would require separating the business earning supercompetitive profits from other businesses. This would not necessary [sic] fall along the line of separating platforms from commerce. Although in other contexts the functional goal of preventing protected profits from financing entry into new markets aligned with the goal of preventing conflicts of interest, in this context the two goals may yield different forms of breakup.

[18] This Note defines "self-preferencing" as a platform leveraging its dual role as both an operator of a dominant platform that hosts third-parties, and as a market participant that competes with those same third-parties, to gain an advantage in one or both of those markets.

[19] *See* COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 398.

legislation and rulemaking wrong in this area. Next, Part II will explain why rulemaking is an optimal option and identify the problems that rulemaking is best situated to tackle.

I. 'BIG TECH' AND NEW PROBLEMS FOR ANTITRUST

As an initial note, the terms *big tech* and *technology platform* are often used in ill-defined ways. This Note focuses on four companies that have been described as "super-platforms" by Professors Maurice E. Stucke and Ariel Ezrachi[20] —Apple, Amazon, Google, and Meta (Facebook).[21] These companies run on "sophisticated computer algorithms" and "create an economy which, for all purposes, is not planned by bureaucrats or CEOs, but by the technostructure."[22] They are special because:

> "[a]nyone building a brand, for example, can't ignore Facebook's highly engaged daily audience of 1 billion. Anyone starting a business needs to make sure they can be found on Google. Anyone with goods to sell wants Amazon to carry them. Any mobile app maker needs to be available in Apple Inc.'s or Google's online stores."[23]

While this Note takes the view that there might be an inherent problem with the size and scope of big technology firms,[24] it is still important to draw

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[20] EZRACHI & STUCKE, *supra* note 4, at 149.

[21] Microsoft was/is arguably a super-platform as well, but analysis of Microsoft will be excluded in this Note. Microsoft was not a major independent focus of scrutiny from the Investigation of Competition in Digital Markets. *See* COMPETITION IN DIGITAL MARKETS, *supra* note 1; Khan, *Separation of Platforms*, *supra* note 5. This is likely because Microsoft was arguably the first 'Big Tech' digital platform to be sued by the DOJ for antitrust violations, and Microsoft lost. United States v. Microsoft Corporation, 253 F.3d 34 (D.C. Cir. 2001). The litigation had a major impact on the DOJ and Microsoft. *See* Avery Hartmans, *Google is Facing an Antitrust Showdown with the DOJ More Than 22 Years After Microsoft's Watershed Case. Here's Why the Government Scrutinized Gates and How it Played Out for the Company*, INSIDER (Oct. 20, 2020), https://perma.cc/5KCB-MKX6.

[22] EZRACHI & STUCKE, *supra* note 4, at 32-33.

[23] Don Clark & Robert McMillan, *Facebook, Amazon and Other Tech Giants Tighten Grip on Internet Economy*, WALL ST. J. (Nov. 5, 2015), https://perma.cc/9R8A-UTGR.

[24] For an argument that there is *not* a problem with companies having a high concentration of power or becoming monopolies, ask Peter Thiel:

> Since [a monopoly like Google] doesn't have to worry about competing with anyone, it has wider latitude to care about its workers, its products and its impact on the wider world. . . . Creative monopolists give customers more choices by adding entirely new categories of abundance to the world. Creative monopolies aren't just good for the rest of society; they're powerful engines for making it

out the exact issues with self-dealing by technology platforms. For example, CVS could place its generic brand in a favorable location on a shelf, and Macy's can selectively choose what products it sells online—antitrust law does not have a problem with this. The refusal to deal,[25] essential facilities,[26] tying,[27] and predatory pricing doctrines[28] are each somewhat analogous to the issues with self-dealing and preferencing by technology platforms, but they do not appear to be comprehensive or realistic legal options.[29] Following a narrow Chicago

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> better. . . . But the history of progress is a history of better monopoly businesses replacing incumbents. Monopolies drive progress because the promise of years or even decades of monopoly profits provides a powerful incentive to innovate. Then monopolies can keep innovating because profits enable them to make the long-term plans and finance the ambitious research projects that firms locked in competition can't dream of.

Peter Thiel, *Competition is For Losers*, WALL ST. J. (Sept. 12, 2014), https://perma.cc/64DS-EVGS.

[25] The FTC describes what's at stake in the refusal to deal doctrine as follows:

> In general, any business — even a monopolist — may choose its business partners. However, under certain circumstances, there may be limits on this freedom for a firm with market power. As courts attempt to define those limited situations when a firm with market power may violate antitrust law by refusing to do business with other firms, the focus is on how the refusal to deal helps the monopolist maintain its monopoly, or allows the monopolist to use its monopoly in one market to attempt to monopolize another market.

Refusal to Deal, FED. TRADE COMM'N, https://perma.cc/G5KH-WLXD.

[26] The Department of Justice has endorsed the following formulation of the essential facilities doctrine:

> In MCI, the Seventh Circuit set forth a leading formulation of the doctrine, under which a plaintiff must prove four elements to establish liability and defendant's obligation to provide access: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."

U.S. DEP'T OF JUST., COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 127 (2008), https://perma.cc/AZ9L-LHG3 (quoting MCI Commc'ns Corp. v. AT&T, 708 F.2d 1081, 1132-33 (7th Cir. 1983)).

[27] The FTC describes tying and its potential anticompetitive effects as follows:

> For competitive purposes, a monopolist may use forced buying, or 'tie-in' sales, to gain sales in other markets where it is not dominant and to make it more difficult for rivals in those markets to obtain sales. This may limit consumer choice for buyers wanting to purchase one ('tying') product by forcing them to also buy a second ('tied') product as well.

Tying the Sale of Two Products, FED. TRADE COMM'N, https://perma.cc/3RG9-36UQ.

[28] *See generally Predatory or Below-Cost Pricing*, FED. TRADE COMM'N, https://perma.cc/X2JF-5VBL ("Consumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time.").

[29] As a preliminary matter, for a defendant to be found guilty of violating an antitrust law, the plaintiff or the government must prove the defendant is a monopoly or has market

School approach, some argue that antitrust doctrine's current ambiguous applicability to self-dealing by technology platforms is a feature, not a bug[30]: It is better to have underenforcement of antitrust rules to allow tech companies to innovate and grow without the fear of legal scrutiny.

However, the difficulty in applying traditional antitrust doctrines to technology platforms' conduct derives more from procedural reasons than substantive ones. Antitrust law defines very few per se illegal conduct. Instead, the burden of proof is on a plaintiff or the government to show that the anticompetitive effects of a course of conduct outweigh any procompetitive benefits. Antitrust litigation is often fact-intensive and relies on expensive economic expert analysis to prove wrongdoing. Additionally, simplified economic concepts woven within antitrust case law do not always fit well with today's technology-backed firms. Whether competition is horizontal or vertical, the market is defined narrowly or broadly, or the market is two-sided or one-sided, are not concepts that *actually* help identify harm in all cases, but they are bedrock concepts of how courts apply antitrust law regardless.[31]

A. *Digital Platforms Are Different than Brick-and-Mortar Businesses*

'Super' digital platforms are different than brick-and-motor stores because of their ability to collect and leverage consumer and competitor data. They are also different than other online stores—like Revolve, Costco, and Walmart, who

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power. Despite the high market cap of the big four U.S. tech platforms, other than Google Search, establishing that these companies are monopolies in the markets in which they self-deal will be difficult:

> Apple, Amazon, and Facebook may have no more than 60% of their respective consumer markets, and in Apple's case considerably less . . . Even if they are monopolies, however, none of these companies charge the high consumer prices we expect from traditional monopolies. Indeed, Google and Facebook provide their consumer services for free, and the antitrust objections to Amazon have centered on the argument that its prices are too *low*.

Mark Lemley, *The Contradictions of Antitrust Challenges to Platforms*, 1 J. FREE SPEECH L. 303, 313 (2021).

[30] Shapiro, *supra* note 4, at 33 ("[Chicago School lawyers] do not see any fundamental failing with how antitrust law has evolved in recent decades.").

[31] The typical start of a legal antitrust analysis is defining the relevant market, although the "Sherman Act makes no reference whatsoever to relevant markets or how market power is to be measured." Hovenkamp, *Looming Crisis*, *supra* note 5, at 502. Consider also the Supreme Court's peculiar decision in *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018), where the Court found that only other two-sided platforms compete with two-sided platforms. *Id.* at 2287. This conclusion means that Uber—a two-sided platform, with one side being drivers and the other side being passengers—does not compete with traditional taxicab companies. Hovenkamp, *Looming Crisis*, *supra* note 5, at 504. Over time, these legal considerations have increased the burden on plaintiffs in establishing that an antitrust violation took place.

all sell their own products alongside third-party products—because of their size and corporate breadth. Eventually, these online platforms could be considered super-platforms[32] and might need to be regulated as such. But right now, the 'big four' pose the most interesting and immediate threats.[33]

Khan explains that technology platforms are different because they can surveil consumer and competitor data when neither consumers nor competitors have realistic alternatives (especially from Amazon).[34] For example, it is nearly impossible to quit Amazon because it is a major web services provider, along with maintaining an extensive shipping network.[35] As explained by someone who attempted to quit Amazon for a week, "Amazon has embedded itself so thoroughly into the infrastructure of modern life, and into the business models of so many companies, including its competitors, that it's nearly impossible to avoid it."[36] Additionally, technology platforms act as intermediaries, operate in a variety of different markets, and benefit from network effects. Self-dealing exacerbates switching costs and lack of competition. These are the things that make technology platforms different. And antitrust law needs to adapt to address diminishing external innovation and strains on consumer choice.[37]

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[32] Walmart especially competes with Amazon's retail platform:

> Did [Amazon] disrupt Walmart? Absolutely. But Walmart is still a major competitor today, and Amazon is fighting against not only incumbents with established brick-and-mortar footprints and growing online sales (with free shipping to rival Prime) but also focused start-ups like Chewy and direct-to-consumer producers. Retail remains a difficult, highly competitive business where sustainable advantage is limited.

See Alison Beard, *Can Big Tech be Disrupted?*, HARV. BUS. REV., Jan.–Feb. 2022, https://perma.cc/3UUQ-VQ9Z (quoting Columbia Business School professor Jonathan Knee).

[33] Although this Note focuses on issues related to the big four technology platforms, that is not to say these technology platforms have not created benefits to society and our economy—such as "lowering our search costs . . . lowering entry barriers, creating new channels for expansion and entry, and ultimately stimulating competition." EZRACHI & STUCKE, *supra* note 4, at 233. However, these benefits are not without significant costs.

[34] Kashmir Hill, *I Tried to Block Amazon from My Life. It Was Impossible*, GIZMODO (Jan. 22, 2019), https://perma.cc/453J-FUZ7. In this piece, the author attempted to block Amazon from all aspects of her life–meaning no Alexa, no Whole Foods, and no Amazon Marketplace. That was difficult enough, but blocking Amazon from her deliveries (i.e., Fulfillment by Amazon) and website use (i.e., websites hosted by Amazon Web Services) was impracticable.

[35] *Id.*

[36] *Id.*

[37] In some way, consumers have more choices among products, but not among platforms selling those products. However, choice among platforms, exacerbated by online advertising, has a direct impact on product availability and innovation.

Super-platforms can use novel anticompetitive tactics to entrench themselves in a market. Being dominant in a market is not necessarily a proxy for innovation or the best products—it is often a proxy for the ability to acquire start-ups and leverage market power.[38]

B. *'Frenemy' Relationships Weaken Competition*

Platforms and their competitors in secondary markets can be described as 'frenemies.'[39] The platform and the downstream competitor are frenemies because the competitor utilizes the platform for their business, but at the same time, the competitor can be taken advantage of by the platform. This frenemy relationship can produce anticompetitive harms when a super-platform abuses its dominant market position and "uses unfair tactics to favor its own services and products on its platform over those of independent producers."[40] Self-dealing distorts fair competition and permits dominant technology platforms to entrench their positions in the market. Competition is distorted when technology platforms preference their own products or demote competitors' products on a platform, especially when competitors have no realistic alternatives. Perhaps most important in the context of technology platforms is the ability to appropriate and unfairly leverage competitor data.

The frenemy relationship creates innovation and appropriation issues, because the bigger and richer technology platforms can either copy or acquire companies seen as a threat.[41] Interestingly, reporting by the Washington Post found that "no one in libertarian-leaning Silicon Valley thinks [Meta] should be further regulated," and that the threat of Meta's copying new ideas "forces the best entrepreneurs to be more creative."[42] There is possibly some truth to this sentiment. Skeptics of change could argue that ideas easily copied by a resource rich firm able to create a better product are not necessarily ideas worth

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[38] COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 44. For example, "data-driven acquisitions of nascent or potential rivals can significantly undermine competition while systematically evading antitrust scrutiny . . . this type of acquisition can tip the market in favor of a dominant firm, having the same ultimate effect as monopolistic conduct." *Id.*

[39] EZRACHI & STUCKE, *supra* note 4, at 222 ("The dynamics of a data-driven environment, as the Frenemy scenario reflects, can be complex. The competition agency must appreciate the interdependence, the asymmetry in bargaining power, the strength of network effects, the absence of outside options, high switching costs, and whether customers are locked in.").

[40] *Id*. at 221-22.

[41] *See* Elizabeth Dwoskin, *Facebook's Willingness to Copy Rivals' Apps Seen as Hurting Innovation*, WASH. POST (Aug. 10, 2017), https://perma.cc/R439-DAKA.

[42] *Id.*

protecting with antitrust law.[43] But Meta and other super-platforms are not just copying ideas to improve them or outcompete competitors. Platforms like Meta have the power to copy or acquire a firm with an innovative product and shut that company down completely. Despite the threat of being shut down, app makers might not have realistic alternatives to using Meta's API or platform. Therefore, the frenemy relationship could leave markets with less innovation.

Meta itself has asked to be regulated.[44] Less surprising, is that Meta has proposed rules that would likely be self-serving.[45] The regulation that Meta supports appears to be geared to privacy protections and standards for content moderation—not about fair competition.[46] Commentators have argued that regulating digital platforms generally could swamp smaller platforms that have less resources to comply with complicated rules.[47] Therefore, rules that seek to regulate the biggest technology firms must be mindful of the downstream impact on the often smaller frenemies.[48]

C. *Legislative Proposals with Unintended Consequences: Distinguishing Competition, Content Moderation, and Consumer Privacy*

There have been calls to "break-up,"[49] "rein-in,"[50] or otherwise "regulate"[51] "Big Tech" in the United States, but this means different things to different people and movements. These movements emerged from a resistance to high concentrations of corporate power, pervasive economic inequality, the

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[43] *Id*. ("When venture capitalists hear pitches from entrepreneurs, they say that one of the first questions they ask is how easy would it be for Facebook to copy the idea.").

[44] Josh Constine, *Facebook Asks for a Moat of Regulations It Already Meets*, TECHCRUNCH (Feb. 17, 2020, 3:34 PM), https://perma.cc/E84B-QNVV.

[45] *Id.*

[46] FACEBOOK, CHARTING A WAY FORWARD: ONLINE CONTENT REGULATION (Feb. 2020), https://perma.cc/ERJ2-PN9J.

[47] Articulated one way:

> Tech giants like Facebook have the profits lawyers, lobbyists, engineers, designers, scale and steady cash flow to navigate regulatory changes. Unless new laws are squarely targeted at the abuses or dominance of these large companies, their collateral damage can loom large. Rather than spend time and money they don't have in order to comply, some smaller competitors will fold, scale back or sell out.

Constine, *supra* note 44.

[48] *Id.*

[49] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019, 3:34 PM PDT), https://perma.cc/7Y56-HVBC.

[50] Joel Thayer, *A Better Strategy to Rein in Big Tech*, THE HILL (Sept. 7, 2022, 2:00 PM), https://perma.cc/X9HS-W2KY.

[51] Roger McNamee, *Big Tech Needs to Be Regulated. Here Are 4 Ways to Curb Disinformation and Protect Our Privacy*, TIME (Sept. 7, 2022, 2:00 AM EDT), https://perma.cc/BCW7-6SQF.

increased presence of digital technology in our lives, and the actual market power these platforms hold.

On one hand, we have election-objector conservative Senator Josh Hawley, who has made multiple proposals to regulate big technology platforms. Hawley wants to go after "woke mega-corporations" and ban all mergers and acquisitions by companies with market capitalization over $100 billion.[52] On the other hand, we have former law professor and progressive Senator Elizabeth Warren and fellow Democrat Senator Amy Klobuchar who are also concerned with amorphous "bigness."[53] Warren proposes breaking-up Whole Foods and Zappos from Amazon, Instagram and WhatsApp from Facebook, and Waze and Nest from Google.[54] Neither on the left nor the right are there clear goals and objectives when it comes to regulating big technology firms. There are also competing concerns for interoperability (to enhance competition and consumer experiences) and data privacy (to increase security and prevent surveillance).

Within the conversation to regulate the biggest technology firms, there are calls to eliminate Section 230 of the Communications Decency Act (CDA)[55] to punish social media sites from either being too restrictive or too permissive with speech on their platforms. It is imperative that policy makers concerned with protecting competition do not seep into the realm of content moderation without appreciating the consequences.

At a high level, CDA § 230(c)(1) gives platforms certain immunities for keeping up illegal user content, and CDA § 230(c)(2) gives platforms certain immunities for good-faith removal of lawful user content.[56] This immunity keeps internet platforms from becoming "publishers," which otherwise could make them liable for third-party speech.[57] For example, Twitter and Facebook

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[52] *A Trust-Busting Agenda for the 21st Century*, JOSH HAWLEY: U.S. SENATOR FOR MISSOURI, https://perma.cc/JE9B-55J8.

[53] Shira Ovide, *How Klobuchar and Hawley See Things When It Comes to Technology*, N.Y. TIMES (May 13, 2021), https://perma.cc/B68A-CECC. ("Ms. Klobuchar says that the word [antitrust] is an artifact of 19th-century corporate giants like Standard Oil and is meaningless to 21st-century Americans. She's right. Ms. Klobuchar says that we should instead start talking about competition policy, monopolies or simply 'bigness.' And yes, Ms. Klobuchar acknowledges that her book is titled 'Antitrust.'").

[54] *Break Up Big Tech*, WARREN (2021), https://perma.cc/XC3A-JLKS.

[55] Emily Brooks, *Greene Offers Bill to Abolish Section 230*, THE HILL (Apr. 28, 2022, 10:44 AM ET), https://perma.cc/S8NG-QT2B ("[N]o one should lose their social media account. None of us did anything wrong.").

[56] *See generally* DAPHNE KELLER, WHO DO YOU SUE? STATE AND PLATFORM HYBRID POWER OVER ONLINE SPEECH (Hoover Inst. ed., 2019).

[57] *Id.* at 12.

have immunity from civil liability for hosting illegal speech on their platform that could constitute defamation, false advertising, or intentional infliction of emotional distress.[58] On the flip side, platforms acting in good-faith are immune from civil liability for taking down legal but objectional speech (like hate speech and bullying).[59] There is no CDA § 230 immunity for violating federal criminal law (e.g., hosting child sexual abuse material or material in support of terrorism) or from violating intellectual property law.[60]

If you eliminate CDA § 230, liberals should note that platforms will risk publisher liability if they choose to moderate by taking down hate speech and disinformation.[61] If you go a step further to make platforms common carriers or otherwise require them to host *all* legal speech, conservatives should note that free-speech havens could carry a lot of spam, trolling, and hate speech.[62] Relatedly, for the conservatives who are worried about censorship, it would also be ironic (or potentially illegal) for the government to force a private platform to host speech it does not want to—which raises another set of First Amendment concerns.[63] What's more, "[i]n the U.S. a lot of 'legal' speech is highly offensive, a truth that even 'free speech absolutists' have to face."[64]

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[58] Eric Goldman, *Why Section 230 Is Better Than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 37 (2019).

[59] KELLER, *supra* note 56, at 13.

[60] *See* Erik Olson, Nate Garhart & Ashleigh Nickerson, *No Quarter: What Claims Doesn't Section 230 of the Communications Decency Act Protect Platform Companies Against?,* THE RECORDER (Aug. 30, 2021, 4:56 PM), https://perma.cc/AZ5T-VNZ2.

[61] *See Daphne Keller Explains the Communications Decency Act*, MEDIUM (Aug 12, 2020), https://perma.cc/P3VT-3HMY.

[62] *Id.* For a more detailed analysis of common carrier laws, see Blake E. Reid, *Uncommon Carriage* (Univ. of Col. L. Legal Stud. Rsch., Research Paper No. 22-20, 2022).

[63] KELLER, *supra* note 56, at 13.

[64] Nilay Patel, *Welcome to Hell, Elon*, VERGE (Oct. 28, 2022, 6:02 AM PDT), https://perma.cc/4SJG-KZ8K. For an explanation of the constitutional boundaries of CDA § 230 and platform speech regulation, see Daphne Keller, *Six Constitutional Hurdles for Platform Speech Regulation,* STANFORD L. SCH.: CTR. FOR INTERNET AND SOC'Y (Jan. 22, 2021, 6:50 AM), https://perma.cc/S7EU-2UKW. Some commentators, such as Justice Thomas, appear to skirt these implications of repealing CDA § 230—a law which is aimed to be speech-enhancing to the extent it gives platforms immunity for *leaving up* certain illegal speech up. *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) (considering issues of whether *social media websites* should be treated as de facto state actors subject to the First Amendment, common carriers, or public accommodations, when the issue before the lower court was whether a *President* blocking users on a social media site violated the First Amendment); *see also* Berin Szóka & Corbin Barthold, *Justice Thomas's Misguided Concurrence on Platform Regulation*, LAWFARE (Apr. 14, 2021), https://perma.cc/MS7H-NZPR; Eric Goldman, *Deconstructing Justice Thomas' Pro-*

CDA § 230 is an imperfect law, but repealing it in an effort to tackle the issue of high concentrations of corporate power is ill-advised.[65] It is important for policy makers focused on competition to appreciate this background. Well intentioned laws that give competitors private rights of action for anticompetitive harms, which are crucial to the enforcement of antitrust laws, can look like "must-carry" rules if not drafted carefully.[66]

For example, major legislative proposals to regulate large technology firms were introduced in 2021 and 2022 and were ostensibly focused on competition policy (and not content moderation). The American Innovation and Choice Act, S.2992, and the Open App Markets Act, S.2710, target "genuine platform competition issues," but they also "let disinformation merchants, hate speech purveyors, et all sue to make platforms carry and prioritize their content."[67] Those who support platforms' ability to moderate content and products—despite it being a "chaotic and imperfect mess"[68]—should be mindful that a nondiscrimination regime can come dangerously close to a common carrier

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Censorship Statement in Knight First Amendment v. Trump, TECH. & MKTG. L. BLOG (Apr. 12, 2021), https://perma.cc/DY9N-BAH7. The concern about immunity for taking legal content down is valid, especially when there are opaque and arbitrary rules for removal. But "[r]eality has a nice way of destroying the myth that no moderation is a reasonable stance" because free speech would not be facilitated by social media platforms that are "total and complete garbage dump[s] full of spam, porn, harassment, abuse and trolling." Mike Masnick, *It Appears That Jason Miller's GETTR Is Speed Running the Content Moderation Learning Curve Faster Than Parler*, TECHDIRT (Jul. 12, 2021), https://perma.cc/SHF3-3WRV.

[65] In fact, CDA § 230 is especially important for startups by "not only by preventing massive monetary judgments for hosting user-generated content but, more importantly, by sparing them from the high legal costs of defending even meritless lawsuits." ENGINE, SECTION 230: COST REPORT, https://perma.cc/7CM8-MQHT.

[66] KELLER, *supra* note 56, at 11 ("'[M]ust-carry' claims . . . would compel platforms to keep users' content online in order to protect their speech rights.").

[67] Daphne Keller (@daphnehk), TWITTER (Jan. 31, 2022, 1:10 PM), https://perma.cc/ZPY2-HGW9. Daphne Keller directs the Program on Platform Regulation at Stanford's Cyber Policy Center and is a Lecturer in Law at Stanford Law School who focuses on intermediary liability, platform regulation, and internet users' rights. https://perma.cc/45YY-D2AJ.

[68] Daphne Keller (@daphnek), TWITTER (Feb. 10, 2022, 7:53 AM), https://twitter.com/daphnehk/status/1491802576626479106. For more on why content moderation is such a mess, see Patel, *supra* note 64:

> So you can make all the promises about "free speech" you want, but the dull reality is that you still have to ban a bunch of legal speech if you want to make money. And when you start doing that, your creepy new right-wing fanboys are going to viciously turn on you, just like they turn on every other social network that realizes the same essential truth . . . Actually, there's a step before trying to get the ad money: it turns out that most people do not want to participate in horrible unmoderated internet spaces full of shitty racists and not-all-men fedora bullies.

regime.[69] For example, TechFreedom warned that if the FTC has rulemaking power,

> [Democrats] should assume the next Republican President will attempt to leverage [rulemaking] power by asking the FTC to make [unfair method of competition] rules that advantage the likes of Parler, Gettr, and Infowars, and by asking the FTC, the DOJ, and Republican state attorneys general to bring suit under both [the Innovation and Choice Act and the Open App Markets Act].[70]

The new bills go further than preventing self-preferencing from major platforms like Google, Amazon, Apple, and Meta. The Innovation and Choice Act would also prevent "discriminating" against "similarly situated businesses" in ways that could potentially require the platforms to host hate speech, disinformation, or otherwise objectionable products or content.[71] Issues that

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[69] In the abstract, common carrier rules that could force platforms to provide equal treatment for all users and downstream competitors can sound reasonable to those concerned with competition policy. But common carrier regimes, or "must-carry" rules slip into forcing Apple to host Parler in the App Store, or mandate Facebook to host Alex Jones. Daphne Keller elaborates:

> Some must-carry proponents seemingly aim to hold platforms to the same rules as the government, or want to convert them to common carriers—bound to deliver any message at all, or at least any that isn't illegal. Such a standard might leave platforms free to apply content-neutral "time, place and manner" restrictions . . . But it would also require platforms to preserve speech that many people find obnoxious, immoral or dangerous. Real-world examples of legal online speech that have attracted outrage include "history of why jews ruin the world" and "how to burn jews." Examples of speech protected under recent First Amendment case law include signs held by picketers near a soldier's funeral saying "Thank God for IEDs" and "You're Going to Hell."

KELLER, *supra* note 56, at 13. Amazon, on the other hand, may choose to keep selling Alex Jones' products if it wishes, but not via a mandate. *See*, Tom Dreisbach, *Alex Jones Still Sells Supplements on Amazon Despite Bans from Other Platforms*, NPR (Mar 24, 2021, 4:57 PM ET), https://perma.cc/Y2S6-YWBM; *see also* Daphne Keller (@daphnehk), TWITTER (Jan. 20, 2022, 7:12 AM), https://perma.cc/YS43-6TVM ("[P]eople who understand content regulation are siloed from the people who understand competition law.").

[70] Letter from Berin Szóka, TechFreedom President & Corbin K. Barthold, TechFreedom Internet Policy Counsel, to The Hon. Richard J. Durbin, Chair, Senate Judiciary Comm. & The Hon. Chuck Grassley, Ranking Member, Chair, Senate Judiciary Comm. (Jan. 19, 2022), https://perma.cc/25CL-4JLD.

[71] S. 2992 says:

> It shall be unlawful for a person operating a covered platform in or affecting commerce to engage in conduct, as demonstrated by a preponderance of the evidence, that would (3) discriminate in the application or enforcement of the terms of service of the covered platform among similarly situated business users in a manner that would materially harm competition.

arise from platform content moderation are distinct from platform anticompetitive conduct—but those who want to regulate the latter *must* take affirmative steps to steer clear of the former. Meta should have the ability to block apps, like Six4Three's app that scraped and compiled women's bikini photos, from its API access, even if the app is not engaging in illegal conduct.[72]

Free Press argues that the American Innovation and Choice Act would give federal and state officials authority to sue platforms that arguably have terms of service that discriminate against certain viewpoints.[73] The Open App Markets Act, though confined to digital app stores, also provides a private right of action for alleged violations.[74] Even if lawsuits under these proposed bills would not be successful, the threat of litigation—and the cost, public scrutiny, and discovery that arises from litigation—has the power to alter platform behavior in unintended ways (like Six4Three's lawsuit against Facebook). Of course, it is a good thing for competition when these bills deter unfair practices by providing more avenues for lawsuits tackling anticompetitive harm. The issue is that these bills also open the door for lawsuits from apps and websites like

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Skeptics have argued that "the main reason that Klobuchar keeps this nonsense in the bill and doesn't fix the language, is because she knows that this is the only way to keep Republicans on the bill. Republicans see this content moderation trojan horse in the bill, and are thrilled with it. Because they think it's going to allow lawsuits to protect Parler, Truth Social, and [other conservative] websites." Mike Masnick, *Senator Klobuchar Fixed None of The Problems with Her Antitrust Bill; But Made Sure to Carve Out ACTUAL Monopolists Like Telcos and Finance Companies*, TECHDIRT (May 27, 2022, 9:33AM), https://perma.cc/3Z6P-N7VW.

[72] *See* Kurt Wagner, *Here's Why an App for Finding Bikini Pics is Facebook's Latest Headache*, RECODE (Nov. 29, 2018), https://perma.cc/V3AC-T9AX. This is a good example of times when a platform may be blocking a downstream competitor for a reason other than gaining a competitive advantage. A nondiscrimination regime must have flexibility to deal with these issues. The Bikini app Six4Three was using Facebooks API, which at the time let developers see Facebook data from users and "data from all of that users' friends." *Id.* Facebook changed its API, which stopped giving developers access to users' friend data. Josh Constine, *Facebook Is Shutting Down Its API For Giving Your Friends' Data to Apps*, TECHCRUNCH (Apr. 28, 2022, 11:06 AM) https://perma.cc/LFK7-YT94. Six4Three sued, arguing that the new 'data privacy' policies were actually anticompetitive. Kristen Grind & Deepa Seetharaman, *Facebook Considered Charging for Access to User Data*, WALL ST. J. (Nov. 28, 2018, 8:24PM ET) https://perma.cc/CBC7-N3JL. Six4Three's lawsuit was largely unsuccessful on the merits. Robert Burnson, *Facebook Execs Win $77,000 From Bikini App Maker That Sued Them*, BLOOMBERG (Apr. 3, 2019, 7:11PM PDT), https://perma.cc/AT72-M99A. But the lawsuit still led to increased scrutiny over Facebook's data privacy practices and exposed a deeper look inside Facebook's decision making. *Id*.

[73] Timothy Karr, *Provision in Senate Antitrust Bill Would Undermine the Fight Against Online Hate and Disinformation*, FREE PRESS (Jan. 20, 2022), https://perma.cc/WF74-KWVY.

[74] S. 2710, 117th Cong. § 5(b)(1) (as introduced to Senate, Aug. 11, 2021)

"Parler, Gab, and 4Chan" to argue that any removal of their content is "unreasonable preferencing."[75]

The Ending Platform Monopolies Act[76] would define a platform's core business as a common carrier service, and it could prohibit the platform from owning or operating any segment outside of the core business.[77] This bill could deter Apple and Google from preinstalling their own apps on their hardware or limit Amazon's ability to distribute Amazon Basics.[78] However, if the covered platforms were forced to make these changes, it is unclear that it would benefit consumers.[79]

Many of these calls to 'regulate Big Tech' are rooted in legitimate concerns, but the proposals and goals are often sprawling and lack appreciation for on-the-ground implications.[80] In thinking about the potential for regulation, policymakers need to be clear about what they are *not* doing as well. For example, "the harm to users that is inflicted through the extraction of data may be easier to address and to remedy under the consumer and data protection laws than under the competition laws."[81] And concerns about certain tech-firms' bigness, and only their bigness, might not be antitrust issues at all: In the United States, monopolies are legal.[82] Baring self-preferencing is important. But some of the current legislative proposals, backed by populist movements, will create more problems than they solve.

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[75] Letter from TechFreedom et al. to The Hon. Richard J. Durbin, Chair, Senate Judiciary Comm. & The Hon. Richard Blumenthal, Senate Judiciary Comm. (Feb. 2, 2022), https://perma.cc/CUV6-UWZZ.

[76] H.R. 3825, 117th Cong. (2021).

[77] Letter from Berin Szóka, TechFreedom President & Corbin K. Barthold, TechFreedom Internet Policy Counsel, to The Hon. Jerrold Nadler, Chair, House Judiciary Comm. & The Hon. Jim Jordan, Ranking Member, Chair, House Judiciary Comm. (June 22, 2022), https://perma.cc/8W3Z-BM5Q.

[78] Alex Reinauer, *Ten Terrible Tech Bills from the 117th Congress: Ending Platform Monopolies Act*, COMPETITIVE ENTER. INST. (May 13, 2022), https://perma.cc/4YZU-BRF4.

[79] Mike Masnick, *Will Congress' Big New Push On Antitrust Actually Solve Any Competition Issues?*, TECHDIRT (June 11, 2022), https://perma.cc/6A6L-HS2X.

[80] *See generally* Lemley, *supra* note 29.

[81] EZRACHI & STUCKE, *supra* note 4, at 221.

[82] Under the Sherman Act,

> An *unlawful* monopoly exists when one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anticompetitive conduct. The Act, however, is not violated simply when one firm's vigorous competition and lower prices take sales from its less efficient competitors; in that case, competition is working properly.

Antitrust Laws and You, U.S. DEP'T OF JUST. (updated Mar. 21, 2022), https://perma.cc/VKJ8-HT9T (emphasis added).

D. Practical Difficulties with Structural Separation

Lina Khan argues that policymakers should seriously consider using structural separation as a tool to protect against the threat of anticompetitive behavior by dominant tech-platforms.[83] She is right that without real separation, the underlying incentives to behave anticompetitively by stifling competition to entrench dominant firms are not eliminated. This Note's concerns with structural separation are not for economic or ideological reasons, but for practical ones.

Khan identifies two approaches to structural separation. First, "operational or functional" separation requires a company to "create separate divisions within the firm, requiring that a platform wishing to engage in commerce may do so only through a separate and independent affiliate, which the platform may not favor in any manner."[84] Alternatively, "full structural separation" requires "that the platform activity and commercial activity be undertaken through separate corporations with distinct ownership and management." [85] Khan argues for full structural separation and acknowledges that prices could rise due to the inefficiencies otherwise achieved by integration, but argues that higher prices could be offset with more innovation and competition in the market.[86]

There are three ways Khan imagines structurally separating platforms from commerce. First, Congress could pass a statue establishing "the principle of separating platforms from commerce—as was the case with banking—with specifical authority to design and implement separations delegated to an agency."[87] Second, an agency, namely the FTC, "could use its Section 5 authority to implement a separations principle through rulemaking."[88] However, unlike with Congressional legislation, the agency would have to "create rules of general applicability," which would not allow the FTC "to structure highly tailored separations."[89] Lastly, structural separations could be compelled through costly litigation, based on ambiguous legal ground at best, showing

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[83] Khan, *supra* note 5, at 1086.
[84] *Id.* at 1084.
[85] *Id.*
[86] *Id.* at 1084-88.
[87] *Id.* at 1083.
[88] *Id.*
[89] *Id.* at 1084.

"anticompetitive conduct and effect stemming from a digital platform's involvement involving multiple markets."[90]

Finally, Khan identifies three potential costs to separations. First, that "integration can eliminate double markups,"[91] therefore "limiting a network monopolist's ability to compete on its own network," which "would sacrifice certain cost savings, resulting in higher prices."[92] "Second, separations could come at the expense of platform innovation."[93] Third, separations could "dampen entrepreneurial investment by creating a barrier to exit."[94] These costs do not outweigh the need for separations (or scrutinizing mergers and enforcing antitrust law more aggressively). However, there is an additional challenge for structural separation—the business structures of certain firms may make structural separation unideal.[95] Designing structural separations for Google, Amazon, Apple, and Meta—the companies whose actions have sparked a desire for regulation—might be extremely complicated.

There are two reasons why structural separation might be especially difficult for super-platforms. First, internal cross-subsidization across products and services is common. The relevant companies have many segments, and each segment makes money in different ways. Some segments are offering 'free' products (like Google Search), and those products are being subsidized by money-making segments (like Google AdWords). Similarly, Amazon can offer cheaper products on its marketplace, in part because of the revenue it generates from Amazon Web Services (AWS) and advertising.

Second, with respect to product and service integration, some integration is more necessary than others. For example, the iPhone would lose an essential element of its product without the App Store. Whole Foods and Amazon are integrated, but that integration is less essential to the functionality of each

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[90] *Id.*

[91] Described one way:

> Double marginalization arises when two firms make complementary or vertically related products that are thus typically used together and each firm has some market power in its own product. If each maximizes individually, the aggregate price will be "too high," in the very strong sense that the buyer of the two products and the sellers of each of them would all be better off if they could coordinate output to the joint-maximizing level.

Herbert Hovenkamp, *Antitrust and the Costs of Movement,* 78 ANTITRUST L.J. 67, 92 (2012).

[92] Khan, *supra* note 5, at 1085.

[93] *Id.*

[94] *Id.* at 1086.

[95] Structural separation is still an important antitrust tool. But nondiscrimination rules can fill the gaps where structural separation would not benefit consumers or the competitive process.

business. However, it is unclear that separating Whole Foods and Amazon would help merchants selling on Amazon's online marketplace or be beneficial to consumers. The following sections break down the business models of today's super-platforms in more detail, and how those business models might complicate antitrust intervention.

1. Alphabet

Alphabet is Google's parent company. Alphabet makes around 80% of its money from Google Ads.[96] Ads appear on Google searches and YouTube videos. Alphabet also makes money from its cloud services, hardware, Google Play store, YouTube Premium Content, and YouTube TV.[97] However, "[i]n 2018, Google pulled in $36 billion in operating income, while the combined total of Alphabet's other segments posted a loss."[98]

Google is a super-platform that is also a 'frenemy' in other markets. Google is both a platform and competitor for search: "Google places and reviews may substitute content from other specialized search platforms such as Trip Advisor and Yelp."[99] Google is also a platform and competitor for digital applications. For example, Gmail is an application available on Google Play (Google's app store), which also competes with Spark, another popular e-mail application. In addition, Google is a platform and competitor in online advertising: Google sells hardware that appears in Google advertising space.[100] There is no doubt that Google has many conflicts of interests across multiple lines of its businesses.

One solution could be to structurally separate segments of Google where it is both a platform and competitor. For example, Elizabeth Warren has proposed separating Waze and Nest from Google.[101] This separation might alleviate some conflicts of interest: Separation might remove the incentive for Google to give Nest optimal advertising spots in Google search results and remove the incentive for Google to prominently display Waze in the Google Play

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[96] Kimberlee Leonard, *6 Different Ways Google Makes Money*, SEEKING ALPHA (Mar. 21, 2022), https://perma.cc/XA4E-ZLR2.
[97] *Id.*
[98] Khan, *supra* note 5, at 997.
[99] Michael Luca, Tim Wu, Sebastian Couvidat & Daniel Frank, *Does Google Content Degrade Google Search? Experimental Evidence* (Harvard Bus. Sch., Working Paper Paper No. 16-035, 2015). *Infra* Figures 1 and 2 show how Google maps and Google places can act as a substitute for Yelp.
[100] *Infra* Figures 3 and 4 show how Google hardware, such as Nest and Fitbit, appear in Google advertising space.
[101] *Break Up Big Tech*, *supra* note 54.

store. Google's incentive to unfairly discriminate against others and/or promote itself diminishes with separation, but only across one dimension—this separation does not address the overall issue of Google's dominance and ability to leverage its market power. For example, if Waze and Google are structurally separated, there will still be an incentive for Google to prefer Google Maps on Google hardware or Google Search.

In some cases, the anticompetitive harms from integration are so severe that separation is necessary (i.e., Google Search might need to operate as an independent business). But digital platforms are operating in a variety of markets, potentially making it necessary to break up Google across many sectors to fully eliminate its incentive to self-preference via structural separation. A nondiscrimination rule might be better suited in this case because it could demand Google to act fairly across multiple markets.

Additionally, as noted above, not all of Alphabet's segments are profitable, or nearly as profitable as Google's ad business. This means that some segments that might be a good candidate for separation for antitrust reasons, such as a Google vertical product from Google search, might not be able to practically operate as a separate entity. In some cases, a Google business segment might be operating at a loss. For example, even though Google Cloud is operating at a loss,[102] it might be serving a procompetitive function in attempting to catch up to compete with Amazon Web Services.[103] Even though the integration and cross subsidization creates conflicts of interests, it can also open the door to new lines of business.

2. *Meta*

Meta is the parent company of Facebook, Instagram, and WhatsApp. Meta makes around 97% of its money by selling placements to digital advertisers.[104] Facebook is a platform and competitor for application development. The 'frenemy' relationship exists because Meta gives app developers access to its application programing interfaces (APIs). But Meta also has the power to cut

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[102] Daisuke Wakabayashi, *Alphabet's Profit Drops 8% As Google's Pandemic Boom Shows Signs of Slowing*, N.Y. TIMES (Apr. 26, 2022), https://perma.cc/MUD7-8GBM.

[103] Trung T. Phan, *Can Google Cloud Compete with Amazon?*, HUSTLE (Feb. 7, 2022), https://perma.cc/U52E-46VD (“The cloud industry will be worth $400B by 2025, per Bloomberg. With a 6% market share, Google is still far behind Amazon Web Services (41%) and Microsoft Azure (20%).”)

[104] Joanne Guo, *How Facebook, Now Meta Platforms, Makes Money*, SEEKING ALPHA (Mar. 23, 2022), https://perma.cc/XZK4-XCES.

API access from developers if they compete too closely with Meta's 'core' functions, which is precisely what it did to Vine.[105]

Meta is also a platform and competitor for online advertising. Publishers rely on Meta's massive communication network to distribute ads. When an end user clicks these ads, it takes them to the publishers' website. A publisher then can make money by hosting ads on its website, which is increasingly valuable when the publisher's website hosts more traffic.[106]

There is a conflict of interest, because:

> "[i]f [Meta] were able to surveil a publisher's readers, it could sell access to those readers at a fraction of the publisher's price—undercutting the publisher's pricing power in the ad market. For [Meta], meanwhile, access to this data would enable it to more precisely target Facebook users when selling ads, increasing revenue."[107]

It is unclear how structural separation could address the problems with digital advertising because Meta's platforms are so integrated with its advertisement business.

Structural separation might help the issue of Meta's 'no copying' policy and ability to leverage its API to behave anticompetitively. For example, if Instagram, WhatsApp, and Facebook were structurally separated, it could potentially give app developers alternatives. In addition, because data collection is so central to Facebook's advertising business, structural separation from Instagram and WhatsApp might diminish Meta's Facebook dominance.

A nondiscrimination rule could also address the issues posed by Meta. For example, Germany issued a ruling requiring that "[Meta] only integrate data from disparate sources, such as WhatsApp, Instagram, [Facebook], and other Web activities, if users opt-in."[108] Similarly, a nondiscrimination rule could

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[105] Khan, *supra* note 5, at 1000-01 ("In 2013, for example, Facebook cut off API access to Vine, the Twitter-owned feature that lets users create six-second videos. Emails released by the U.K. Parliament revealed that the decision to block Vine's access came directly from CEO Mark Zuckerberg—presumably because Twitter, which owned Vine, is a Facebook competitor, and Facebook was building out its own video offering.").

[106] *Id.* at 1003 ("The value that online publishers offer advertisers is access to their specific readers; it is this audience relationship that ultimately allows ad-based publishers to monetize their content.").

[107] *Id.* at 1004.

[108] Kate Cox, *Antitrust 101: Why Everyone Is Probing Amazon, Apple, Facebook, and Google*, ARS TECHNICA (Nov. 5, 2019), https://perma.cc/NB4U-K7GX.

regulate the ways in which Meta is able to extract data from publishers by only allowing Meta to surveil a publisher's readers if they opt-in.

Meta is notoriously aggressive when it comes to acquiring would-be competitors.[109] An issue with structurally separating these companies, such as Instagram and WhatsApp, from Facebook, is that many of them were not generating much revenue before the mergers.[110] Therefore it is unclear how they would do as companies if structurally separated and technologically unintegrated from Facebook. Not allowing these mergers to happen in the first place would likely have been more effective than relying on structural separation or a nondiscrimination regime after the fact.[111]

3. *Amazon*

Amazon is a platform and participant in online retail. Amazon competes with its own third-party sellers on the Amazon marketplace. Additionally, some brands that are not owned by Amazon agree to sell their products exclusively on the site.[112] Amazon has an incentive to favor its own brands and exclusives

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[109] Lemley & McCreary, *supra* note 5, at 21 ("Facebook, for instance, has acquired over ninety companies, mainly startups—building and maintaining its userbase partly by acquiring, and then often shuttering, other services.").

[110] Chris Hughes, *It's Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019), https://perma.cc/VA2Y-WHFL ("Neither Instagram nor WhatsApp had any meaningful revenue, but both were incredibly popular.").

[111] Lemley & McCreary have advocated for the following approach:

> First, we think the antitrust agencies should presumptively block acquisitions of directly competitive startups by dominant firms. That presumption would extend to startups worth less than $200 million (the current threshold for reporting mergers for antitrust review). . . . That presumption should be rebuttable if (1) the startup would not be viable as a freestanding entity and (2) there are no other plausible acquirers (a non-dominant company willing to pay a reasonable price, even if lower than the incumbent would pay).

Lemley & McCreary, *supra* note 5, at 97-98. As Lemley & McCreary note, government antitrust enforcers have grown more "lax," and fewer mergers are being successfully challenged—their proposal would help shift the balance by stopping these "killer acquisitions" at the outset. *Id*. at 91.

[112] This is an interesting development:

> Like Amazon's private-label brands, exclusives sit under Amazon's "Our Brands" umbrella, which signifies items that can only be found on Amazon's site. But separate from its private-label brands, which require Amazon to trademark, develop, produce, market and distribute products on its own, exclusive brands let Amazon shoulder some of the work, and resources, required to roll out new products. The burden of R&D and production is shifted to the brand partners Amazon is tapping to participate in its exclusives programs.

Hilary Milnes, *Amazon Is Now Focusing on Exclusive Brands, Signaling a Shift in Strategy,* DIGIDAY (Apr. 4, 2019), https://perma.cc/LAA4-4FJE.

over pure third-party competitors.[113] At the same time, Amazon takes a cut out of all merchant sales, giving Amazon an incentive to let those merchants survive.

While Amazon makes most of its revenue from "North America" and "International" retail, those segments often operate at a loss.[114] Instead, Amazon Web Services (AWS) often accounts for all of Amazon's operating income.[115] In the fourth quarter of 2021, Amazon would have posted an operating loss of $1.8 billion without AWS.[116] This business structure could complicate structural separation because AWS is often subsidizing the other parts of Amazon's business.[117] Amazon has focused on growth over profitability, but it is still able to offer low consumer prices and further expand its dominance likely because of AWS's stable and major successes. A major threat to competition is that Amazon competes with third-party sellers on its own marketplace, while most of the money is coming from AWS. Therefore, if the FTC were to separate the Amazon marketplace from Amazon products, an issue might arise as to which of these subsidiaries could still be attached to AWS

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113 And Amazon appears to follow that incentive:

> We analyzed search results on Amazon for 3,492 popular internet product queries in January 2021 and looked closely at what Amazon placed in the first spot. In 60 percent of cases, Amazon sold this spot to an advertiser and added a public label indicating the listing was "sponsored." Of the rest, Amazon gave half to its own brands and brands exclusive to the site, and the other half to competing brands. But Amazon brands and exclusives made up only 6 percent of all products in the sample, and competitors made up 77 percent. In short, Amazon was hogging the top spot.

Adrianne Jeffries & Leon Yin, *Amazon Puts Its Own "Brands" First Above Better-Rated Products*, MARKUP (Oct. 14, 2021), https://perma.cc/3Y6F-XJN3.

114 Matthew Johnston, *How Amazon Makes Money*, INVESTOPEDIA (Feb. 19, 2022), https://perma.cc/MV9H-BQCG.

115 *Id.* For example, AWS represented all of Amazon's profits in Q3 2019, Q2 2016, Q2 2017, and Q3 2017. Timothy Prickett Morgan*, Amazon Is the Flywheel, AWS Is the Cash Register*, NEXT PLATFORM (Oct. 29, 2021), https://perma.cc/3WFE-GN6G.

116 Todd Bishop, *Amazon Would Have Posted $1.8 Billion Operating Loss in Q4 2021 If Not for Amazon Web Services*, GEEKWIRE (Feb. 3, 2022), https://perma.cc/4HYB-YXHL.

117 Along with structural separation being difficult to apply to Amazon, so too is traditional antitrust law. The predatory pricing doctrine in antitrust law is ill equipped to alleviate the potential harms to innovation caused by Amazon's breadth. *See generally* Khan, *supra* note 3. A further complication is that:

> Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare. This strategy can only be successful if the short-run losses from pricing below cost will be made up for by much higher prices over a longer period of time after competitors leave the market. Although the FTC examines claims of predatory pricing carefully, courts, including the Supreme Court, have been skeptical of such claims.

Predatory or Below-Cost Pricing, *supra* note 28.

(and thus able to receive operating income from AWS). A rule barring self-preferencing and dictating how Amazon products can operate on the Amazon marketplace might be an easier solution, though it would not completely eliminate the conflict of interest.

On top of Amazon's in-house brands, Amazon has exclusive deals with brands that they do not own.[118] Structural separation could prevent Amazon from unfairly preferencing its own brands, but it still leaves the conflict of interest arising from Amazon exclusives intact. Amazon exclusives can still lawfully get perks from Amazon, like preferred advertising space, faster shipping, or less fees imposed by Amazon. However, a nondiscrimination rule could prevent Amazon exclusives from unfairly appearing higher in general search results above other products that are arguably better.[119]

Senator Elizabeth Warren has proposed that Amazon should be separated from Whole Foods and Zappos.[120] Separating Whole Foods or Zappos from Amazon may do little to directly make Amazon marketplace fairer to third-party merchants. For example, a third-party merchant competing with an Amazon exclusive product may not be impacted whether Amazon also owns Zappos or Whole Foods in their day-to-day business. However, in the aggregate, Amazon may be able to share customer data and product sales data between Whole Foods, Zappos, and Amazon marketplace to get an unfair advantage over other grocery stores, online shoe retail, and online marketplaces. A nondiscrimination rule could be implemented to regulate data collection policies as it relates to competition.[121] Specifically, a nondiscrimination rule should consider banning data sharing between platforms and their subsidiaries so that the subsidiaries are competing fairly. However, regulators should prevent this type of rule from becoming an anti-interoperability rule.[122]

The denial of interoperability traditionally could be seen as anticompetitive because it "serves as the dominant network owner's mechanism for excluding

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118 Jeffries & Yin, *supra* note 114.

119 *Id.*

120 *Break Up Big Tech*, *supra* note 54.

121 This type of rule would not diminish a need for comprehensive data security regulation and/or legislation.

122 Interoperability can enhance competition and consumer choice. *See, e.g.*, Ian Carlos Campbell, *Sonos Says Google is Blocking It from Offering More Than One Voice Assistant at Once*, VERGE (Sept. 29, 2021, 12:54 PM PDT), https://perma.cc/EDR9-2EZ5 ("Sonos developed a system called 'Concurrency' that could make multiple voice assistants interoperable on its smart speakers but had to put its plans on hold because of Google").

rival application developers and other complementors from its network."[123] Interoperability is typically pro-competitive, because it forces the dominant player to "provide existing or potential rivals the ability to interact and share information with it."[124] Therefore, a rule barring data sharing between platforms and their subsidiaries needs to be consistent with the goals of interoperability. A nondiscrimination rule could bar Whole Foods from sharing consumer data with Amazon for example, unless the data from Whole Foods is also shared with other downstream Amazon competitors.

4. Apple

Out of Apple's five primary business segments,[125] iPhone and Apple Services generate the most revenue. iPhone is the biggest money-maker for Apple, but Apple Services is taking up an increasing share. The App Store is the "primary driver" for Apple Services.[126] This is not surprising, given the significant cut Apple takes from certain in-app purchases. Apple is also working to expand its other "Services" products, like Apply TV+ with hit shows like Severance, to compete with other major streaming platforms.[127]

Apple is a platform and competitor in iOS applications. For example, Apple has Apple Music, Apple TV+, and Apple Arcade[128] in the Apple App Store, and it competes with services like Spotify, Netflix and Epic Games. This is another 'frenemy' relationship because Apple is providing the platform that hosts applications and provides access to more users. However, Apple has an incentive to behave anticompetitively because it is also competing with third-party apps.[129]

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[123] Laura Alexander & Randy Stutz, *Interoperability in Antitrust Law & Competition Policy*, CPI ANTITRUST CHRON., June 2021, at 4, https://perma.cc/47NY-VSX3.

[124] *Id.*

[125] The primary segments include 1) iPhone, 2) iPad, 3) Mac, 4) Wearables, Home, and Accessories, and 5) Services. *See Apple's 5 Most Profitable Lines of Business*, INVESTOPEDIA (Feb. 14, 2022), https://perma.cc/DC32-CTYP.

[126] Daniel Sparks, *Apple, Inc.'s 2 Fastest-Growing Segments*, MOTLEY FOOL (Aug. 22, 2017), https://perma.cc/2RKD-22VY.

[127] *Apple Services*, APPLE INSIDER, https://perma.cc/6F83-DLSH.

[128] *Apple Arcade*, APPLE, https://perma.cc/Q4JW-MFH8 ("Apple Arcade is a [paid] game subscription service that offers unlimited access to a growing collection of over 200 premium games — featuring new releases, award winners, and beloved favorites from the App Store, all without ads or in-app purchases. You can play Apple Arcade games on iPhone, iPad, iPod touch, Mac, and Apple TV.").

[129] *See generally* Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021).

It is unclear how much profit or loss the Apple Store provides to Apple overall, like many of Apple's other "interwoven business units."[130] Without the clear profitability of each Apple segment, policymakers cannot determine if Apple Services, particularly the App Store, can realistically operate independently from Apple and its other product segments. Fundamentally, when a user purchases an iPhone or other piece of Apple hardware, the user likely expects the App Store to be part of that product. The App Store is not simply a marketplace, but potentially a core function of a piece of hardware. It is unlikely that structural separation is a good fit to address the concerns that Apple is behaving anticompetitively on the App Store—but a nondiscrimination rule has promise. For Apple, a nondiscrimination rule could require Apple to treat third-party apps fairly alongside its own apps, without completely separating the App Store from Apple hardware products.

II. WE NEED A NONDISCRIMINATION RULE

A. Business Structures Compel Relying on Nondiscrimination Rules

Structural separation can encourage competition, but policymakers should not lose sight of consumer harm during the needed shift away from strict Chicago School thinking.[131] One issue with structural separation is determining

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[130] Even Apple execs appear willfully ignorant of the number:

> The App Store, [Apple Executive Phil Schiller] said, is just one of many interwoven business units at Apple without a distinct . . . profit and loss statement. It's not fair to say the App Store makes an unjust amount of profit on the backs of developers because it's impossible to say how much it costs to operate the store; it's just one cog in the wheel of Apple and just one component of the overall iOS ecosystem.

Nick Statt, *Not Even Phil Schiller Knows the App Store's Profitability, and That's Great News for Apple*, PROTOCOL (May 19, 2021), https://perma.cc/YPW4-AZAB.

[131] This means that competition is not the end goal, but a means to an end. That end is traditionally consumer welfare (but it arguably should include employee welfare and opposition to high concentrations of corporate power, which can be exploitative and antidemocratic). The e-book market is a good example of how these issues can become complicated. For the sake of competition, it was 'good' that Apple entered the e-book market. At the time Apple entered, Amazon was arguably a monopolist in that market and engaging in predatory pricing. Therefore, Apple entering the market on its face looks like an increase in competition. However, when Apple entered the market, it violated the Sherman Act by organizing a horizontal conspiracy among book publishers to raise e-book prices. *See* United States v. Apple, 791 F.3d 290, 297-98 (2d Cir. 2015). The case was complicated by the fact that book publishers felt that Amazon's artificially low prices were damaging the book publishing business, which has its own implications on hurting the 'public good.' *See* Vauhini Vara, *Did Apple Fix E-Book Prices for the Greater Good?*, NEW YORKER (Dec. 16, 2014), https://perma.cc/MA46-HM88. Ironically, years later a class action was brought against

how parts of a business centered around 'free' and cheap products can operate separately from parts of a business that generate profits. As we see with Amazon and Google, some company ventures are operating at a loss, so some segments might not exist without the cross-subsidization. This is not to say that all money-losing ventures should necessarily exist if they require subsidization from anti-competitive practices, but some segments are providing a public benefit.

There are also procedural issues to consider with structural separations. Even if the FTC has the power to design separations, via a new statute or its Section 5 authority, the FTC will have to use adjudication, a case-by-case approach, to separate the platforms. Going after wealthy companies, who arguably need to be separated the most, will not be easy—the companies would likely fight a separation to the fullest extent legally possible. This is not a reason to forego pursuing structural separations entirely, but policymakers still should be mindful of the FTC's resources.

B. The Power of Rulemaking

It is crucial that policymakers look to tools already handy to address today's problems. Technological advancement is going to continue at an exponential pace, and acquiescing to the idea that our laws always lag behind will allow anticompetitive behavior to continuously escape legal scrutiny. Of course, certain issues may be better tackled outside of antitrust law[132] or will require Congressional action.[133] But if we can employ current laws now, we should.

Lina Khan and Rohit Chopra have compellingly argued that the FTC should make rules to supplement their adjudication authority.[134] Whether the FTC has unfair methods of competition rulemaking authority is hotly debated.[135] With

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Amazon for illegally conspiring with publishers to fix book prices. Tim De Chant, *Amazon Colluded with Publishers to Fix Book Prices, Class-Action Suit Alleges*, ARS TECHNICA (Apr. 1, 2021, 7:24 AM), https://perma.cc/782D-9QLT. That case was dismissed as of September 2022. Jonathan Stempel, *Amazon, Major Publishers Win Dismissal of Antitrust Lawsuits over Book Pricing*, REUTERS (Sept. 29, 2022, 4:40 PM PDT), https://perma.cc/CWC9-AHJT.

[132] Such as data privacy or content moderation policies.

[133] For example, establishing a new federal agency to deal exclusively deal with digital platform issues.

[134] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020).

[135] *See* J. Howard Beales III & Timothy J. Muris, *Foreword*, *in* RULEMAKING AUTHORITY OF THE U.S. FEDERAL TRADE COMMISSION, v, xi-xii (Daniel A. Crane ed., 2022):

> Arguing for FTC's boldness, Lao emphasizes judicial precedent for the FTC to act

Lina Khan now leading the FTC, fully intending to use rulemaking in addition to adjudication,[136] this Note jumps from the assumption that the FTC has this authority and specifies what that power could be used for. If we take Khan and Chopra's argument as true that the FTC has wide latitude to interpret what constitutes an "unfair method of competition,"[137] the agency should be able to lay out what constitutes unfair practices for online marketplaces. Specifically, the FTC should create a rule barring self-preferencing by super platforms that facilitate commerce while competing on that platform.

There are many procedural advantages to using agency rulemaking to regulate technology platforms.[138] The Administrative Procedures Act requires that agencies make rules in a transparent and democratic way before they become final.[139] The FTC would have to give notice of a proposed rule, along with the information it relied on to make the rule, and allow the public time to

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beyond the Sherman and Clayton Acts, and believes that FTC rulemaking authority should survive even under modern judicial standards for supervising regulatory agencies. . . . Ohlhausen and Rossen argue that UMC rules are essentially a dead end. . . . Szóka and Barthold also cast serious doubts on expanded FTC rulemaking powers . . . . Assuming that the agency has the power, Su nevertheless opposes wide use of competition rulemaking. . . . Pierce joins whose who believe that the 1973 D.C. Circuit opinion used statutory interpretation inconsistent with modern courts . . . . Abbott also doubts that the FTC's rulemaking effort will succeed legally, emphasizing the constitutional delegation doctrine, principles of statutory construction, and the general judicial trend toward reigning in administrative agencies. Finally, on the UMC rule issue, Ohlhausen and Rill join in emphasizing the lack of statutory authority for such rules, and the problem that the rules will distract from the FTC's core mission of case-by-case expert adjudication. . . . Finally, as Crane notes, the FTC's independence is under threat, both from the executive branch, with an executive order urging the Commission to address certain competition concerns of the administration, and from the judiciary, via decisions such as *Seila Law* holding that executive branch officials must be subject to presidential removal at will.

[136] *See* Memorandum from Chair Lina M. Khan to Commission Staff and Commissioners 1 (Sept. 22, 2021), https://perma.cc/8RJM-6Y8W; *see also* Fed. Trade Comm'n, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022), https://perma.cc/6YVN-EE2S (describing the broad scope of FTC's Section 5 prohibition on unfair methods of competition).

[137] *See generally* Chopra & Khan, *supra* note 134.

[138] Marina Lao, *Competition Rulemaking: The Case for Boldness*, *in* RULEMAKING AUTHORITY OF THE U.S. FEDERAL TRADE COMMISSION, *supra* note 135, at 1, 3 ("Furthermore, rulemaking has specific advantages that are especially helpful for the protection of competition in digital platform markets, primarily because the economic features of those markets often render conventional antitrust enforcement ineffective.").

[139] *Id.* at 1 ("FTC Chair Lina Khan and former Commissioner Rohit Chopra, in particular, have advocated notice-and-comment rulemaking under the Administrative Procedure Act (APA) as a means to give fuller effect to the agency's mandate to prohibit 'unfair methods of competition' (UMC) under section 5.").

comment.[140] Then, the FTC would have to address all the material comments before publishing a final rule.[141] The policy of the rule cannot be "arbitrary" or "capricious"[142] and while the FTC would be given deference in its interpretation of an 'unfair method of competition,' the agency's interpretation still must be reasonable.[143] Rulemaking has legal safeguards that directly allow stakeholders to participate in the regulatory process.[144]

Along with procedural protections that give agency rulemaking its legitimacy, rulemaking is also quicker and more flexible than relying on new legislation. Congress has already spoken and declared that unfair methods of competition are unlawful under Section 5 of the FTC Act. Rulemaking that builds from what Congress has already enacted will save time and sparse government resources. FTC employees also act in the public interest as experts on competition policy, compared to legislators who are generalists. With Congress so polarized, the FTC could be more insulated from any proposals by legislatures who personally benefit from an unnuanced 'take down big tech' approach. Rulemaking is also superior to adjudication because it could immediately apply to an entire category of online commerce platforms. These rules could have the potential to immediately shape behavior, specifically when it comes to appropriation and self-preferencing.

A major critique of rulemaking is that rules will not serve as a meaningful deterrent for anticompetitive behavior. Rulemaking could be insufficient to address harms, especially because algorithm use and targeted search results make it difficult to determine whether a platform is self-preferencing. Since the FTC no longer has the power to obtain disgorgement or restitution remedies under Section 13(b) of the FTC Act,[145] the agency's power to prevent harms *ex ante* is diminished. This could strengthen the argument for favoring structural separation over rulemaking, because structural separation precludes self-preferencing at its core.

Rulemaking does have the power to have an immediate impact by automatically applying to all super platforms—but violations would have still

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140 *Id.*; *see also* OFF. FED. REG., A GUIDE TO THE RULEMAKING PROCESS 5, https://perma.cc/3H6Z-P4G8 (archived Dec. 18, 2022).

141 OFF. FED. REG.*, supra* note 140, at 5.

142 *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

143 *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984); Nat'l Cable & Telecommc'ns. Ass'n. v. Brand X Internet Servs., 545 U.S. 967 (2005).

144 *See* OFF. FED. REG., *supra* note 140, at 3.

145 AMG Cap. Mgmt., LLC v. Fed. Trade Comm'n, 141 S. Ct. 1341 (2021).

need to be enforced with FTC adjudication. It is crucial that the FTC can go after illegal behavior quickly, especially because the FTC now lacks Section 13(b) disgorgement power.[146] Additionally, if a fine or risk of publishment is minimal, it may be worth it for companies to engage in anticompetitive conduct, even if it risks enforcement actions. Additionally, smaller competitors might already be out of business due to unfair practice if there is a slow FTC response.

Because the FTC often enforces Section 5(b) of the FTC Act with consent decrees, rulemaking can still serve as a powerful tool to change platform behavior.[147] If the FTC has more rules on the books of what is and is not allowed, it could streamline enforcement and give the FTC increased leverage in negotiating the consent decrees.

C. Conduct that Should Violate a Nondiscrimination Rule

Below are examples of practices and policies that should be barred by a nondiscrimination or an anti-self-preferencing regime. Often, platforms have stopped engaging in certain anticompetitive practices because of public or regulatory scrutiny. Instead of waiting for these practices to cause more harm to competition, or slowly scrutinizing these practice platform by platform, we can create rules based off what has already been learned.

1. Manipulated Search Results

Search platforms that also compete in downstream markets should not be allowed to override general search results to get their products placed higher. Whether it is general search in Google, product search in Amazon, or app search in the App Store, platforms should not be able to cheat the algorithm and put their products on top. At a minimum, platforms should be required to label manipulated search results as ‘sponsored’ or ‘advertised content.’

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[146] *Id.*

[147] Fed. Trade Comm'n, *A Brief Overview of The Federal Trade Commission’s Investigative, Law Enforcement, and Rulemaking Authority* (May 2021), https://perma.cc/H2YY-CBGN (“When the Commission has ‘reason to believe’ that a law violation has occurred, the Commission may issue a complaint setting forth its charges. If the respondent elects to settle the charges, it may sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review. If the Commission accepts the proposed consent agreement, it places the order on the record for thirty days of public comment (or for such other period as the Commission may specify) before determining whether to make the order final.”).

For example, "[i]n more than a quarter of searches in which Amazon gave its brands the top spot, it placed its products above competitors that had both better ratings and more reviews than the Amazon brand or exclusive product."[148] Even if these results are not the outcome of direct human intervention, a platform should not be able to create an algorithm that favors that platform's products or services. A platform's product might be the best for a consumer, but the product should only appear higher up if it is in fact the most responsive search result.

There may be issues in identifying breaches of a rule barring search result manipulation—any manipulation would likely be the result of multiple factors and from both human and non-human decisionmaking. One solution is having a transparency requirement, which could require a platform to "detail how [their] systems are designed and work—for example, how specific algorithms are designed and by whom, but also how those algorithms are applied to what services, including advertising and content curation. This could detect potential biases in algorithmic design and suggest new ways to test algorithmic impact."[149]

Of course, transparency reporting is not a "panacea" because transparency reports could be difficult to comprehend, they do not necessarily fix the problems they are shedding light on, and platforms could distort the report results.[150] However, these pitfalls in the rules and methods of enforcement do not outweigh the need to try to lay ground rules and make explicit that platforms should be using fair principles in their search results.[151]

2. *Noncompete and Copycat Policies*

A nondiscrimination rule should bar platforms from banning applications or competitors that copy the platforms features. This practice functions similar to noncompete or exclusionary agreements. If platforms are allowed to enforce anti-copycat policies, as Facebook previously did quite aggressively, it could stifle innovation and fair competition. Facebook had a rule preventing

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148 Jeffries & Yin, *supra* note 113.

149 Heidi Tworek & Alicia Wanless, *Time for Transparency from Digital Platforms, But What Does That Really Mean?*, LAWFARE (Jan. 20, 2022, 8:01 AM), https://perma.cc/BUR6-QSA3.

150 *Id.*

151 Requiring fair search results does not mean that platforms need to be categorized as common carriers—meaning search platforms should not be forced to show certain results or host content that is otherwise against the platform's good-faithed policies. It just means that their search results cannot be based on anticompetitive factors.

developers to not "replicat[e] core functionality that Facebook already provides."[152] Vine, Vixer, MessageMe, and Phhhoto were "cut off from Facebook's platform for too closely replicating its video, messaging or GIF creation tools."[153] App developers even sued Facebook alleging that Facebook schemed to "attract developers to make applications that connected to Facebook with the aim of identifying and closing out potential rivals while striking deals with certain developers to continue access."[154] Instead of being dominant because it has outcompeted others, a super-platform can keep its dominance by simply banning competitors it sees as gaining more popularity.

Facebook not only banned competitors, as it did when it cut Vine off from its API, it also copied the banned applications features.[155] This copying might not be a problem in itself,[156] but allowing platforms to copy *and* ban competitors eliminates the opportunity for consumers to choose their preferred product. Instead, the choice is made by the biggest or most dominant platform. In 2018, Facebook agreed to stop banning alleged 'copy-cat' applications practice during the era when it was facing scrutiny from UK regulators, its internal emails were being publicly released, and the company was facing backlash in the wake of the Cambridge Analytica scandal.[157]

Somewhat similarly to what Facebook used to do, Apple bars app developers from copying other apps.[158] But the ban on copying does not apply to Apple.[159] When this was identified during a 2020 hearing before the Subcommittee on Antitrust, Commercial and Administrative Law, Apple CEO

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[152] Josh Constine, *Facebook Ends Platform Policy Banning Apps that Copy Its Features*, TECHCRUNCH (Dec. 4, 2018), https://perma.cc/PH6A-MPQ6.
[153] *Id.*
[154] Bryan Koenig*, 9th Circ. Tosses App Maker Antitrust Suit Against Meta*, LAW360 (Feb. 28, 2022), https://perma.cc/RFW3-2GEZ.
[155] Khan, *supra* note 5, at 1001.
[156] Unless what is being copied is protected intellectual properly.
[157] *See* Constine, *supra* note 152; DAMIAN COLLINS, SUMMARY OF KEY ISSUES FROM THE SIX4THREE FILES 1 (2014) (U.K.), https://perma.cc/J5CZ-X9LS; HOUSE COMMONS, DIGIT., CULTURE, MEDIA & SPORTS COMM., DISINFORMATION AND 'FAKE NEWS': FINAL REPORT OF SESSION 2017-19, at 38 (2019) (U.K.).
[158] *Apple Store Review Guidelines*, APPLE (Mar. 30, 2022), https://perma.cc/6NLF-RVK2 ("Come up with your own ideas. We know you have them, so make yours come to life. Don't simply copy the latest popular app on the App Store, or make some minor changes to another app's name or UI and pass it off as your own. In addition to risking an intellectual property infringement claim, it makes the App Store harder to navigate and just isn't fair to your fellow developers.").
[159] *See* APPLE, APPLE DEVELOPER AGREEMENT ¶11 (archived Jan 13, 2023), https://perma.cc/P7A8-AD8R ("Nothing in this Agreement will impair Apple's right to develop, acquire, license, market, promote, or distribute products, software or technologies that perform the same or similar functions as, or otherwise compete with, any other products, software or technologies that you may develop, produce, market, or distribute.").

Tim Cook appeared to be unaware of the practice.[160] As of the writing of this Note, the Apple policy banning app developers to copy but allowing Apple itself to copy is still in place. All platforms, including Facebook and Apple, should be barred from having these kinds of one sided noncompete policies.

3. Appropriating Third-Party Data to Favor Platform's Products

Platforms should not be allowed to appropriate data from third-party sellers to develop their own products. A good example of the anticompetitive harms that can come with appropriating third-party data is Amazon—a company with arguably unparalleled access to third-party data:

> "By virtue of hosting a digital marketplace, Amazon's ability to collect and analyze ecommerce data is unrivaled . . . [Amazon] captures which goods a customer clicked on but did not buy, the exact price change that induced a customer to peruse an item or purchase it, how long a user hovers her mouse over a particular good, how customers are reacting to product images and videos, and a wealth of other microdetails . . . ."[161]

Amazon has a deeply unfair advantage when it comes to product development, to the point where it may not be possible for competitors to compete on the same playing field. This advantage does not just come from Amazon marketplace, but AWS as well.[162] Amazon can use "data from [AWS] usage patterns of their platform to decide with whom and how to build competitive products," therefore "[c]ompanies that use AWS are feeding critical market data directly to the company that, almost certainly, will one day be there largest competitor."[163]

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160 *See Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google Before the H. Comm. on Antitrust, Commercial and Administrative Law*, 116th Cong. (2020) (statement of Tim Cook, CEO, Apple) ("Yeah, Congressman, we run the App Store to help developers, not hurt them. We respect innovation. It's what our company is built on. We would never steal somebody's IP. But I will follow up with your office on more detail on this.").

161 Khan, *supra* note 5, at 992.

162 Alistair Barr, *FEATURE-Amazon Finds Startup Investments in the 'Cloud'*, REUTERS (Nov. 9, 2011, 12:46 PM), https://perma.cc/BU3Q-MX5E ("Amazon can tell which AWS customers need a lot more [computing power by the hour through its EC2 service and remote storage through the S3 service] quickly, giving the company clues on the businesses and technologies that are gaining traction—insights that VC firms do not have.").

163 *Kashmir Hill, I Tried to Block Amazon from My Life. It Was Impossible,* GIZMODO (Jan. 22, 2019), https://perma.cc/453J-FUZ7.

Amazon appears to recognize the issues inherent in accessing third-party data. Merchants selling on Amazon consider their data to be proprietary, and Amazon has asserted to Congress that it does not use information from individual third-party sellers.[164] Amazon additionally tries to sooth concerns by arguing that it only uses *aggregate* data while it develops products for its private labels.[165] But the aggregate data is so particularized and detailed, that the fact that it is 'aggregate data' does not limit the harm.[166] In addition, there only needs to be two entities within a pool of vendors for the data to be considered 'aggregated.'[167] On top of the online marketplace and AWS, Amazon may also gather information from its Alexa technology to develop its own products.[168] Amazon has also claimed that there is a "clear firewall between the Alexa Fund and Amazon's product development teams."[169] Amazon also collects data "from third-party gadgets, asking them to report, for example, not just when a television is on but what channel it is set to."[170]

There have also been reports that Amazon employees go "over the fence" and get access "to data containing proprietary information that they used to research bestselling items."[171] Going "over the fence" and allowing a product development team to access third-party data from a business team should be clearly barred by a nondiscrimination rule. As explained above, we cannot trust companies to implement these practices themselves. Of course, a brick-and-motor store that also develops and sells products that compete with third-party sellers also has access to more data about the market and competitive environment inside their own store than the third-party merchants.[172] But the extent of in-store surveillance does not come close to what is possible online.[173]

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164 Dana Mattioli, *Amazon Scooped Up Data from Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM ET), https://perma.cc/X8BS-CT9E.
165 Kirsten Errick, *Amazon Used Merchant Data for Its In-House Products, Reports Claim*, L. ST. MEDIA (Apr. 28, 2020), https://perma.cc/5JN2-BN7B.
166 *See Id.*
167 Kate Cox, *Amazon Reportedly Used Merchant Data, Despite Telling Congress It Doesn't*, ARS TECHNICA (Apr. 24, 2020, 11:09 AM), https://perma.cc/6X38-QAJ2.
168 Khan, *supra* note 5, at 995.
169 Id.
170 *Id.*, at 996 n.101.
171 *See* Errick, *supra* note 165.
172 Sarah Nassauer, *How Kirkland Signature Became One of Costco's Biggest Success Stories*, WALL ST. J. (Sept. 10, 2017, 7:00 AM ET), https://perma.cc/8FDB-E3Z7.
173 *See* Errick, *supra* note 165 ("It is a common business strategy for grocery chains, drugstores and other retailers to make and sell their own products to compete with brand names. Such private-label items typically offer retailers higher profit margins than either

If Amazon wants to use this data in its own product development, then a nondiscrimination rule should allow this given they share all, or most of the appropriated data with third-party competitors. However, this could lead to secondary problems—we could expect that many third-party merchants do not want their business data being shared with their non-Amazon competitors because they view their data as proprietary. Therefore, to preserve fair competition, product development segments should be clearly prohibited from using appropriated third-party merchant data.

D. Conduct That Would Not Violate a Nondiscrimination Rule

Conduct that cannot be neatly governed by a nondiscrimination regime would not necessarily make it lawful. There are still anticompetitive problems with much of the below examples, but for some reason they might be ill-suited to be governed by a nondiscrimination rule. Because of the issues described in Part I.C, it is important to identify the boundaries of any new antitrust regulation due the negative externalities that could arise with slipping too close to a common carrier regime.

1. Fair Fees for Third-Party Competitors

When a platform is selling their own goods and services alongside third-party competitors, we could imagine a rule regulating the fees that platforms impose on their downstream competitors. Many merchants believe the fees are too high but feel there is nowhere else to turn to sell their items online.[174] For example, "Amazon charges merchants either a $39.99 monthly subscription fee or a 99¢ per-item flat fee, depending on the plan, as well as a percentage of each transaction."[175] "These sales percentage fees range from 3% to 45%, depending on the product category."[176] These fees are significant as "[r]evenue from seller commissions is outpacing Amazon's overall online sales,"

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well-known brands or wholesale items. While all retailers with their own brands use data to some extent to inform their product decisions, they have far less at their disposal than Amazon.").

[174] Kim Lyons, *Amazon Charges Sellers Fees that Are High Enough to Offset Losses from Prime, a New Report Says*, VERGE (Dec. 3, 2021, 8:23 AM PST), https://perma.cc/Q83S-XN82. Along with the high fees, some merchants have left Amazon because of the threat Amazon will knock off their brand. *See* Jeffries & Yin, *supra* note 113.

[175] Khan, *supra* note 5, at 986.

[176] *Id.* at 986 n.42.

exacerbating the perceived unfairness.[177] But it is unclear how rulemaking could solve this problem. At its core, the issue is that when a platform is selling their products alongside third-party competitors, the third-party competitors have to pay up, but there is no way to make the platform essentially pay a fee to itself. As long as the fee exists, there is a threat of anticompetitive harm.

Like Amazon, Apple also imposes fees on app developers for in-app purchases. The standard commission fee (that is not universally enforced) is generally 30%, but qualifying "small app developers" who make less than $1 million in Apple Store sales can pay 15%.[178] For example, Apple charged Spotify, but not Uber, the 30% fee.[179] Arguably, this makes sense because Apple would seriously undercut, and probably make impossible, Uber's business by taking a 30% cut of every ride purchased in the Uber app. At the same time, Spotify is paid on a subscription basis, meaning that users who signed up for Spotify through the Apple App Store had to pay a higher fee every month than those who signed up on Spotify's website.[180] Arguably, a 'real' reason behind Apple's inconsistent policy is that Apple competes with Spotify via Apple Music, but not food delivery or home share apps (that do not have to pay the fee).[181] Spotify no longer allows its users to sign up for a subscription within the app, even though Apple permitted it to redirect to Spotify within the app due to it being a "reader application."[182]

After settling with Japan's Fair Trade Commission in September of 2021,[183] as of March 2022, Apple started allowing certain "reader applications" to provide links in their apps so customers can sign up, manage, and pay for

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177 *Id.* at 987.

178 Todd Spangler, *Apple App Store 'Tax Cut' for Small Developers Slammed by Spotify, Epic Games*, VARIETY (Nov. 18, 2020), https://perma.cc/N5JC-MWCC; *see also* Ian Carlos Campbell & Julia Alexander, *A Guide to Platform Fees: The Hidden Costs Behind Your Favorite Apps, Games, and More*, VERGE (Aug 24, 2021, 6 AM PDT), https://perma.cc/J9AK-N3RX.

179 Jessica Lim, *Which Apps Bypass Apple's 30% Commission*, MEDIUM: BETTER PROGRAMMING (Sept. 17, 2020), https://perma.cc/6TVV-VGKT.

180 Austin Carr, *Apple's 30% Fee, an Industry Standard, Is Showing Cracks*, BLOOMBERG (May 3, 2021), https://perma.cc/8FSC-85N3.

181 *See* Lim, *supra* note 179.

182 *Apple Payments for Spotify*, SPOTIFY, https://perma.cc/X55H-E388 (last visited May 16, 2022); Mitchell Clark, *Apple Finally Lets 'Reader' Apps Like Kindle, Netflix, and Spotify Link to Their Own Sites*, VERGE (Mar. 30, 2022, 1:34 PM PDT), https://perma.cc/SYZ6-W63U.

183 The Japan Fair Trade Commission was investigating Apple under Japan's Antimonopoly Act for Apple's App Store policies that "restrict[ed] business activities" of app developers from selling "digital contents." Press Release, Japan Fair Trade Comm'n, Closing the Investigation on the Suspected Violation of the Antimonopoly Act by Apple Inc. (Sept. 2, 2021), https://perma.cc/7R33-E8G6.

services on the application's own website.[184] This allowed content providers, such as Spotify and Netflix, to avoid Apple's fee.[185] Gaming applications, such as Fortnite made by Epic Games, still must pay the fees.[186] Apple received $20 billion dollars in revenue from App Store commission fees between 2008 and 2017, and 62% of that came from games.[187]

There is a problem with fees, but the mechanisms of governing these fees might not be suited for nondiscrimination rulemaking. First, it would be impractical for an agency to intertwine itself with company business decisions and announce a rule capping these fees. Thus any such caps should likely be left to adjudication on a case-by-case basis. Second, a rule could attempt to tether the total amount of fees to something reasonable, like the costs of maintaining the platform. But this comes with its own problems. Presumably, Apple has costs associated with reviewing what applications it allows on the App Store that comply with its App Store Review Guidelines,[188] and Amazon likely has similar costs associated with monitoring and maintaining the online marketplace.[189] So there's no guarantee that sort of policy would lead to fee decreases.[190]

To brainstorm another possibility, a nondiscrimination rule could require platforms to have a policy that imposes fees in an application-agnostic way.[191] Apple's current policy would violate such a rule because it treats certain types

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[184] Todd Spangler, *Apple Will Let Content Apps Like Netflix, Spotify Link to Their Websites to Sign Up Users*, VARIETY (Mar. 30, 2022), https://perma.cc/C8G7-NGJB.

[185] *See* Clark, *supra* note 182.

[186] Jon Brodkin, *Apple Will Let Video and Music Apps—but Not Games—Link to Other Payment Options*, ARS TECHNICA (Sept. 2, 2021), https://perma.cc/2A8V-CUSZ. It turns out that 75% of iOS games are completely free to end users, and Fortnight generates only about 7% of its revenue by iOS players. Kyle Orland, Epic Games v. Apple *by the Numbers:* Fortnight *Is Worth* That *Much Money?*, ARS TECHNICA (May 21, 2021), https://perma.cc/LL98-Z3AF.

[187] Orland, *supra* note 186.

[188] Sarah Perez, *Apple Loosens Some of Its App Store Review Guidelines with Latest Update*, TECHCRUNCH (June 7, 2022, 9:10 AM PDT), https://perma.cc/LU92-NC5M.

[189] For example, Amazon has restricted product categories. *The Beginner's Guide to Selling on Amazon*, AMAZON, https://perma.cc/66WR-NCQ2 (last visited Nov. 28, 2022).

[190] As explained in Part II, internal cross subsidization would complicate this kind of policy.

[191] An example of rules requiring companies to treat downstream competitors in an "application agnostic" way can be found in net neutrality laws governing Internet Service Providers (ISPs). Under California's net neutrality law, ISPs are allowed to slow traffic only for a reasonable network management purpose and if it is done in an application agnostic way. This means that ISPs cannot throttle only video apps but not music apps, for example, even to help alleviate online congestion. Cal. Civ. Code § 3101(a)(2). Generally, however, ISPs are and should be regulated differently than technology platforms. *See* Austin Ruckstuhl, *Should Information Flows Be Controlled by the Internet Plumbers?*, TECHDIRT: GREENHOUSE (Sept. 28, 2021, 12:00 PM), https://perma.cc/S64B-PZQW.

of content differently than others (i.e., categorizing some applications as 'reader' apps).[192] Given this, Apple could be required to have content-neutral policies. Under such a rule, Apple could still impose fees based on the size of the company running the application, or the amount of money a company makes using the Apple App Store.

An application-agnostic fee-scheme does not necessarily solve the core anticompetitive problem with Apple and Amazon fees. The anticompetitive issue here is that Apple's and Amazon's own products are essentially subsidized on their platforms because they do not have to pay themselves fees. For example, it is unclear how Apple Music could be required to pay the Apple App Store in a way that is not self-serving. Therefore, there is a clear incentive for Apple and Amazon to hike up the fees, not because it is fair or covers any legitimate costs the companies incur, but because they want to harm the competitive process. An application-agnostic fee regime could potentially alleviate this issue, but not solve it entirely.

2. *Algorithmic Bias*

While the narrow issue barring manipulating search results could be addressed with a nondiscrimination rule, the larger and broader problems associated with 'algorithmic bias'[193] might be left unaddressed by such rule. To be clear, the rule in Part II.C.1. would bar Google from creating a code allowing Google products to always get a top search result spot or advertising spot. But at the moment, a nondiscrimination rule probably cannot be used to analyze an algorithm and force a company to make such algorithm 'neutral.'

Apple, Meta, Amazon, and Google all use sophisticated algorithms at the core of their platforms. How end-users behave and shop online is molded by algorithms.[194] An issue with regulating this behavior with a nondiscrimination rule based in antitrust law is that it is hard to determine when an algorithm has produced a result due to anticompetitive behavior. Another issue is that

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[192] *See* Clark, *supra* note 182.

[193] Here 'algorithmic bias' is referring to platforms biasing their own products are services, not the distinct but serious issue that algorithms often reflect racial and gender bias. *See, e.g.*, Rebecca Heilweil, *Why Algorithms Can Be Racist and Sexis*t, VOX (Feb. 18, 2020, 12:20 PM EST), https://perma.cc/Q5CJ-TZJF.

[194] Ezrachi & Stucke, *supra* note 4, at 29 ("Using sophisticated algorithms, companies are engaging in data mining, data trade, pattern recognition, demand estimation, and price optimization. Our behavior and preferences trigger individualized promotions, all meant to help us make the right choice. But right for whom?").

because search results are often tailored to a specific end-user,[195] it could be increasingly difficult to prove that an algorithm was serving anticompetitive goals, especially on a wide scale. For example, if every time someone searches for a *'smart watch'*[196] in Google, and Google had a wide scale practice of making Google Pixel Watch the top result, and made users scroll before seeing an Apple Watch, this could indicate anticompetitive conduct. But it may seem less anticompetitive if that result was tailored for a user searching from a Google Pixel phone who had just searched for *'best android watches*.'

It is possible that platforms such as Amazon, Apple, Google, or Facebook provide a superior product, application, or service at a given moment, and that is why that product is amplified by an algorithm. The platforms might also have products that are able to 'game the system,' because of increased access to internal knowledge for example, and therefore are amplified by an algorithm. These scenarios are not necessarily anticompetitive.

As explained in Part II.C.1, a nondiscrimination rule should bar companies from explicitly preferencing their products in search results or in advertisement spots. We could imagine a stricter rule, simply barring a platform from putting their products in optimal advertising spots for example. However, it is unclear if such a rule would help consumers, and it could be overreaching, especially given that advertisements are targeted to specific users.[197]

CONCLUSION

There are many issues with 'big tech,' but identifying, defining, and analyzing these problems is often inconsistent and contradictory. Populist movements might spark new legislative efforts, but policymakers need to consider the negative impacts of pro-competition legislation on speech, content moderation, and consumer welfare. Structural separation is a tool for certain anticompetitive behaviors—but the FTC should still create rules barring

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[195] *Id.* at 83 ("[W]e do not know to what extent the ads (or content) we see reflect our search inquires, past purchases, or even the subject of a recent e-mail we wrote.").

[196] *See* Figure 6.

[197] When reporters have criticized the number of advertisements on Amazon, the company has said that users do not mind the ads. *See* Geoffrey A. Fowler, *It's Not Your Imagination: Shopping on Amazon Has Gotten Worse*, WASH. POST (Nov. 26, 2022), https://perma.cc/899W-452W (quoting Amazon spokesman Patrick Graham: "This [advertising] practice is good for customers—it drives discovery and presents them with more choices."). Labeling requirements may address the issues of advertisements taking up more digital real estate and being harder to identify.

self-preferencing. These nondiscrimination rules need to be careful not to unintentionally endorse common carrier regimes, even though those laws may eventually prove appropriate. We should also not overstate the power of nondiscrimination rules where separations, new legislation, or interoperability and privacy rules might be needed. However, the technology sector needs ground rules—and agency rulemaking is the best immediate path forward.

APPENDIX

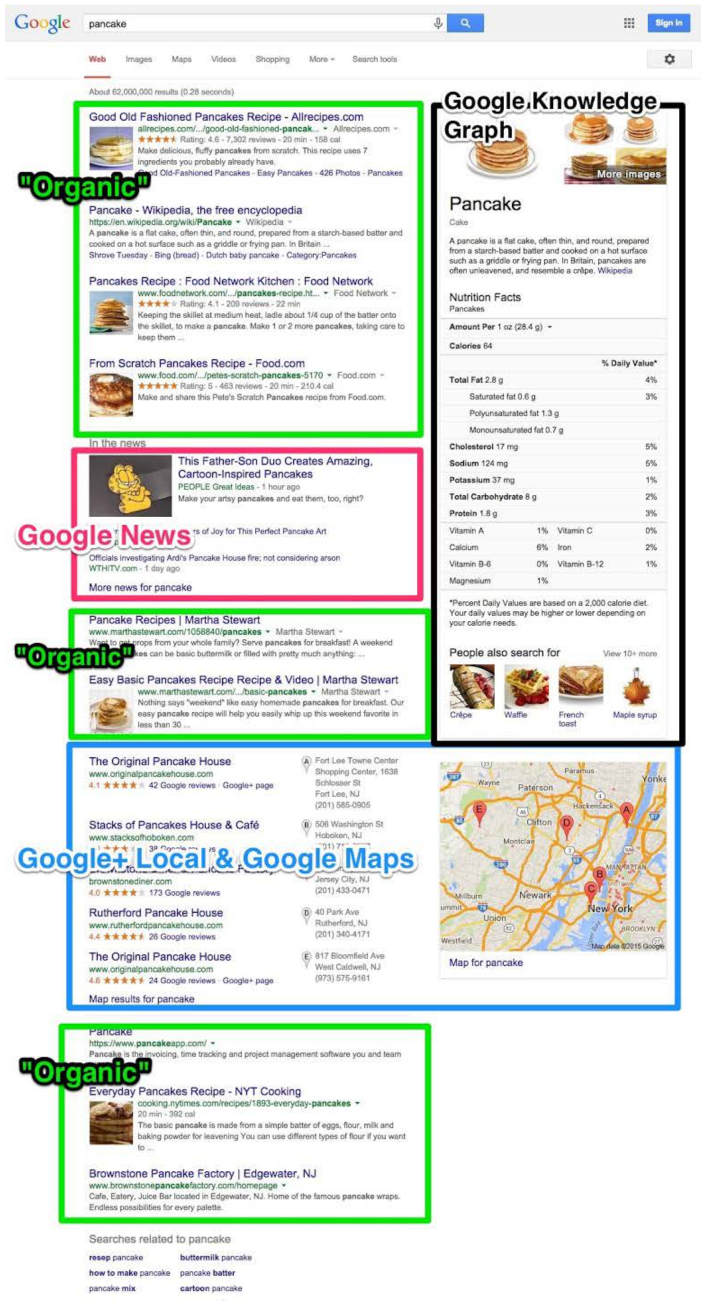

FIGURE 1: FIGURE FROM MICHAEL LUCA, TIM WU, SEBASTIAN COUVIDAT & DANIEL FRANK, *DOES GOOGLE CONTENT DEGRADE GOOGLE SEARCH? EXPERIMENTAL EVIDENCE*, HARVARD BUSINESS SCHOOL NOM UNIT WORKING PAPER NO. 16-035, AT 2 (2015).

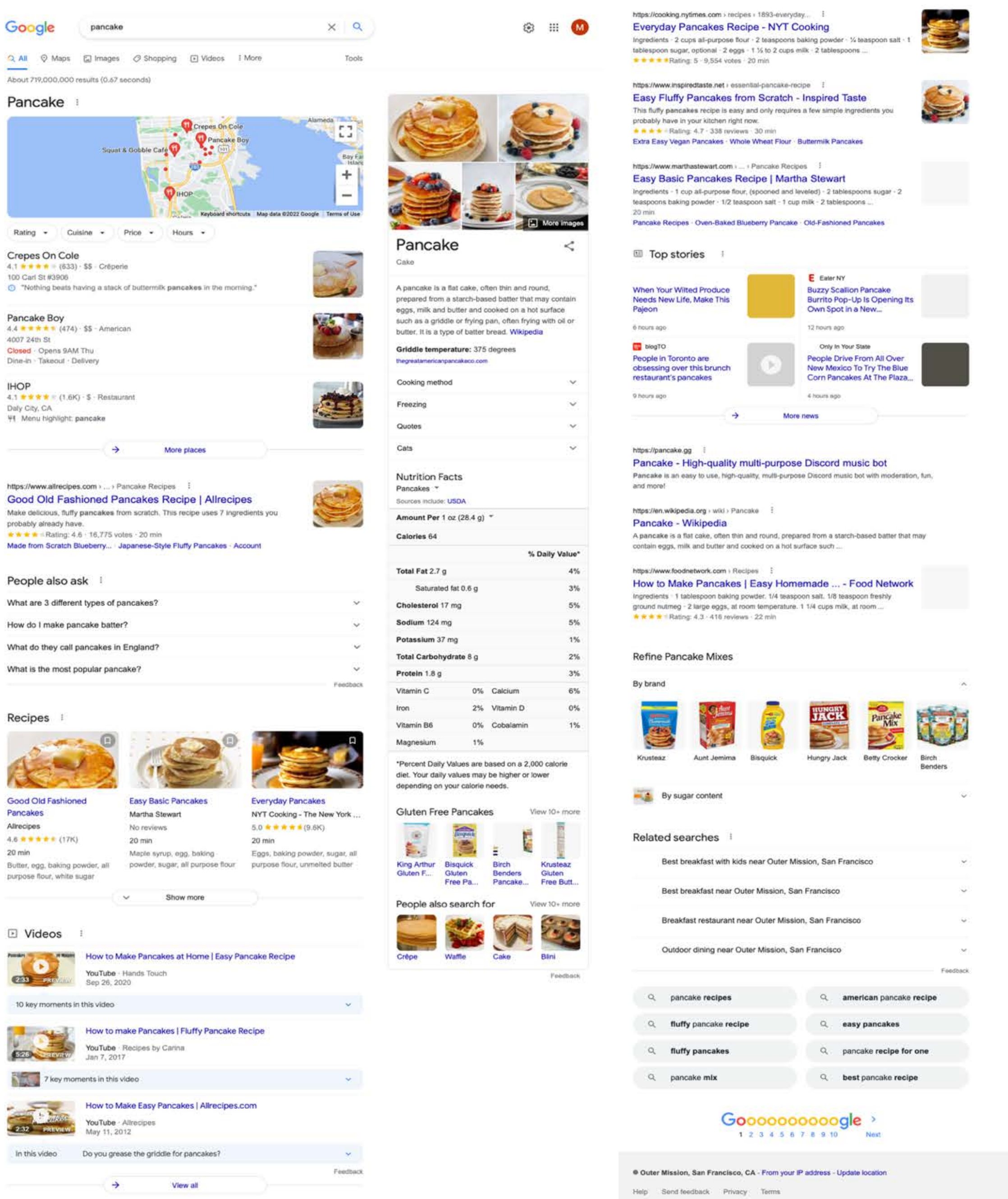

FIGURE 2: GOOGLE SEARCH RESULTS FOR *PANCAKE*. (MAY 18, 2022).

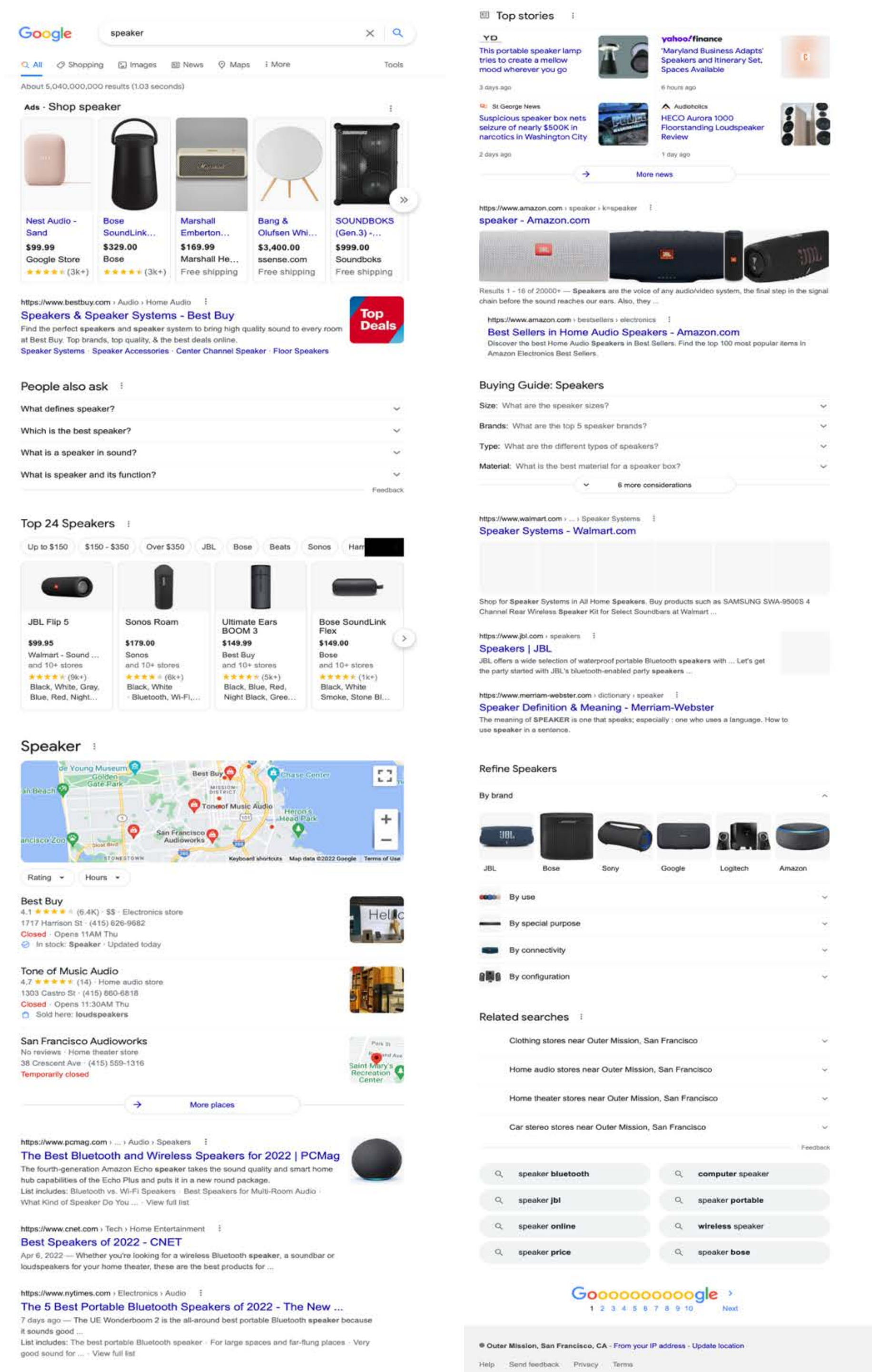

FIGURE 3: GOOGLE SEARCH RESULT FOR *SPEAKER*. (MAY 18, 2022).

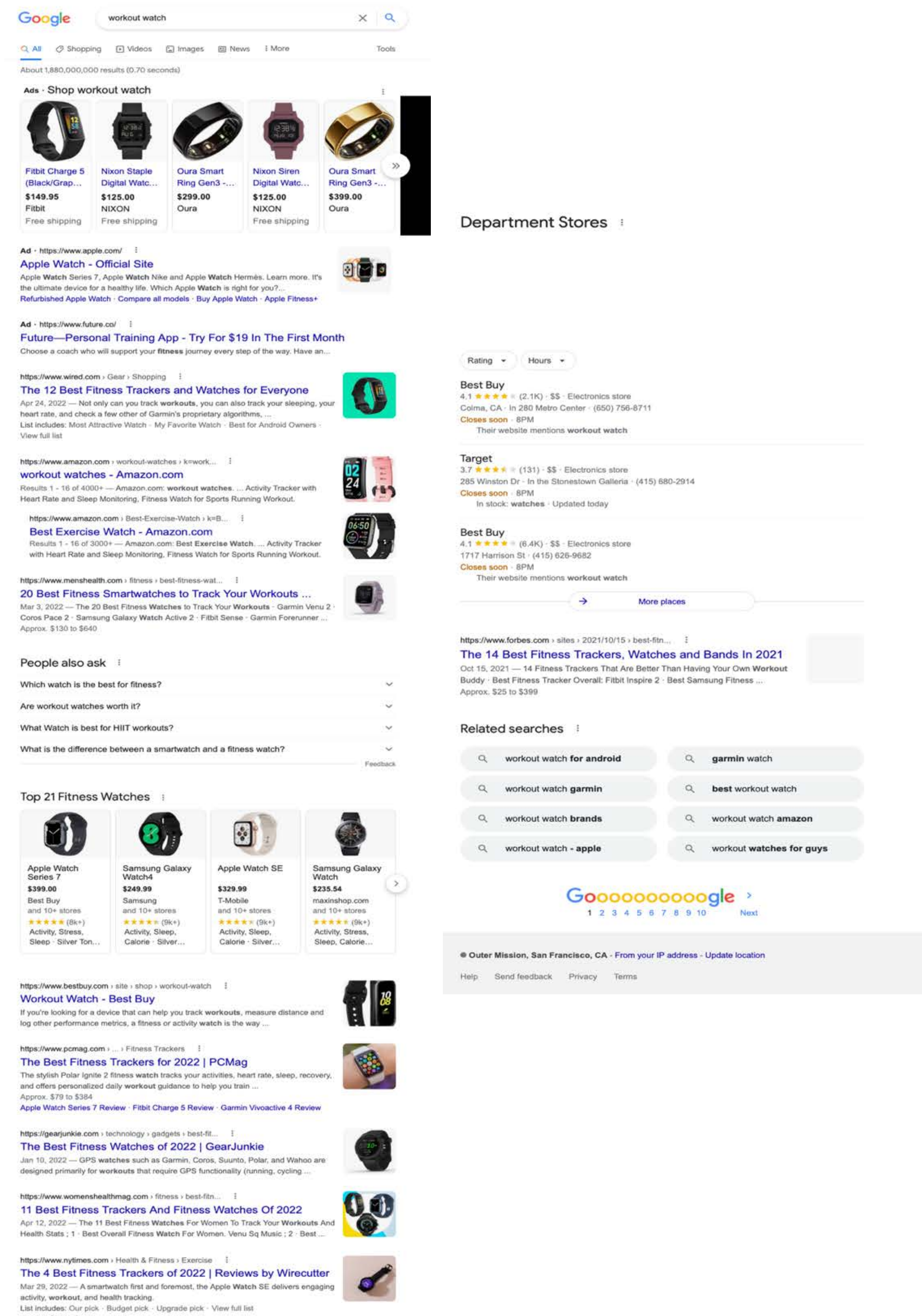

FIGURE 4: GOOGLE SEARCH RESULT FOR *WORKOUT WATCH*. (MAY 18, 2022).

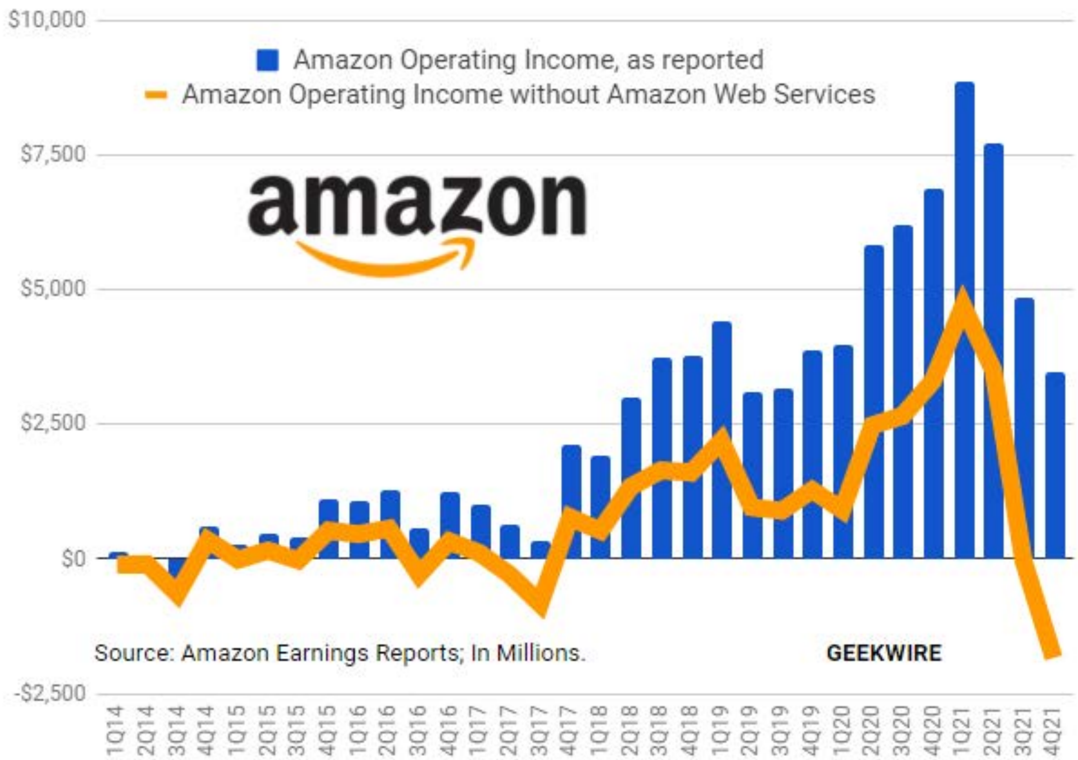

FIGURE 5: TAKEN FROM BISHOP, *SUPRA* NOTE 116.

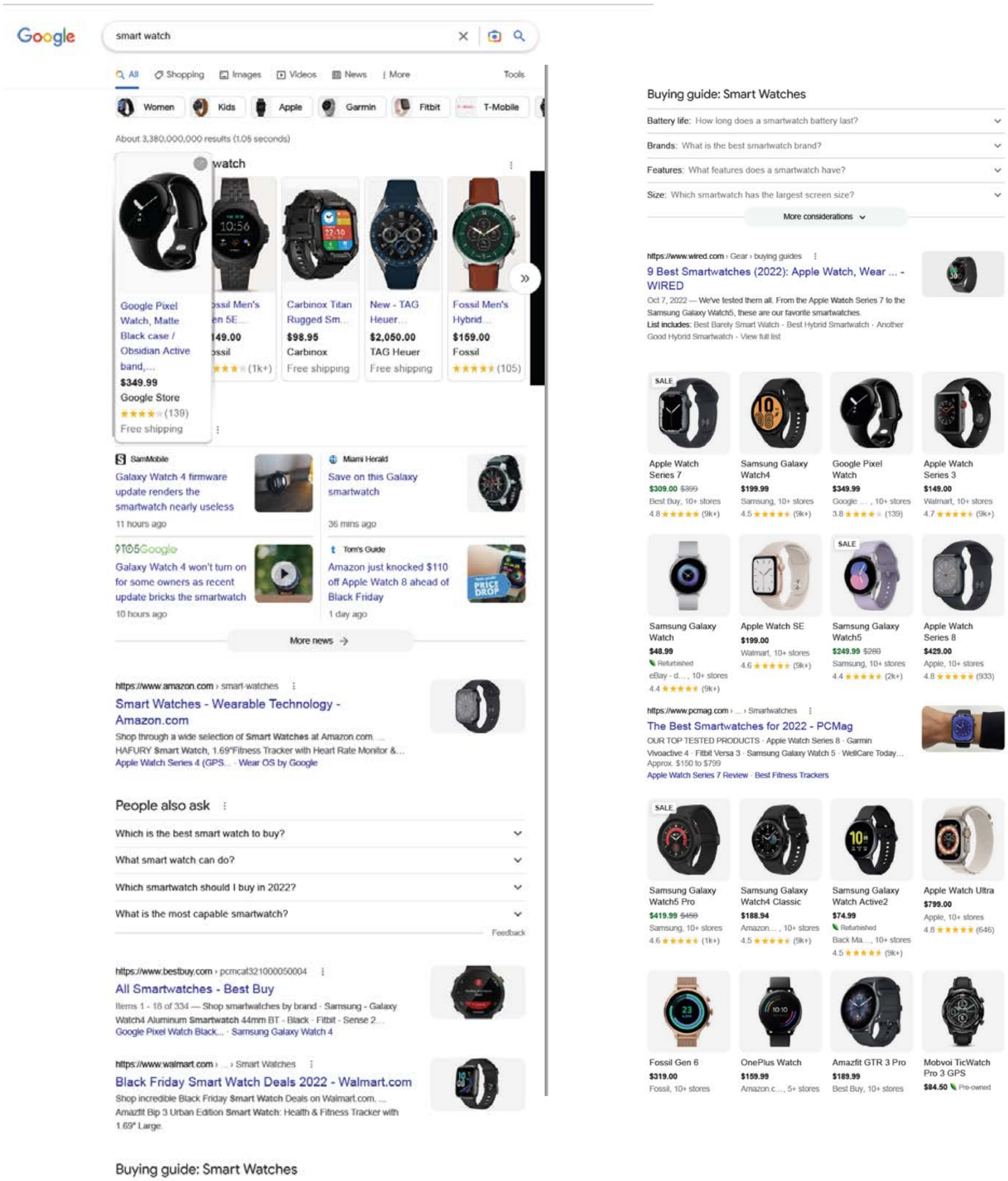

FIGURE 6: GOOGLE SEARCH RESULT FOR *SMART WATCH* (NOV. 7, 2022).