Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 96 | Issue 3 Article 3

Spring 2021

The Case for Preemptive Oligopoly Regulation

Jeffrey D. Manns
George Washington University Law School, jmanns@law.gwu.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/ilj

Part of the Business Organizations Law Commons, Marketing Law Commons, and the Supreme Court of the United States Commons

Recommended Citation
Manns, Jeffrey D. (2021) "The Case for Preemptive Oligopoly Regulation," *Indiana Law Journal*: Vol. 96 : Iss. 3 , Article 3.
Available at: https://www.repository.law.indiana.edu/ilj/vol96/iss3/3

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.

JEROME HALL LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

The Case for Preemptive Oligopoly Regulation

JEFFREY MANNS*

One of the few things former President Donald Trump and leading Democrats appear to agree on is the need to subject Big Technology ("Big Tech") firms to antitrust scrutiny. But unsurprisingly they disagree about how to address the problem. Senator Elizabeth Warren and many other leading Democrats have called for breaking up large technology firms, such as Google, Amazon, and Facebook, in a revival of the trust-busting progressive era of the early twentieth century. In contrast, the Trump administration triggered more traditional antitrust monopoly review of potential anticompetitive activities of a number of leading technology firms, which is more likely to lead to financial sanctions (or more modest consequences).

This Article argues that politicians may be identifying a legitimate concern about the market power of actors in highly concentrated markets. But they are looking at the problem through the wrong lens. The larger concern is less monopoly and more oligopoly domination (and more the potential than the current impact of oligopolies on the marketplace). The challenge of oligopolies is that it is difficult to monitor the individual and collective exercise of market power by oligopolists. Existing oligopoly regulation in the United States is almost exclusively reactive and fails to identify and address the potential impact of market concentration with the notable exception of the Federal Trade Commission's and Department of Justice's review of prospective mergers. The Article makes the case for creating a mandate for federal regulators to oversee oligopolies in a preemptive way in order to better identify the potential for market abuses and to open up concentrated markets to greater competition. The underlying logic is that even if regulators cannot pinpoint antitrust violations in the present, the higher the degree of market concentration the greater the risk that oligopolies will possess and exercise market power to entrench their power and undercut competition. But rather than focusing on invasive divestments, this Article suggests that policymakers consider employing a range of disclosure rules, regulatory exemptions, and tax incentives to level the playing field for smaller competitors in oligopolistic markets.

This Article focuses on the imperative for antitrust oversight of "filtering" or "access oligopolies" who serve as gatekeepers against fraud, data aggregators, and screeners of information and reputation. A small number of oligopolists dominate internet searches, social networking, online shopping, and more traditional spheres of accounting, rating agencies, and investment banking. Participants in these concentrated markets can easily engage in conscious parallelism to mimic one another's prices and practices because of the homogenous nature of the goods or services they provide. But the defining feature of many of these oligopolists is that they have prioritized market share growth and entrenchment by focusing on economies of scale, network benefits, and barriers to entry, rather than the

---

* Professor of Law, George Washington University. I would like to thank participants in the Canadian Law & Economics Workshop, the National Business Law Conference, and the BYU Capital Markets Conference for their constructive comments and Alexander Auster for his research assistance.

conventional supracompetitive pricing that monopolists and oligopolists have embraced in the past. In fact, the paradox of many of these filtering intermediaries is that they may even enhance consumer welfare, such as by offering internet searches or messaging for "free" to consumers, while at the same time leveraging their market power to pressure corporate clients to adopt or retain their services.

Conventional antitrust regulation focuses on preventing monopolists' abuse of their market power to distort market pricing. In contrast, antitrust regulation of oligopolies is almost exclusively reactive and limited in scope. Regulators prohibit express collusion among oligopolies and impose limits on their expansion through mergers and acquisitions based on the potential impact on market concentration. But regulators lack the means to remedy the underlying entrenchment of oligopolies and the resulting market distortions when there is no evidence of express communication or circumstantial evidence of agreement among the parties.

This Article will suggest that antitrust regulators sustain preemptive periodic oversight of highly concentrated markets (rather than react primarily in response to merger reviews), impose heightened disclosures on oligopolists to facilitate monitoring, and seek to open up these markets to greater competition by lowering the regulatory, disclosure, and tax barriers to entry for small market participants. This approach may not satisfy those echoing politicians' calls for mandatory divestments, but it is designed to recognize that high levels of market concentration heighten the potential danger of collusion and leveraging of market power by oligopolists.

INTRODUCTION 753
I. THE EXISTING FRAMEWORK FOR OLIGOPOLY REGULATION AND POTENTIAL REFORMS 758
A. THE INCOHERENCE OF EXISTING ANTITRUST RESTRICTIONS ON OLIGOPOLIES 758
B. THE COSTS OF OLIGOPOLY DOMINATION IN THE INTERMEDIARY CONTEXT 762
C. THE FILTERING INTERMEDIARY CHALLENGE 764
D. THE NEED FOR REGULATORY SOLUTIONS THAT PROMOTE BOTH COMPETITION AND ACCOUNTABILITY 770
II. THE CASE FOR PREEMPTIVE OLIGOPOLY OVERSIGHT AND REGULATION 775
A. A FRAMEWORK FOR PREEMPTIVE OLIGOPOLY REGULATION 775
B. THE DESIRABILITY OF ONGOING OVERSIGHT RATHER THAN ONE-OFF MERGER REVIEW 780
C. THE VALUE OF THE HHI HIGHLY CONCENTRATED MARKET MEASURE 781
D. LEVELING THE REGULATORY PLAYING FIELD 783
1. THE CASE FOR HEIGHTENING OLIGOPOLIST DISCLOSURES 783
2. THE POTENTIAL FOR A "SMALL BUSINESS" EXEMPTION APPROACH 785
3. AN OLIGOPOLY TAX VERSUS OLIGOPOLY TAX RELIEF 789
4. THE POTENTIAL AND LIMITS OF DIVESTMENTS 792
5. APPLYING MARKET DECONCENTRATION TOOLS IN THE FILTERING INTERMEDIARY CONTEXT 797
CONCLUSION 801

INTRODUCTION

We live in a world in which a small number of private actors serve as intermediaries for information, networks, and accountability.[1] The market power of these oligopolistic entities has breathed new political life into antitrust regulation yet also raised questions about whether the existing antitrust principles are relevant to new challenges.[2] We use Google or Yahoo to search for information. We network on Facebook and LinkedIn. We talk on FaceTime, WhatsApp, GroupMe, or Skype. We shop online on Amazon, Walmart, Target, and eBay. We count on other intermediaries to police financial markets, which raise similar issues of how much power can be entrusted in the hands of a small number of private actors without distorting markets. We rely on the Big Four accounting firms to detect financial fraud,[3] the Big Three rating agencies to monitor financial risk,[4] and a handful of leading investment banks and elite law firms to oversee mergers and acquisitions and initial public offerings.[5]

Similar themes cut across all of these types of intermediaries—a high degree of filtering power is vested in a small number of intermediaries that serve as gatekeepers against fraud, data aggregators, and screeners of information and reputation. The importance of these intermediaries' roles and the distorting potential of their market

---

1. The term oligopoly describes a setting in which a small number of firms dominate a market, which raises distinctive regulatory challenges compared to a monopoly context (a single seller in control of prices) and a competitive market situation (where there are numerous sellers such that none can effectively influence supply or prices). *See* Jacob Weissman, *Is Oligopoly Illegal? A Jurisprudential Approach*, 74 Q.J. ECON. 437, 457 (1960).

2. *See* Brent Kendall, *Justice Department to Open Broad, New Antitrust Review of Big Tech Companies*, WALL ST. J., (July 23, 2019, 5:34 PM), https://www.wsj.com/articles/justice-department-to-open-broad-new-antitrust-review-of-big-tech-companies-11563914235 [https://perma.cc/W59Q-SGZ2] (discussing how the Department of Justice is opening up a broad antitrust review of how large technology companies are potentially abusing their market power).

3. U.S. GOV'T ACCOUNTABILITY OFFICE, OFF., GAO-08-163, AUDITS OF PUBLIC COMPANIES: CONTINUED CONCENTRATION IN AUDIT MARKET FOR LARGE PUBLIC COMPANIES DOES NOT CALL FOR IMMEDIATE ACTION 19, 75–76 (2008), https://www.gao.gov/assets/280/270953.pdf [https://perma.cc/YP3U-E7WR].

4. *See* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS, 9 fig.2 (2018), https://www.sec.gov/files/2018-annual-report-on-nrsros.pdf [https://perma.cc/UAF2-9LDR] (documenting that three rating agencies dominate the market: S&P–49.2% market share; Moody's–33.1% market share; Fitch–13.5% market share; DBRS–2.3%; Other–1.9%); *see also* U.S. SEC. & EXCH. COMM'N, ANNUAL REPORT ON NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS 11 (2016), https://www.sec.gov/ocr/reportspubs/annual-reports/2016-annual-report-on-nrsros.pdf [https://perma.cc/S7SU-YG4Z] (documenting that the top three rating agencies account for 96.5% of the market, a higher percentage than before the Dodd-Frank Act was enacted, which initiated greater regulation and oversight of the rating agency market).

5. MARKET SHARE REPORTER 369 (Robert S. Lazich ed., 13th ed., 2003) (reporting 2002 market shares of IPO lead underwriters as follows: Goldman Sachs–33.5%; Morgan Stanley–23.1%; Credit Suisse First Boston–15.9%; Other–15.8%; Salomon Smith Barney–11.8%).

power make these actors particularly appealing case studies for assessing the limits and potential of oligopoly regulation.

The problem is that conventional antitrust regulation may not be able to provide effective oversight of these oligopolistic actors. Currently, oligopoly oversight only comes into play in cases of express collusion and review of mergers in concentrated markets.[6] This Article will argue that oligopolies should be subjected to greater

---

6. A broad literature has explored the challenges of regulating oligopolies since the Sherman Act of 1890. The high-water mark for calls for regulators to address oligopolistic markets was the 1968 Neal Report that sought for the Department of Justice to review systematically oligopolistic markets and to impose mandatory divestments until no participant had more than a twelve percent market share. *See* PHIL C. NEAL ET AL., REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, at 2, 115 Cong. Rec. S15933, S16036 (daily ed. June 16, 1969). Unfortunately, oligopoly regulation was a path not taken. In recent decades actions by the Federal Trade Commission and the Department of Justice to oversee oligopolies have receded to a mere trickle and been limited almost exclusively to the context of merger reviews. In 2004, a Senior Economic Counsel to the DOJ went as far as stating that "interdependence is normal and innocent in oligopoly," that there is little reason to believe this is a significant phenomenon, and that courts must "exclude testimony on structural conditions [i.e., levels of market concentration]." *See* Gregory J. Werden, *Economic Evidence on the Existence of Collusion: Reconciling Antitrust Law with Oligopoly Theory*, 71 ANTITRUST L.J. 719, 779, 788, 791 (2004). But the question of whether to regulate oligopolies has consistently attracted fierce debate. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 125–26 (1978) (arguing against oligopoly regulation based on skepticism of the ability of government regulators to assess and remedy market efficiencies); CHARLES R. GEISST, MONOPOLIES IN AMERICA 239–41 (2000) (discussing how Chicago School economist, George Stigler, led an antitrust commission during the Nixon administration which denounced the Neal Report as a misguided strategy for addressing market concentration, a conclusion which marked a shift toward a much more restrained antitrust policy during the subsequent decades); Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2005–06 (2018) (defending the lack of regulation of oligopolistic market dominance in industries in which industry leader efficiencies or substantial economies of scale can explain their sustained dominance); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1139–48 (1989) (discussing how antitrust regulators have largely abandoned efforts at reducing the level of concentration of oligopolistic markets and suggesting that while divestment strategies are plausible in theory they are difficult to implement in practice); Thomas A. Piraino, Jr., *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 14–15 (2004) (arguing that tacit collusion by oligopolies should be actively regulated by courts based on whether participants in concentrated markets have acted in ways consistent with their self-interest or in ways that facilitate tacit collusion, such as by disclosing confidential pricing information, observing standard industry-wide terms of sale, or following competitors' price increases during periods of overcapacity or declining demand); RICHARD A. POSNER, ANTITRUST LAW 104–05 (2d ed. 2001) (concluding that the Neal Report and other calls for regulation of oligopolies generally "assign[] far too much weight to the single fact of concentration by ignoring all the other considerations"); Michael Salinger, *The Concentration-Margins Relationship Reconsidered*, 1990 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 287, 288–90 (arguing that the positive correlation between higher market concentration and higher prices suggests that relaxed merger oversight in oligopolistic markets is overlooking potential anti-competitive effects); Richard

regulatory scrutiny and potentially proactive regulation. It will suggest that antitrust regulators sustain preemptive periodic oversight of highly concentrated markets (rather than react primarily in response to merger reviews), impose heightened disclosures on oligopolists to facilitate monitoring both by public and private means, and seek to open up these markets to greater competition by lowering the regulatory, disclosure, and tax barriers to entry for small market participants.

Filtering intermediaries do not fit well into the current landscape of antitrust oversight, which is focused on monopoly regulation rather than oversight of oligopolies. Amazon may be the retail behemoth of the future, but it is far from a retail monopolist of the present. Amazon accounts for approximately forty percent of online sales, yet only five percent of overall retail sales.[7] Goldman Sachs may dominate the investment banking space, but, although its tentacles are extensive, it is not a hegemon by itself and accounts for less than fifteen percent of mergers and acquisitions advising.[8] The problem is often not the market power of any individual oligopolistic actor, but rather the aggregate power of actors in concentrated markets to shape the terms of the marketplace in anticompetitive ways. The evidence of this phenomenon is right before our eyes. For example, Amazon, Walmart, and Target routinely match each other's prices online within a remarkably short period of time. The challenge is that conscious parallelism does not require explicit cooperation, which would run afoul of antitrust laws.[9] Instead, the access to near instantaneous information online has made conscious parallelism function similarly to gas stations on the same corner. The dominant market participants can simply observe and react to each other's pricing and practices and sidestep the scrutiny of antitrust law. Economies of scale coupled with conscious parallelism have shielded oligopolies in a range of industries from both meaningful competition and regulatory scrutiny.

In recent years, policymakers and pundits have bandied about the word "monopoly" in calling for greater regulation of the technology industry. For example, Senator Elizabeth Warren has called for the unwinding of many of the most high-

---

Schmalensee, *Inter-Industry Studies of Structure and Performance*, *in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951, 987–88 (Richard Schmalensee & Robert D. Willig eds., 1989) (arguing for greater regulation of oligopolies based on the empirical evidence that market "concentration is positively related to the level of price"). This Article is the first to explore the potential for periodic oligopoly scrutiny to foster competition through disclosure rule changes, regulatory exemptions, and tax incentives in an effort to balance the desirability of greater competition in concentrated markets with respect for markets.

7. *See* Matt Day & Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% from 47%*, BLOOMBERG NEWS (June 13, 2019, 1:34 PM), https://www.bloomberg.com/news/articles/2019-06-13/emarketer-cuts-estimate-of-amazon-s-u-s-online-market-share [https://perma.cc/7ZVB-EV49].

8. *See Dealogic Investment Banking Scorecard*, WALL ST. J. MONEYBEAT, http://graphics.wsj.com/investment-banking-scorecard/ [https://perma.cc/PHV9-K8KP].

9. *See, e.g.*, Franklin M. Fisher, *Games Economists Play: A Noncooperative View*, 20 RAND J. ECON. 113, 120 (1989) (discussing how competitors in concentrated markets rationally try to maximize profits by engaging in tacit collusion); KEITH N. HYLTON, ANTITRUST LAW: ECONOMIC THEORY & COMMON LAW EVOLUTION 73–75 (2003) (discussing that conscious parallelism refers to companies in a concentrated industry conducting business in strategically uniform ways based on the awareness that their competitors are pursuing similar courses of action).

profile mergers in the technology industry to undercut their monopoly power.[10] Many other Democratic leaders have echoed the need to roll back monopoly dominance of significant sectors of the economy.[11] President Trump's administration followed suit by initiating antitrust investigations of several leading technology companies for potential market manipulation.[12] The problem is that the issues both sides of the debate hope to address concern more oligopolies than monopolies. Amazon, Google, and Facebook are leaders in highly concentrated markets rather than monopolists. Lasting solutions may require addressing ongoing efforts to address market concentration and increase competition, rather than publicity grabbing, but more challenging calls for divestments or break ups.

The federal government has embraced a soft approach to remedy oligopolistic collusion by prohibiting price-fixing in which cartels function as if they are a single monopolistic actor in setting prices. Prohibitions on price-fixing fail to address the problems posed by filtering oligopolies. The small number of filtering intermediaries, in any given field, means that these oligopolists can easily engage in conscious parallelism to mimic one another's prices without any explicit agreement. But an equally important issue is the secondary effects that oligopolies may have in distorting markets. Many filtering oligopolists can use their market power to stop new or (small) existing entrants from posing a threat or to influence their clients. For example, rating agencies use the threat of issuing unilateral ratings on companies who do not use their services to make it more difficult for smaller rating agencies to compete.[13] Yelp and Google leverage their screening power in searches to pressure companies to pay them for prominence in searches with the implicit threat of being buried in results if they fail to do so and/or choose to work with alternative search filtering providers.[14]

Another challenge is that oligopolies have in many cases lowered prices or otherwise enhanced consumer welfare (at least in the short run), which is the exact

---

10. *See, e.g.*, Astead W. Herndon, *Elizabeth Warren Proposes Breaking Up Tech Giants Like Amazon and Facebook*, N.Y. TIMES (Mar. 8, 2019), https://www.nytimes.com/2019/03/08/us/politics/elizabeth-warren-amazon.html [https://perma.cc/G5H2-2AC6].

11. *See, e.g.*, Rani Molla & Emily Stewart, *How 2020 Democrats Think About Breaking Up Big Tech*, VOX (Dec. 5, 2019, 4:10 PM), https://www.vox.com/policy-and-politics/2019/12/3/20965447/tech-2020-candidate-policies-break-up-big-tech [https://perma.cc/S6F2-4RWM] (summarizing the leading Democratic presidential candidates' positions on expanding the use of divestments in antitrust enforcement).

12. *See* Brent Kendall, John D. McKinnon & Ryan Tracy, *FTC Preparing Possible Antitrust Suit Against Facebook*, WALL ST. J. (Sept. 15, 2020, 7:17 PM), https://www.wsj.com/articles/ftc-preparing-possible-antitrust-suit-against-facebook-11600211840 [https://perma.cc/MMV5-TPEF]; David McLaughlin, Kurt Wagner & Naomi Nix, *Trump DOJ Escalates Big Tech Scrutiny with New Antitrust Probe*, BLOOMBERG NEWS (July 23, 2019, 5:01 PM), https://www.bloomberg.com/news/articles/2019-07-23/u-s-opens-probe-of-online-platforms-over-competition-harm [https://perma.cc/893X-SGQC].

13. *See, e.g.*, Steven L. Schwarcz, *Private Ordering of Public Markets: The Rating Agency Paradox*, 2002 U. ILL. L. REV. 1, 16–17 (2002) (discussing the use of negative, unsolicited ratings as a tool to attract the future business of debt issuers).

14. *See, e.g.*, Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 112–19 (2010) (discussing the broad power that Google has to shape the contours of search results).

opposite of the supracompetitive pricing that antitrust authorities have traditionally policed as evidence of market power. For example, e-commerce titans such as Amazon and Walmart appear to have consciously fostered short-term consumer welfare benefits in reducing the cost of online purchases in order to grow their market share and consolidate their market power.[15] Similarly, social media providers offer "free" services that enhance consumer welfare and use the wealth of information they harvest from users of their services to make their information-based products for marketing even more indispensable for corporate America.[16] The ultimate concern is about the effects of the inability of firms to compete with the scale and depth of the dominant oligopolists' market power. In the long run the entrenchment of oligopolists will deter new entrants and arguably harm consumer welfare by limiting choices and potentially leading to higher prices (and implicit costs) for consumers.

The problem is that the U.S. antitrust framework for oligopolies is purely reactive, and therefore existing antitrust restrictions on oligopolies fail to prevent oligopoly entrenchment and the resulting stifling of competition. Regulators prohibit express collusion among oligopolies and impose limits on the expansion of oligopolies through mergers and acquisitions based on the potential impact on market concentration.[17] At best, antitrust regulators can only indirectly affect oligopolists by preventing acquisitions or mergers that will result in greater market concentration or conditioning merger approvals on divestitures.[18] But regulators lack the means to remedy the underlying entrenchment of oligopolies and the resulting market distortions when there is no express communication or agreement among the parties.

This Article will argue that oligopolies should be subjected to greater regulatory scrutiny and potentially proactive regulation. It will suggest that antitrust regulators sustain preemptive periodic oversight of highly concentrated markets (rather than react primarily in response to merger reviews), impose heightened disclosures on oligopolists to facilitate monitoring both by public and private actors, and seek to open up these markets to greater competition by lowering the regulatory, disclosure,

---

15. *See, e.g.*, Matthew Boyle, *Walmart Subsidizing Some Vendors in Price War with Amazon*, BLOOMBERG NEWS (Oct. 14, 2019, 2:04 PM), https://www.bloomberg.com/news/articles/2019-10-14/walmart-subsidizing-some-vendors-in-online-price-war-with-amazon [https://perma.cc/KS92-5J26].

16. *See, e.g.*, Cornelis Reiman, *The Janus Face of Social Media*, COST MGMT., Jan.-Feb. 2013, at 1, 2–3 (discussing the disconnect between the "free" cost of social media services to consumers and the extensive data mining taking place based on their usage).

17. Because this Article seeks to address the shortcomings of oligopoly regulation, its discussion focuses on the regulation of horizontal mergers under the Horizontal Merger Guidelines. The Guidelines lay out the Federal Trade Commission's and Department of Justice's framework for assessing and addressing the potential impact of mergers on market concentration and competition. *See* U.S. DEP'T JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (2010) [hereinafter *Guidelines*].

18. *See* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 334–35 (2001) (discussing the conventional application of the Herfindahl-Hirschman market concentration index to review mergers in highly concentrated markets); U.S. DEP'T JUST., ANTITRUST DIV., ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 6–12 (2011) (discussing the use of divestitures as "structural remedies" to "remedy the competitive harm that otherwise would result from the merger").

and tax barriers to entry for small market participants.[19] This approach may not satisfy those echoing calls for mandatory divestments but is designed to recognize that high levels of market concentration heighten the potential danger of collusion and leveraging of market power by oligopolists. But in the absence of actual or circumstantial evidence of collusion or evidence of abuse of market power, antitrust regulators should instead preemptively monitor oligopolists and find ways to level the playing field for smaller players and new entrants to increase competition.

Part I will provide an overview of the existing framework for the regulation of oligopolies and the limits of existing proposals for reform and will describe the particular problems posed by oligopolistic intermediaries. Part II will make the case for preemptive regulation of oligopolies to open up opportunities for new entrants and smaller entities.

I. The Existing Framework for Oligopoly Regulation and Potential Reforms

A. The Incoherence of Existing Antitrust Restrictions on Oligopolies

For decades policymakers and courts have acknowledged the role of oligopolies in distorting markets yet failed to address the problem of how to regulate and oversee oligopolies. While the potentially distorting effects of oligopolies on prices and market competition are clear, antitrust laws do not lay out any effective way to identify tacit collusion or convergent behavior of market actors, let alone how to address oligopolistic market dominance. That is why this Article is proposing a framework for preemptive oversight and regulation of oligopolistic markets. Absent direct evidence of collusion, plaintiffs and regulators are forced to prove collusion using complex and often-shifting economic theories. The larger problem is that antitrust law is largely toothless to address "conscious parallelism" in highly concentrated markets if there is no evidence of an actual meeting of the minds among

---

19. Much of the literature that is critical of regulation of oligopolies (and monopolies) has focused on the use of divestment as a policy tool, which is why this Article focuses primarily on the potential for less invasive remedies to deconcentrate the market. *See, e.g.*, KENNETH G. ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES: A STUDY IN LAW AND ECONOMICS 47 (1976) ("[T]he consensus so far is that structural relief has been attempted in only a few cases, and it has been performed rather badly in those."); RICHARD A. POSNER, ANTITRUST LAW—AN ECONOMIC PERSPECTIVE 85 (1976) ("The picture that emerges of what antitrust divestiture has meant in practice is not an edifying one . . . ."); LAWRENCE ANTHONY SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 141 (1977) ("[I]t is not an easy thing to point to significant remedial successes in [antitrust] proceedings"). *But see* William L. Baldwin, *The Feedback Effect of Business Conduct on Industry Structure*, 12 J. L. & ECON. 123, 128–37 (1969) (finding that the imposition of conduct decrees in government monopolization suits occasionally served to erode market positions of dominant firms); DON E. WALDMAN, ANTITRUST ACTION AND MARKET STRUCTURE 155–65 (1978) (concluding that the antitrust regulators' efforts to seek divestitures in merger cases has caused dominant firms to adjust behavior in ways that lowered entry barriers and increased competition in several concentrated industries); SIMON N. WHITNEY, ANTITRUST POLICIES: AMERICAN EXPERIENCE IN TWENTY INDUSTRIES 388–92 (1958) (concluding that dissolution actions have achieved valuable results in some instances when used to restructure single-firm monopolies).

oligopolists. Parties can mimic one another's behavior in terms of price or quantity or engage in other convergent market activity with virtual impunity absent evidence of an agreement. Regulators have always had difficulty overseeing conscious parallelism, and the advent of the internet has facilitated product transparency, which has ironically made it easier for a range of industries to engage in convergent pricing and practices. The primary recourse antitrust regulators have is to impose restrictions on merger activity in oligopolistic markets, which can slow down further market consolidation yet does nothing to address the existing dominance or organic growth of oligopolies.

Since the passage of the Sherman Act in 1890, courts have been struggling with delineating the scope of antitrust constraints for oligopolies. The Sherman Act broadly outlaws "every contract, combination or conspiracy in restraint of trade," which left courts and regulators to determine what degree of cooperation and concentration rise to the level of antitrust violations.[20] Initially, the Supreme Court interpreted the Sherman Act's prohibitions on constraints of trade in a sweeping way. For example, *United States v. Trans-Missouri Freight Ass'n* did not distinguish between different types of restraints on trade.[21] As a result, many common (potentially benign) practices, like non-compete clauses made during the closing period of the purchase of a company, were deemed to be illegal.

But the Supreme Court swiftly moved away from the *Trans-Missouri* line of cases, in which any restriction on trade was deemed a violation of the Sherman Act.[22] The Court recognized that any literal reading of the Sherman Act could chill potentially productive forms of cooperation among industry participants, such as intellectual property licensing, industry standardization, and other benign direct and indirect interaction amongst competitors. In 1899, *Addyston Pipe & Steel Co. v. United States*[23] was the first case to distinguish illegal naked restraints, in which rivals agree to restrict production in order to raise prices above competitive levels, from lawful "ancillary" restraints, in which parties have agreements on other matters.[24] But this decision left open-ended the degree of express and implicit agreements that could take place when competitors are pursuing convergent functions where standards can facilitate technological development—e.g, computer, cell phone, and television makers. It left unresolved the extent to which seemingly benign express or tacit agreements under the guise of standards or trade association cooperation may impact the development of markets and the emergence of new competitors by creating barriers to entry.[25]

The Supreme Court unpacked the logic of *Addyston Pipe & Steel Co.* in a line of cases that sought to carve out rules and exceptions to determine the extent to which

---

20. *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking* 2 (Univ. of Cal. Berkeley Ctr. for Competition Pol'y, Working Paper No. CPC99-09, 1999).

21. *See* 166 U.S. 290 (1897).

22. *Id.*

23. 175 U.S. 211 (1899).

24. Kovacic & Shapiro, *supra* note 20, at 3.

25. The costs of market exit have been discussed to produce similar effects to those created by higher barriers to entry. *See, e.g.*, WILLIAM J. BAUMOL, JOHN C. PANZAR & ROBERT D. WILLIG, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRY STRUCTURE (1982).

explicit or implicit cooperation among competitors is permissible even if it may have ancillary effects that reduce competition. The challenge was that the language of the Sherman Act itself left little to no guidance as to the boundaries of legal and illegal activities for oligopolists. In 1911, the Supreme Court established the "Rule of Reason" as the basic method for interpreting the Sherman Act.[26] Under the Rule of Reason standard, judges would look at the conduct in question on a case-by-case basis in order to judge the intent and actual harm. The courts identified some acts that were deemed to be "per se illegal" under this standard that entailed express collusion that centered around price-fixing. But most acts by firms, short of collusion, were deemed legal even if they indirectly "restrained trade," as long as they were generally "benign" in nature. The question of what constitutes "benign" restraints on trade was left open-ended and unresolved, which left the door open for constructive cooperation, as well as for anticompetitive, oligopolistic collusion that falls short of express price-fixing.

The Federal Trade Commission Act of 1914 provided a locus of enforcement of antitrust law by vesting an independent agency with the role of making and administering antitrust policy and the mandate of overseeing bans on "unfair methods of competition" and "unfair or deceptive acts or practices."[27] The related Clayton Act of 1914 gave the newly formed Federal Trade Commission limited regulatory powers over oligopolies by prohibiting mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly."[28] Since that time, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) have acted in concert in working to review mergers for their potential anticompetitive impact with each agency alternating control of the review process of companies. Review of the impact of proposed mergers on competition has become the primary focus of regulatory oversight of oligopolies in the absence of evidence of express collusion over price-fixing. However, both Acts did little to address the entrenchment of oligopolies outside of the merger context and largely left oligopoly regulation to the courts to figure out how to address market concentration problems and tacit collusion.[29]

Because of gaps in the legislative framework, courts gradually developed contours for the antitrust regulation of oligopolists but did so in an incomplete way that has left most oligopoly conduct outside the scope of federal oversight. For example, in 1954, in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, the Supreme Court established that "conscious parallelism" (i.e., firms responding to each other's price or output changes independent of each other) is not in itself a Sherman Act violation.[30] The Second Circuit expanded on this view in *E.I. du Pont de Nemours & Co. v. Federal Trade Commission*, noting that conscious parallel pricing "represents a condition, not a 'method'" and could indeed be consistent with

---

26. *Id.* at 4.
27. Federal Trade Commission Act of 1914, 15 U.S.C. § 45.
28. Clayton Act of 1914 § 7, 15 U.S.C. § 18 (prohibiting certain types of tying arrangements, exclusive dealing agreements, interlocking directorates, and mergers achieved by purchasing stock).
29. *Id.* § 5.
30. 346 U.S. 537, 541 (1954).

intense competition.[31] However, the Supreme Court left the door open for potentially prosecuting conscious parallelism if additional "plus factors" are in place that indicate an actual conspiracy among the parties, yet left undefined what the contours of these plus factors are.[32]

Academics have hypothesized what circumstantial evidence may, in the aggregate, serve as evidence of an oligopolistic conspiracy,[33] as well as economic indicators that suggest collusion.[34] Economic indicators of collusion include a variety of market distorting behavior and barriers to entry including: (1) market shares being fixed; (2) market-wide price discrimination; (3) firms sharing pricing information; (4) prices within a market varying from region to region; (5) firms regularly submitting identical bids; (6) price or output changes occurring at the formation of the cartel; (7) industry-wide "resale price maintenance;" (8) market shares of industry leaders showing decline; (9) markets where changes in price can be easily checked; (10) a market where demand is inelastic at the market price; (11) a market where profits can easily be tracked; (12) a market where the market price is inversely correlated with the number of firms or elasticity of demand; (13) a market where pricing is done using a system of "basing-point pricing;" and (14) a market where exclusionary practices are common (including tying arrangements, predatory pricing, vertical integration, exclusive dealing, and boycotts).

Nonetheless, courts have been reluctant to hold oligopolies accountable for collusion in the absence of evidence of a smoking gun of an actual agreement.[35] For example, in *Williamson Oil Co. v. Phillip Morris USA*,[36] the Eleventh Circuit concluded that the government's economic evidence of conscious parallelism merely

---

31. 729 F.2d 128, 139 (2d Cir. 1984).

32. Theatre Enters., Inc., 346 U.S. at 540–41 ("Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.").

33. POSNER, *supra* note 6, at 69–79. Posner posits that conditions that suggest circumstantial evidence of collusion include: (1) the market being concentrated on the selling side; (2) a lack of "small sellers;" (3) inelastic demand for the product at a competitive price; (4) a market with a high cost of entry; (5) lack of concentration on the demand side of the market; (6) a standardized product; (7) a non-durable product; (8) a market where the principal firms in the market sell at the same level in the distribution chain; (9) a market where the only competition is over price, as opposed to quality; (10) a market with a high ratio of fixed costs to variable cost; (11) similar cost structures and/or production processes throughout the market; (12) a market without growing demand; (13) a market where prices are not sticky; (14) a market where sealed bidding is practiced regularly; (15) a local market; (16) a market where cooperative practices already exist (where firms lobby together or are each other's customers as well as competitors, for example); and (17) markets where there is a history of collusion.

34. *Id.* at 77–93.

35. *See, e.g.*, *In re* Baby Food Antitrust Litig., 166 F.3d 112, 122, 124, 137 (3d Cir. 1999) (affirming summary judgement in favor of the oligopoly after reviewing company documents explicitly referring to "truce" in the industry and stating that finding otherwise would punish "independent conduct of competitors" and "chill the very conduct the antitrust laws are designed to protect").

36. 346 F.3d 1287 (11th Cir. 2003).

indicated that an oligopoly existed, which in itself is not illegal.[37] In the absence of clear evidence of an agreement, mere circumstantial evidence based on the economic structure of the market was deemed inadequate to establish an antitrust violation.[38] Similarly, the First Circuit in *White v. R.M. Packer Co*.[39] held that there was no violation of antitrust laws when the evidence could not explain whether the parallel pricing was achieved by agreement or mere interdependent actions. Other circuit courts have given lip service to the role of economic factors in establishing anticompetitive effects but have based their decision on concrete evidence. For example, the Seventh Circuit in *In re High Fructose Corn Syrup Antitrust Litigation*[40] laid out dicta (from Judge Posner) on the role of noneconomic factors in determining that market participants in an oligopoly violated antitrust laws. But the Seventh Circuit grounded its findings of antitrust violations primarily on a CEO's statement that "our competitors are our friends. Our customers are the enemy."[41] Similarly, the Third Circuit in *In re Flat Glass Antitrust Litigation*[42] noted the problems posed by a high degree of market concentration but rested its decision of an antitrust violation on evidence of collusion among oligopolists.[43] In its approval of the merger between T-Mobile and Sprint in 2020, two of the four leading players in the market, the United States District Court for the Southern District of New York also acknowledged the impact on market concentration, which could increase the potential for conscious parallelism, yet deemed the entrance of a new competitor, Dish Network, would offset any negative impact on competition.[44] The lack of uniformity in the circuit courts' analysis of "plus factors" reflects the lack of coherence and uniformity in the Supreme Court's oligopoly theory as a whole.

B. The Costs of Oligopoly Domination in the Intermediary Context

Part of the problem facing regulation of oligopolies is the nature of defining the problem. Much of the debate on oligopolies has focused on how to identify and whether to address tacit collusion which distorts industry pricing. For example, Richard Posner has argued that oligopolistic supracompetitive pricing is frequently the result of tacit collusion.[45] Posner suggests that enforcement agencies should target markets that appear susceptible to price manipulation and apply economic analysis to determine if prices are higher than would be expected in a competitive context, which would suggest express or tacit collusion.[46] The challenge in applying the Posnerian lens is the inherent uncertainty of determining whether a given

---

37. Matthew M. Bunda, *Monsanto, Matsushita, and "Conscious Parallelism": Towards a Judicial Resolution of the "Oligopoly Problem,"* 84 WASH. U. L. REV. 179, 202 (2006).
38. *Id.* at 201.
39. 635 F.3d 571 (1st Cir. 2011).
40. 295 F.3d 651 (7th Cir. 2002).
41. *Id.* at 662.
42. 385 F.3d 350 (3d Cir. 2004).
43. *Id.* at 361–69.
44. New York v. Deutsche Telekom AG, 495 F. Supp. 3d 179 (S.D.N.Y. 2020).
45. POSNER, *supra* note 6, at 60, 69.
46. *See id.* at 69–70 & n.16–17.

economic effect is a consequence of the oligopolistic structure of the industry or due to other market forces, such as barriers to entry.

Other antitrust scholars have embraced the Donald Turner school of thought that supracompetitive pricing is an unavoidable consequence of the structure of oligopolistic markets and does not necessarily reflect tacit collusion.[47] In other words, concentrated markets naturally produce higher prices because of the reduced level of competition, regardless of whether the concentration occurs through successful competition or anticompetitive activity. This school of thought holds that oligopolists should be effectively immune from antitrust scrutiny as long as there is no "meeting of minds" among participants, which is consistent with courts' hands-off approach to conscious parallelism by oligopolists so long as there is no overt collusion.[48] The primary shortcoming of both of these views is that oligopolistic collusion on pricing is only part of the potential problem. Oligopolies can distort markets in numerous ways and create barriers to entry that entrench a concentrated set of market players.

The problem with oligopolies appears simple: companies can engage in tacit mimicry to create and leverage market power. But this "conscious parallelism" problem has proven to be remarkably difficult to police or remedy. In competitive markets, firms lack market power. Firms are price takers, responding to market demand and supply, and are generally not in a position to shape industry practices. In contrast, a key feature of oligopolies is the awareness and exploitation of interdependence among the small number of participants in concentrated markets. Each firm recognizes that its decisions can significantly affect the market conditions faced by its rivals.[49] Under these circumstances, leading firms in an industry can, through a series of individual decisions, settle on a price significantly higher than what would be expected in a competitive market or converge on industry standards that raise barriers to entry for competitors.[50] Similarly, oligopolists can converge on practices or even push for government regulations that create or reinforce barriers to entry that entrench the dominance of the existing market actors. The end result is a pattern of behavior that is economically equivalent to a traditional cartel, in spite of the absence of an express agreement.[51]

---

47. *See* Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 666 (1962).

48. *Id.* at 664, 671.

49. *See, e.g.*, George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 443–44 (1982) (contrasting individualism of competitive markets with interdependence in oligopolistic markets). The awareness of interdependence has long been recognized as the "most essential differentiating aspect" of oligopoly. K.W. Rothschild, *Price Theory and Oligopoly*, 57 ECON. J. 299, 303 (1947).

50. There is a large body of literature devoted to modeling how oligopolistic firms can engage in conscious parallelism without an express agreement. *See, e.g.*, Guy Sagi, *The Oligopolistic Pricing Problem: A Suggested Price Freeze Remedy*, 2008 COLUM. BUS. L. REV. 269, 272–86 (2008) (summarizing notable economic and game-theoretic models of consciously parallel behavior).

51. *See, e.g.*, Piraino, Jr., *supra* note 6, at 21–22 (noting the "consensus among economists" that the effects of conscious parallelism are equivalent to those of express anticompetitive agreements).

The difficulty in policing conscious parallelism is that it is very difficult to stop mimicry through conventional antitrust law. The classic example is gas stations on a corner, all of which have remarkably convergent prices. No one can stop owners of gas stations from looking across the street at each other's prices. The gas station owners sell a virtually identical product, and over time, owners can anticipate one another's moves in response to price changes to sustain higher prices for their corner as they can come to act in concert as repeat players. A key difference between gas station owners and conventional oligopolies is the degree of market power and the size of the industry. Gas stations on a corner have to worry about gas stations down the street and others that are miles away that serve as a credible alternative to consumers. The larger the number of participants, the higher the risk of defection in the absence of express, binding agreements. In contrast, in conventional oligopolies the small number of participants in an entire industry makes it easier for conscious parallelism to take place and for market participants collectively to sustain lasting market power.

The larger problem is that the impact of oligopolists on the marketplace is not limited to price effects. Participants in concentrated markets can create and sustain durable barriers to entry that stifle competition. The same type of dynamics that may facilitate mimicry of price may facilitate convergent practices that paradoxically leverage transparency to raise the costs of entry. Ironically, regulation often magnifies this type of problem by playing into the hands of dominant industry players by creating layers of rules that smaller participants cannot cost-effectively comply with. In fact, the power of oligopolists may give them a disproportionate role in pushing for and shaping regulations in ways that reinforce their strengths and deepen the barriers to smaller players and new entrants. The result is that oligopolists can effectively entrench their dominance without being exposed to meaningful antitrust scrutiny (outside of the merger review context).

C. The Filtering Intermediary Challenge

Filtering intermediaries serve as a useful case study for considering the limitations of existing antitrust regulation and the merits and mechanisms of preemptive oligopoly oversight. Intermediaries perform distinctive gatekeeping roles that provide them with tremendous influence over users and the potential to perform consumer-welfare enhancing functions. For example, financial intermediaries, such as credit rating agencies, accounting firms, and underwriters, can serve as appealing substitutes for public enforcement because of their ability to cost-effectively monitor clients for unlawful or deceptive use of their goods or services. Online search engines and online retailers allow consumers to streamline their searches and to engage in comparisons of value, security, and speed that consumers could only achieve on their own at a high cost.

The same dimensions of financial intermediaries that make them desirable as tools for policing risks also facilitate tacit collusion, such as the small size of the industry, relative homogeneity of their products, and the role of reputational capital in their

legitimacy.[52] The small number of financial intermediaries in fields such as rating agencies and accounting firms is both a boon and burden. Since financial intermediaries function as reputational proxies, there may be a value in having a finite number of actors performing this role. That way market participants can easily verify reputational proxies about financial risk or financial accuracy without having to invest time and resources in verifying the legitimacy of the gatekeeper source of information. Think about how you approach internet searches in a similar way, as there is reason to be skeptical about news or price information when it comes from an unfamiliar source. That partly explains the market power that search engines such as Google, Yahoo, or Firefox enjoy in serving as reliable filters for information. This same phenomenon appears in a myriad of online contexts from internet searches to the online transmission of money. For example, you do not need to spend much time pondering why you would prefer to purchase an item from Amazon, Target, or Walmart online, rather than "Portarget.com," "Wufair.com," or "Bonanza.com." It is not that there isn't any competition online, as every search produces a myriad of "no name" entities, but there is an absence of reputable alternatives in the same price point range as the dominant three retailers. Similarly, this fact underscores the value of an audit from a "Big Four" accounting firm for all market participants. These leading accounting firms are so deeply entrenched that the failure to use one of the "Big Four" may in itself be a "red flag" as was true in the Bernie Madoff ponzi scheme.[53] But the downside of the small number of leading firms is that it makes it easier for financial gatekeepers to coordinate behavior. Just as the law of large numbers ensures a higher risk of defection, the smaller the number of oligopolists the easier it is for parties to monitor and mimic one another for mutual benefit.

Another feature of financial intermediaries, which is both a vice and virtue, is that they produce relatively homogenous products. For example, the methodologies of rating agencies vary, but their assessments of credit risk are remarkably similar in practice, both in terms of substantive analysis and conclusions.[54] Having little product differentiation makes it easier to compare ratings from one rating agency to another, but it also facilitates mimicry. This fact can frustrate the very purpose of gatekeepers in detecting fraud or excessive risk taking as they can all converge on remarkably similar processes and outcomes, whether or not their approaches actually heighten accuracy or serve to entrench their clients and themselves. This same phenomenon appears in internet searches, as while the search algorithms are different, there is significant fungibility in the results particularly when it comes to important segments of the market such as online commerce or customer rating searches.

---

52. *See* Hay, *supra* note 49, at 447–51 (discussing characteristics that facilitate oligopoly pricing).

53. Matthew Goldstein, *Madoff Accountant Avoids Prison Term*, N.Y. TIMES: DEALBOOK (May 28, 2015), https://www.nytimes.com/2015/05/29/business/dealbook/madoff-accountant-avoids-prison-term.html [https://perma.cc/XF8U-RBCL] (discussing the failures of micro accounting firm Friehling & Horowitz—which consisted of one accountant—to oversee Bernie Madoff's fraudulent financial empire).

54. *See, e.g.*, John C. Coffee, Jr., *Ratings Reform: The Good, The Bad, and The Ugly*, 1 HARV. BUS. L. REV. 231, 245–46 (2011) (discussing how ratings from the leading rating agencies frequently converge).

The related problem is the interconnected roles of government regulation, self-regulation, and reputational capital in entrenching financial gatekeepers. Government regulation, deference to industry self-regulation, and other forms of recognition of financial intermediaries may effectively laurel oligopolistic actors with reputational capital by granting the imprimatur of the state. For example, well-intended regulation to certify that financial intermediaries meet government standards may function as barriers in practice and reinforce the oligopolistic nature of the industry. To the extent that the federal government defers to private parties to fulfill public gatekeeping purposes, it is understandable that the government would want to make sure qualified parties are serving this role. The challenge is that government regulation may create protectionist barriers that shield established players from competition. For example, qualifications for certification as a nationally recognized statistical rating organization emphasize the rating agency's track record, which is hard and expensive for new entrants to replicate.[55] Similarly, well-intended requirements that no client of a rating agency amounts to more than ten percent of their business (to mitigate potential conflicts of interest) have hamstrung the ability of small rating agencies to compete with the top three market participants.[56]

Government regulation is less of a concern in exacerbating market concentration in the online world. Facebook and LinkedIn are dominant players in social and professional networking, not because of the high cost of government regulatory restrictions but because of the network benefits that arise from their hundreds of millions of users. Amazon has used its economic power to shake down states and localities for subsidies, as its search for a second headquarters underscored, but the success of Amazon's core business is primarily based on economies of scale and strategic investments in its distribution networks rather than government regulation. Ironically, Amazon championed the imposition of an online sales tax, but not because of any sympathy for its brick-and-mortar competitors. Instead, Amazon sought to strip advantages away from its smaller online competition as Amazon built a broad network of distribution centers throughout the country that would expose it to state taxes because of its physical footprint.[57]

Similar problems arise from government deference to self-regulation. Self-regulation or self-regulatory organization rules may rise (or descend) from the level of standard setting to constituting protectionist barriers that shield established players from competition. For example, the creation of Generally Accepted Accounting Principles and formalization of accounting practices creates a lingua franca and clear

---

55. *See* Frank Partnoy, *How and Why Credit Ratings Agencies Are Not Like Other Gatekeepers*, *in* FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? 59, 60–62 (Yasuyuki Fuchita & Robert E. Litan eds., 2006) (discussing how the rating agency industry has an "oligopoly market structure that is reinforced by regulations that depend exclusively on credit ratings issued by Nationally Recognized Statistical Rating Organizations").

56. *See* Peter Feltman, *SEC Grants Bond Rater Exemption for Large Clients*, CONG. Q. ROLL CALL (Oct. 14, 2015) (discussing the SEC's granting an exemption to the Kroll Bond Rating Agency to allow it to temporarily violate the 10% cap on revenues from any single client).

57. *See* Jacob Goldstein, *Why Amazon Supports an Online Sales-Tax Bill*, NPR: PLANET MONEY (Apr. 22, 2013, 12:57 PM), https://www.npr.org/sections/money/2013/04/22/178407898/why-amazon-supports-an-online-sales-tax-bill [https://perma.cc/84PF-SAY6].

expectations for the accounting world which creates broad benefits. But this progress also comes at a potential price as relatively homogenous products facilitate convergence in pricing and process and make it easier for parties to curb defection from the oligopoly. Similarly, measures from online retailers to curb counterfeit product selling by participants on their sites reinforces the private regulatory role of Amazon, Walmart, or eBay over their respective website marketplace participants.[58]

Even to the extent that governments roll back regulatory barriers on new entrants or smaller players, the centrality of reputational capital to filtering intermediaries also poses significant barriers to entry. Reputational capital is difficult to build, so prospective entrants must weigh the financial and temporal challenges and uncertainties of attracting business and building up their reputations enough to viably compete with established players. The related problem is that reputation is sticky.[59] Entrenched intermediaries can cash in their reputation by imposing higher prices or laxer gatekeeping without the fear of immediate reputational costs to their businesses. That is what happened to the run up to the financial crisis, as financial intermediaries traded off greater profits for greater risks to their reputations by legitimizing dubious collateralized debt obligations. Amazon and eBay have recently claimed to crack down on counterfeit products. But historically they have profited from lax gatekeeping by allowing large-scale sales of counterfeit products,[60] just as social networking sites, such as Facebook and Twitter, have profited from legions of fake profiles that warp the scale of their clout for prospective advertisers.[61] While financial intermediaries faced the fallout from legislators and regulators for lax gatekeeping after the financial crisis, their reputations emerged largely unscathed because there was more than enough blame to go around to other market parties as well as the government. Online oligopolists have fared even better by leveraging their influence in the economy and in the world of public opinion to quell any meaningful effort to check their market power.[62]

Conventional oligopoly analysis focuses on the potential for actors to maintain supracompetitive pricing (i.e., prices above what one would expect in competitive

---

58. *See* Emily Birnbaum, *US Announces Crackdown on Counterfeit Products Sold Online*, THE HILL (Jan. 24, 2020), https://thehill.com/policy/technology/479852-us-announces-crackdown-on-counterfeits-online [https://perma.cc/3BF9-AAWC] (discussing efforts by the United States and retailers, Amazon and eBay, to crack down on counterfeit good trafficking).

59. Jeffrey Manns, *Insuring Against a Derivative Disaster: The Case for Decentralized Risk Management*, 98 IOWA L. REV. 1575, 1585 (2013) (discussing how "market actors often give much greater weight to past reputation than to more recent shortcomings in gatekeeping").

60. Malathi Nayak, *Lawmakers Spur Amazon, eBay to Crack Down on Counterfeits (1)*, BLOOMBERG LAW (June 4, 2019, 6:10 PM), https://news.bloomberglaw.com/ip-law/amazon-ebay-confront-counterfeit-scourge-in-hill-meeting [https://perma.cc/X7KF-RK2C].

61. *See, e.g.*, Elaine Moore & Hannah Murphy, *Facebook's Massive Fake Numbers Problem*, L.A. TIMES (Nov. 18, 2019, 3:38 PM), https://www.latimes.com/business/technology/story/2019-11-18/facebooks-massive-fake-numbers-problem [https://perma.cc/6LNW-GJ5W].

62. *See, e.g.*, Cecilia Kang, *Tech Industry Pursues a Federal Privacy Law, On Its Own Terms*, N.Y. TIMES (Aug. 26, 2018), https://www.nytimes.com/2018/08/26/technology/tech-industry-federal-privacy-law.html [https://perma.cc/RC3T-63CM].

markets).[63] While that is a concern with filtering intermediaries, oligopolistic firms may also collude—tacitly or expressly—on a range of competitive factors aside from price.[64] The underlying logic of conscious parallelism works the same way as it does in the pricing scenario; interdependence enables the emergence of cooperative strategies that boost oligopolists' profits at the expense of issuers/investors/overall financial system.

For example, one of the key aspects of filtering intermediaries is that they perform screening functions to filter information, detect fraud, and/or excessive risk taking. Inasmuch as filtering intermediaries mimic each other's standards or conduct due to conscious parallelism, this convergence may come at the expense of performing their core functions. Lax gatekeeping is a problem that negatively impacts financial markets as a whole but may serve at least the short-term interest of the financial actors that gatekeepers serve. The concentrated nature of the market may allow firms to follow each other's lead in pursuing profit at the expense of quality. Theoretically, in competitive markets, reputational constraints would punish gatekeepers who appear to compromise on quality, similarly to how price competition punishes firms who set excessive prices.[65] Under this logic, individual gatekeepers should be deterred from seeking profits via practices that negatively impact the perceived quality of their services; the prospect of additional profits is offset by the prospect of losing market share to "cleaner" rivals. Under oligopoly conditions, however, the major firms can blunt the force of reputational constraints by pursuing quality-compromising practices in unison. Put simply, if everyone's a little bit dirty, no one can be singled out for it. This problem is magnified by the stickiness of reputation, as reputation takes a long while to cultivate and equally long periods of time to erode in the public's eye.

The accounting and rating agency contexts both underscore this danger. Accounting firms paved the way for the Enron accounting scandal (and similar scandals at other companies) through their aggressive marketing of non-audit services to audit clients. This arrangement allowed accounting firms to expand their profits but at the cost of potentially compromising auditors' independence, thereby weakening a key safeguard of audit integrity.[66] Economic theory would suggest that

---

63. Some commentators frame this behavior as "tacit collusion." The terms are interchangeable in their meaning, different connotations aside. *See* HYLTON, *supra* note 9, at 73 (defining conscious parallelism as a process by which oligopolists seek to "maintain a high price or to avoid vigorous price competition"); POSNER, *supra* note 6, at 52–53.

64. Alexis Jacquemin & Margaret E. Slade, *Cartels, Collusion, and Horizontal Merger*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 415, 420 (Richard Schmalensee & Robert D. Willig eds., 1989) ("Firms [engaging in collusion] can choose from a rich set of non-price instruments of rivalry, such as advertising, *product quality*, productive capacity, and R&D . . . .") (emphasis added).

65. The role of reputation as a guarantor of high quality has been studied extensively. *See* Joseph E. Stiglitz, *Imperfect Information in the Product Market*, *in* 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 769, 823 n.59 (Richard Schmalensee & Robert D. Willig eds., 1989) (highlighting notable examples from a "vast literature" on the economics of reputation).

66. *See* John C. Coffee, Jr., *Understanding Enron: "It's About the Gatekeepers, Stupid,"* 57 BUS. LAW. 1403, 1411–12 (2002); Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1237–38 (2002).

in competitive markets one or more major firms would have refused to go along with this trend, choosing instead to emphasize their commitment to high-quality audits in an attempt to take market share from the others by strengthening their reputation. However, a tight oligopoly in the market for large audits allowed all of the then "Big Five" auditing firms, acting in conscious parallelism with one another, to become increasingly management-friendly while expanding their consulting operations—thus allowing each of them to profit hugely from consulting fees without the danger of losing market share due to reputational damage.[67] While this particular problem was addressed in the Sarbanes-Oxley Act through a prohibition on accounting firms' cross-marketing of consulting services, it underscores the type of process convergence that can arise in oligopolistic markets.[68]

Similarly, conscious parallelism among rating agencies in the run up to the financial crisis raised a similar cautionary tale. In the mid-2000s, Moody's, S&P, and Fitch were heavily engaged in the rating of subprime mortgage debt instruments. Despite the fact that this market accounted for a significant portion of the agencies' revenue, and that the instruments in question were both novel and complex, the agencies all converged on ratings inflation as the quality of the underlying collateral decreased while ratings remained high.[69] Again, in normal conditions of market competition, economic theory suggests that at least some firms would have exercised greater caution, investing more heavily in diligence, especially given the size of the subprime debt market. In turn, firms who adopted the lax approach of the "Big Three" would stand to lose significant market share once the extent of their negligence became apparent. But conscious parallelism allowed each of the leading rating agencies to mitigate scrutiny up front and to minimize accountability on the back end after the extent of their laxness was exposed.

Another issue is that the oligopolistic structure of financial gatekeepers may reduce the amount of information produced by financial gatekeepers as a whole and suppress innovation.[70] Oligopolistic mimicry suppresses innovation as gatekeepers may have little incentive to differentiate their products if they can sustain a high degree of profitability through convergent practices. In contrast, greater competition means that firms may have more to gain from greater product or process

---

67. *See, e.g.*, James D. Cox, *The Oligopolistic Gatekeeper: The U.S. Accounting Profession*, *in* AFTER ENRON: IMPROVING CORPORATE LAW AND MODERNISING SECURITIES REGULATION IN EUROPE AND THE U.S. 269, 289–92 (John Armour & Joseph A. McCahery eds., 2006) (suggesting that the small number of dominant accounting firms post-Enron allowed the remaining big firms to retain overall market share despite having relaxed their standards over the previous several years); Coffee, Jr., *supra* note 66, at 1414–15 (alleging that relaxation of standards by the then "Big Five" accounting firms in the late 1990s was a result of "implicit collusion").

68. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 201, 116 Stat. 745, 771 (2002) (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

69. *See* Jeffrey Manns, *Rating Risk After the Subprime Mortgage Crisis: A User Fee Approach for Rating Agency Accountability*, 87 N.C. L. REV. 1011, 1046–47 (2009).

70. More ratings activity generates more information overall due to particular features of the rating industry. Multiple agencies independently rate the same clients, and the judgments of ratings agencies are completely encapsulated in simple grading scales, whose granularity facilitates comparison.

differentiation. In the case of rating agencies, a higher level of competition would provide incentives for greater variation in terms of risk models to differentiate firms in terms of accuracy, which could heighten the probability that at least one rating agency anticipates emerging risks. A benefit of this approach is that it would make more information available to the public because rating agencies would likely look at more factors and assess them from additional angles. A lower degree of market consensus would potentially spur other financial actors to scrutinize ratings and financial risks more thoroughly. Similarly, the convergence of pricing, delivery, and promotional practices by e-commerce firms means that not only do customers face remarkably convergent pricing from the leading e-commerce companies but increasingly also face similar terms at every step in the transaction, which ends up giving consumers less options and less variability in terms of prices.

D. The Need for Regulatory Solutions That Promote Both Competition and Accountability

The nature of oligopolistic entrenchment poses challenges for policymakers in seeking to craft solutions that both facilitate greater competition and foster accountability in oligopolistic markets. The concern is that government intervention may have distorting effects that impair competition. For example, the costs of regulatory compliance often perversely reward scale and size (and the rules themselves are often molded or adjusted over time by the largest industry players who have greater lobbying pockets and sway). A related, yet distinctive concern, is that regulations may be toothless if safe harbor conditions or other formalist legal requirements insulate parties from oversight and accountability. Understanding each of these challenges is key to considering the potential solutions to oligopolistic dominance that regulators should consider.

One of the greatest challenges to addressing oligopolistic dominance is overcoming barriers to entry which have economic, reputational, and regulatory dimensions. Market entry in a general sense often appears to be simple. Incorporating a company costs a nominal amount of money, and each year over six hundred thousand new businesses are formed in the United States.[71] In theory, start-ups have some comparative advantages as they avoid legacy-cost burdens such as pension fund costs, higher labor costs due to unionization, and the absence of outdated infrastructure. Sometimes start-ups are able to sidestep existing competitors by utilizing new technologies and redefining the markets through creative disruption—think of how Amazon and eBay utilized emerging online markets to outflank existing brick and mortar retail competitors to forge dominant positions in online retail of new and used goods respectively. Sometimes start-ups are able to create whole new categories of activity,[72] such as the social and professional networking facilitated by Facebook and LinkedIn, which provides them with a first mover advantage. The

---

71. *See* HENRY R. NOTHHAFT & DAVID KLINE, GREAT AGAIN: REVITALIZING AMERICA'S ENTREPRENEURIAL LEADERSHIP 43 (2011) (discussing how six hundred thousand new businesses are created on average each year, but that seventy-seven percent of these businesses will fail within a year).

72. *See, e.g.*, Joseph Farrell, *Moral Hazard as an Entry Barrier*, 17 RAND J. ECON. 440, 444–45 (1986).

credit ratings industry provides another notable example, in which the three dominant firms—Moody's, Standard & Poor's, and Fitch—also happen to be the first three large-scale firms to enter the market for credit ratings (opinions on creditworthiness).[73]As the earliest firms to achieve a high degree of economies of scale in issuing ratings, they did not face the same initial costs that new potential competitors would currently face and did not have to overcome the reputational strengths of entrenched incumbents. Instead, they were forging new types of reputational goods and could use their marketing and branding both to build and entrench the emerging markets for their products.

But once firms have established their dominance, new entrants often face formidable barriers to break into the inner circle of oligopolists who may have a wide spectrum of market power-related tools to marginalize competitors. One of the most significant barriers is the nature of reputational dynamics, which make it much more difficult for new entrants to compete with established oligopolists.[74] A simple thought exercise can help to explain the challenge of overcoming reputational barriers. Think of the last time you purchased something online. It may be that you sought to purchase a narrow niche product that for whatever reason may not be on a general marketplace website like Amazon or Walmart.com. But those purchases are increasingly the exception to the rule because Amazon (and to a lesser extent Walmart) are as much forums for commerce as the direct suppliers. If you search for any given product on Google (another oligopolist of note), you will get search results that feature convergent pricing on a handful of websites such as eBay, Walmart.com, Target.com, and Amazon. You will also see the product offered by smaller retail websites that you have likely never heard of (and whose names often change, which in itself should raise eyebrows) and who seek to match the terms of the oligopolist online retailers. If you are like most consumers, you will end up purchasing the item on Amazon or Walmart.com simply because, all other things being equal, you will trust in the reputation for quality, efficient delivery, certainty of return eligibility, and safeguards against online fraud offered by the dominant online retailers.

Because of the economies of scale that the online retail behemoths enjoy, the reality you do not observe is that even the efforts of the smaller retailers to match or marginally beat Amazon's prices may come at the cost of narrow margins or sustained losses merely to attempt to build market share. The long-term hope of smaller competitors is that they can grow quickly enough and secure capital quickly enough to scale up even as their larger rivals achieve ever greater economies of scale. This insight suggests that would-be entrants must spend heavily (through accruing losses) on activities in an attempt to build up their reputations, which may not be economically sustainable. The larger concern is that potentially the advantages dominant firms enjoy may be insurmountable at least for the foreseeable future because their economies of scale effectively thwart existing or would-be competitors. As this Article will discuss later, these daunting barriers to entry provide

73. *See, e.g.*, Norbert J. Gaillard & Michael Waibel, *The Icarus Syndrome: How Credit Rating Agencies Lost Their Quasi-Immunity*, 71 SMU L. REV. 1077, 1081–82 (2018) (discussing the rise of Moody's, Standard & Poor's, and Fitch as the leading players in the rating agency industry).

74. The term "entrant" describes any firm, from a new startup to an established niche operator, that seeks to compete with the industry's dominant firms.

justifications for treating smaller competitors like small businesses with regulatory, disclosure, and tax preferences to level the playing field.

Start-ups face a chicken and egg problem for establishing reputations in the face of entrenched competitors. Reputations are a strategy for reducing uncertainty when the quality of services cannot be ascertained at the time of purchase.[75] They are shaped partially, but not exclusively, by a firm's past performance.[76] From the point of view of the consumer and the market as a whole, entrants have no reputation, or, equivalently, they have a reputation of unknown quality which consumers would systematically discount. This is a major disadvantage for upstart firms, to the extent that reputation is the true underlying "product" that companies purchase from gatekeepers and online intermediaries.[77] Under these circumstances, an entrant would have incentives to offer discounts to entice new customers to attract attention and build market share. However, this straightforward strategy is complicated by the relationship between price and reputation—an entrant's discounted price sends an ambiguous signal: the entrant could be either a high-quality firm seeking to build its reputation or a low-quality firm that can afford to offer less because it spends less on diligence or quality control.[78] Therefore, in order to effectively signal its commitment to high quality, the entrant must cut its price even further, to a level where even a low-quality firm would be expected to have zero or negative profit (which would entail burning its venture capital in the hope of building market share).[79]

A related problem is that there is not necessarily a linear way to build reputation. We may think of reputational ratings through the prism of eBay or Uber ratings. Each time a purchase takes place, both the consumer and supplier have the chance to rate one another. In theory, this interaction creates credibility for the reputational ratings. But there is widespread evidence that these ratings are less revealing about reputation than they purport to be because of intermediaries' exclusion of negative results (often paid for by the sellers as in the case of Yelp) or intermediaries' tolerance of paid plaudits.[80]

---

75. This condition is widespread in financial gatekeeper industries. In many cases, mistakes or shortcuts—or worse, deliberate fraud—cannot be detected until long afterward. *See* Stephen Choi, *Market Lessons for Gatekeepers*, 92 NW. U. L. REV. 916, 939–943 (1998) (discussing challenges that gatekeeper industries face due to difficulty of verifying accuracy and fidelity of individual gatekeepers and outlining potential responses, including increased reliance on reputation).

76. *See, e.g.*, Stiglitz, *supra* note 65, at 829–31 (developing a model of how information on a firm's past performance is used to create rational expectations concerning future performance).

77. *See, e.g.*, Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 613–21 (1984) ("In essence, the investment banker rents the issuer its reputation.").

78. *See* Stiglitz, *supra* note 65, at 825 (noting that discount pricing may fail to bring new customers due to suspicion that low prices result from low quality).

79. *See* Farrell, *supra* note 72, at 441, 448 (discussing how entrants may be able to signal high quality by demonstrating a "pure sacrifice" of profits in an introductory period).

80. *See, e.g.*, Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1245–54 (2019) (discussing the range of potential pathologies that distort the value of consumer reviews).

The broader problem is that the reputation of entrenched parties may be unassailable. For example, think of the credit card context. If a retailer refuses to accept Amex, Visa, Mastercard, or Discover, consumers may interpret that as a negative signal. If a lesser-known credit card is able to persuade retailers (by cutting their percentage fees charged to retailers) to accept their card, that change would do little to change consumers' perceptions of the "big four" credit card companies compared to new entrants. Even offering consumers a substantial amount of cash back on their purchases would make it difficult to erode oligopolists' dominance as the experience of smaller credit card companies in trying to build market share has underscored.

A related challenge is that the market may punish (or at least, many managers believe it will punish) those companies who do not choose (visible) intermediaries with well-established reputations. In contrast, the reputation of suppliers may matter far less if their brand is not publicly accessible—the notable exception being when supply scandals arise such as in the quality of food in a firm's supply chain or defective inputs used in the production of some other product. For example, consumers may be less likely to use a retail website if it does not accept one of the big four credit cards but only allows parties to pay through electronic checks from consumers' banks (in order to avoid or minimize any processing fees). To the extent managers believe that they will face reputational fallout from not relying on the established players, they have a strong incentive to stick with the oligopolists, instead of going with a lower-priced newcomer.[81] After all, it defeats the purpose of saving on fees if in turn the company's cost of borrowing increases, or its stock value decreases because of reputational backlashes or reduced revenues from consumer reactions.

One of the key features of filtering intermediaries is that they can potentially leverage their brands both to build consumer loyalty and to pressure actors to rely on their services. For example, Google and other search engines can use features such as options for firms to pay for greater prominence in search results to incentivize companies to use their services. Similarly, Yelp can use its rating system to pressure companies to advertise Yelp at their establishments and/or pay to decrease the prominence of negative feedback from their customers in their ratings. Another example is that the dominant three credit rating agencies can leverage their reputations to pressure companies into retaining their services. For example, both Moody's and S&P have issued unsolicited ratings when issuers have chosen not to pay for their services.[82] Because the issuers were not clients in these cases, the rating agencies had less information on which to base their ratings decisions and therefore could justify lower ratings on the premise that they had to assume unknown

---

81. *Cf.* U.S. GEN. ACCT. OFF., GAO-03-864, PUBLIC ACCOUNTING FIRMS: MANDATED STUDY ON CONSOLIDATION AND COMPETITION 45–52 (2003) (presenting results of a Fortune 1000 survey in which eighty-eight percent of respondents said they would refuse to consider an accounting firm outside of the "Big 4").

82. *See, e.g.*, Frank Partnoy, *How and Why Credit Rating Agencies Are Not Like Other Gatekeepers*, *in* FINANCIAL GATEKEEPERS: CAN THEY PROTECT INVESTORS? 59, 70–73 (Yasuyuki Fuchita & Robert E. Litan eds., 2006) (discussing instances in which ratings agencies allegedly used unsolicited negative ratings to coerce rated entities to purchase full ratings).

information in a conservatively negative way. It is true that not every type of intermediary may be able to leverage these types of unilateral pressure on prospective clients (e.g., accounting firms who provide services only for paying clients). But this potential exploitation of reputational power offers another reason why intermediaries possess extraordinary means to entrench their dominance.

As discussed earlier, antitrust law currently lacks the tools to lower the barriers to entry for new entrants in oligopolistic markets. Antitrust law primarily targets monopolies and oligopolies who expressly function like monopolies by achieving collective market power through explicit agreements. But antitrust law all but overlooks oligopolistic convergence as oligopolists can mimic one another with impunity. Consciously parallel behavior alone is not enough to establish a Sherman Act § 1 violation.[83] Regulators must establish conspiracy through either (1) direct evidence of an agreement or (2) sufficient circumstantial evidence supporting an inference of agreement (by identifying "plus factors" that suggest an actual agreement was in place).[84] But the bottom line is that, in the absence of evidence of an express agreement, regulators have little in the way of meaningful tools in their arsenal to hold oligopolists accountable.[85]

The one notable exception is heightened merger review and approval processes for prospective mergers involving oligopolists.[86] Regulators can point to the extent of market concentration as a justification for rejecting further industry consolidation through mergers. But this power is a purely reactive and negative constraint. This power serves only to keep the present situation from becoming worse, by blocking mergers that would further consolidate that power or mitigating the impact of mergers on market concentration. This approach does not address existing

---

83. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993) ("Tacit collusion, sometimes called oligopolistic price coordination or conscious parallelism, describes the process, *not in itself unlawful*, by which firms in a concentrated market . . . set[] their prices at a profit-maximizing, supracompetitive level. . . .") (emphasis added); Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775 (1984) ("[T]he Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy . . . ."); Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954) ("[T]his Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense."); *see also* Turner, *supra* note 47 (arguing that § 1 should apply only when the existence of an agreement can be proved).

84. Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 768 (1984) ("[T]here must be direct or circumstantial evidence that reasonably tends to prove that [the parties] had a conscious commitment to a common scheme . . . ."). For discussion of plus factors commonly seen in § 1 cases and the often ambiguous role they play in a court's analysis, see Michael D. Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 886–87 (1979); William E. Kovacic, *The Identification and Proof of Horizontal Agreements Under the Antitrust Laws*, 38 ANTITRUST BULL. 5, 35–55 (1993).

85. *See* Sherman Act § 1, 15 U.S.C. § 1 (2006) ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.").

86. Clayton Act § 7, 15 U.S.C. § 18 (2006) (prohibiting mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly").

oligopolies or market concentration through organic growth or when oligopolies leverage their strength in one area to expand their footprint in another.

The problem is that antitrust law lacks the power to affirmatively open up oligopoly-dominated industries to greater competition. This shortcoming leads to predictable failure. This approach offers no response to problems inherent in oligopolies that do not involve prohibited conduct—such as the overall drop in gatekeeping performance or convergent standards that deepen the barriers to entry for the industry. Antitrust law is effectively blind to these problems, which requires defining the oligopoly problem in a new way and equipping regulators with a more effective tool kit for addressing these issues.[87]

II. THE CASE FOR PREEMPTIVE OLIGOPOLY OVERSIGHT AND REGULATION

A. A Framework for Preemptive Oligopoly Regulation

This Article will suggest strategies for regulators to address this oligopoly problem by creating a framework for preemptive regulation: the creation of heightened disclosure requirements on oligopolists to make it easier for new entrants to emulate their business model and treatment of smaller competitors in oligopolistic industries as "small businesses" qualified for a range of small business regulatory exemptions and tax incentives to foster competition and new entry. It will also explore the merits and significant tradeoffs of using divestments to reduce market share and overall market concentration, an approach whose shortcomings suggest the wisdom of primarily relying on less invasive strategies to foster competition. The logic of proposing multiple strategies is that the shortcomings of antitrust enforcement show that there is not necessarily a "one-size-fits-all" solution to the challenges posed by oligopolies. Instead, regulators need to be equipped with a tool kit for ongoing or periodic oversight of oligopolies that gives them flexibility to address market concentration in a tailored way to facilitate greater competition.

The common core for efforts to foster competition in oligopolistic markets is establishing a baseline for government intervention to address the entrenchment of filtering oligopolies. A logical starting point for this analysis is to understand and adapt the framework for concentrated markets in the merger context, which provides a reference point for what level of market concentration may merit oligopoly scrutiny. The premise of the Herfindahl-Hirschman Index (HHI) market concentration calculations under the Horizontal Merger Guidelines is that the degree

---

87. In the past, recognition of antitrust law's weakness in this regard has led to proposals for active deconcentration of oligopolies. *See, e.g.*, Kovacic, *supra* note 6, at 1136–40, 1143 (outlining efforts in the 1960s and 1970s to empower antitrust law to restructure concentrated industries and the subsequent decline in support for deconcentration as an antitrust goal); NEAL ET AL., *supra* note 6. Since the 1980s, however, commentators have increasingly rejected restructuring and divestiture as counterproductive remedies. *See, e.g.*, BORK, *supra* note 6, at 175–78 (discussing the disadvantages of government-led restructuring, including the costs of the judicial process and the long timeframes for implementing remedies); POSNER, *supra* note 6, at 60 (ascribing shift in opinion to "the growth of faith in . . . the efficiency . . . of the free market and the growth of skepticism about the efficacy of ambitious government interventions").

of market concentration is a proxy for the ability of firms individually or collectively to exercise market power.[88] The legal and economic logic is intuitive. The higher the degree of market concentration among a small number of firms, the more easily that they can either expressly cooperate or the more easily they can observe and react to one another's actions and engage in conscious parallelism. In contrast, in less concentrated markets the collective action problems for collusion or conscious parallelism will be much harder to overcome.

The (HHI) market concentration calculations serve as triggers for regulatory review and potential divestment remedies in the merger context.[89] The HHI is elegant in its simplicity as it calculates the degree of market concentration by summing the squares of the market share of each firm included in the market.[90] But the one important caveat is that the HHI scores are only as informative as the accuracy of the underlying product and geographic market definitions, which turn on highly discretionary determinations of substitutability of products and ease of entry.[91]

This HHI market concentration method results in scores that range from 0 (a market consisting of an infinity of firms which each have minute market shares) to 10,000 (a complete monopoly in which a single firm has a market share of 100%). The use of squares highlights the fact that larger firms have a disproportionate impact on shaping pricing and in facilitating potential conscious parallelism among industry participants. Every firm has an impact on the HHI score, although small firms have very small effects, and the larger the firm's market share, the bigger the effect it has on the HHI score, which reflects its potential negative impact on competition. The antitrust agencies' rule of thumb is that markets are treated as "unconcentrated" when the HHI score is below 1500, "moderately concentrated when the HHI score is between 1500 and 2500," and "highly concentrated when the HHI score is above 2500."[92]

Generally, the FTC and DOJ will not challenge mergers where the post-merger HHI is below 1500 unless extraordinary circumstances exist that raise anticompetitive concerns. The logic is that markets with less than a 1500 HHI score

---

88. *Guidelines*, *supra* note 17, § 5.3.

89. *Id.*

90. The agencies' reliance on the HHI began with the DOJ Merger Guidelines in 1982. Department of Justice Merger Guidelines, 47 Fed. Reg. 28,493, 28,497 (June 30, 1982). The guidelines were revised in 1984, 1992, and 2010 yet retained the HHI as the measure of market concentration. Department of Justice 1984 Merger Guidelines, 49 Fed. Reg. 26,823, 26,830 (June 29, 1984); Department of Justice 1992 Horizontal Merger Guidelines, 57 Fed. Reg. 41,552, 41,557 (Sept. 10, 1992). Since 1982, the agencies' policies have converged, and the 2010 Horizontal Merger Guidelines (HMG) reflect current FTC policy on horizontal mergers. *Guidelines*, *supra* note 17; Press Release, Fed. Trade Comm'n, Federal Trade Commission and Department of Justice Issue Revised Horizontal Merger Guidelines (Aug. 19, 2010), https://www.ftc.gov/news-events/press-releases/2010/08/federal-trade-commission-us-department-justice-issue-revised [https://perma.cc/X4GB-DR6M].

91. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 213 (2005) (criticizing HHI analysis because it creates "an appearance of great rigor to merger analysis" and "superficially precise 'readouts' of market concentration" when this framework is grounded in "assumption, conjecture, and even speculation").

92. Herbert Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 730–31 (2017).

are not concentrated enough for explicit or implicit coordination among the leading actors to distort the market. For example, a 1500 HHI score translates into an industry in which the leading four players each have approximately a 19% market share and a large number of smaller players control the remaining 24% of the market. Alternatively, a 1500 HHI score would apply to an industry where the two leading players have 27.5% market shares and a large number of players have fractional market shares of the rest of the market. In practice, mergers with an HHI score below 1500 effectively enjoy a "safe harbor," while progressively higher scores receive greater regulatory scrutiny for anticompetitive effects.

The FTC and DOJ more systematically scrutinize prospective mergers in "moderately concentrated" markets whose HHI market concentration score falls between 1500 and 2500. But review is not tantamount to action as the FTC and DOJ will generally not challenge mergers which merely increase the degree of moderate concentration unless the merger will result in a highly concentrated market (an HHI score of 2500 or above) or unless there is additional evidence that the merger will have anticompetitive effects. The logic for this approach is that empirical evidence does not support a clear nexus between market concentration and market power in this moderate concentration range, so additional evidence of anticompetitive impact would be needed to justify antitrust agency intervention.[93]

For example, an industry in which the top four firms have market shares of 19% and a large number of smaller players control the remaining 24% of the market would have the baseline score of 1500. In contrast, a market in which the top four firms control almost 25% of the market apiece with only minor competitors would have an HHI score of 2500. Similarly, an industry with two leading players that have 27.5% market shares would lead to a 1500 HHI if the other market participants only have fractional shares. But an industry with two leading players with a 35.5% market share and small competitors would be just above the 2500 score, signaling a highly concentrated market. This point underscores that market participants in moderately concentrated markets do face regulatory scrutiny but have significant flexibility in making acquisitions.

For example, in an industry with two dominant firms each with 30% market share and regional competitors with small market shares, one of the industry leaders could potentially acquire a smaller competitor and gain 3% of the market. The result would be a shift from an 1800 HHI score to a score of 1989, a 189 increase that would still place the market well below the threshold for being highly concentrated. This approach gives large firms the potential to make a series of small acquisitions of early-stage companies in moderately concentrated markets but would make it much more difficult for the acquisition of more sizable competitors.

The FTC and DOJ threshold for "highly concentrated markets" is an HHI score above 2500.[94] The agencies presume that a merger is anticompetitive if it would

---

93. *See, e.g.*, Hovenkamp & Shapiro, *supra* note 6, at 2003–04 (discussing how this approach reflects actual agency practice of being deferential to mergers in moderately concentrated markets).

94. *See* Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 278–79 (2015).

result in a 200-point increase in an HHI score of 2500 or above.[95] In practice that means that a market with each of the three leading players with a 29% market share and small competitors would be just above the 2500 score to signal a highly concentrated market. But under the current Guidelines one of the 29% firms could pursue a merger with a firm controlling 3% of the market because it would fall below the 200 point presumptively anticompetitive threshold. The FTC and DOJ would still review this merger, but the merger could potentially be approved without mandatory divestments. When mergers in a highly concentrated market would have an effect of greater than 200 HHI points (roughly a 4% market share increase), then the Merger Guidelines establish that the FTC and DOJ are highly likely to challenge the prospective merger and demand divestments, unless there is an extraordinary reason not to.[96] While the FTC and DOJ have discretion to defer to mergers under extenuating circumstances, broadly speaking, the Guidelines establish that the leading participants in highly concentrated markets have limited leeway in terms of potential mergers.[97]

The FTC and DOJ also consider other factors that seek to place the degree of market concentration in context. The most important of these factors is the ease of entry into the market.[98] If the reviewing agency finds that new entrants could credibly emerge within two years to take advantage of potential post-merger price increases, then the agency allows the merger to take place even if it is within a highly concentrated market. The challenge with this premise is that many industries may have only nominal barriers to entry, such as forming an online business. But in practice new firms may face formidable barriers to build reputational capital and overcome economies of scale.[99] The inherent discretion and uncertainty in this calculation suggests the desirability of ongoing or periodic review of oligopolies' market power rather than the current system of one-off assessments of oligopolistic markets in the merger context that lead to remedies for a single oligopolistic firm.

---

95. *See Guidelines*, *supra* note 17, § 5.3 ("Mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points will be presumed to be likely to enhance market power.").

96. This approach is more lax than earlier approaches to policing market concentration. Under the now defunct "leading firm proviso," the FTC and DOJ challenged mergers that would add even one percent to the market share of a firm that controlled at least 35% of the market. 1984 Merger Guidelines, *supra* note 90, § 3.12. This presumption was rebuttable based on the merging parties' showing that the proposed market was poorly defined, that the market shares exaggerate the anticompetitive effects, that new entry would mitigate any impact on competition, or that offsetting efficiencies would keep prices at pre-merger levels or offset any anticompetitive effects. *See* 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 970–76 (4th ed. 2016).

97. *See* Salop, *supra* note 94, at 278–79.

98. *Guidelines*, *supra* note 17, § 9. ("[I]f entry into the market is so easy that the merged firm and its remaining rivals in the market, either unilaterally or collectively, could not profitably raise price or otherwise reduce competition compared to the level that would prevail in the absence of the merger. ").

99. *See id.* (discussing the need to consider the potential for product substitution, i.e., revamping existing facilities to enter a new market or the challenges of creating new facilities out of whole cloth).

The FTC and DOJ can consider the significance of changing market conditions that may threaten to erode the market dominance of existing firms. For example, technological changes in online streaming may render dominance in DVD production less significant and justify allowing mergers for even greater consolidation of the concentrated DVD production market because the nature of the market itself is in flux as new streaming technologies become closer substitutes. The FTC and DOJ are also more deferential to market consolidation that is a product of financial weakness.[100] If either the purchaser, the target, or both are in a weakened financial condition, then the FTC and DOJ may conclude that the current market share of each firm is less significant and allow mergers to proceed in concentrated markets that would otherwise not be permissible.[101]

The Merger Guidelines also allow the FTC and DOJ to consider the potential efficiencies created by a merger as a mitigating factor if the merging parties can produce "clear and convincing" evidence that such efficiencies exist that can increase competitiveness and enhance consumer welfare.[102] The underlying premise is that the more significant the potential impact on competition, the more the merging parties need to identify anticipated efficiencies. Projected efficiencies can come from greater economies of scale and lower administrative and overhead costs from consolidation of operations. In theory, the FTC and DOJ are supposed to reject efficiency claims if the parties can achieve efficiency benefits without engaging in the merger, such as each firm's cutting administrative and overhead costs on its own. But in practice, both the claimed efficiencies from the mergers or unilateral efficiencies are difficult to substantiate, which gives the FTC and DOJ broad discretion to make exceptions in the name of efficiency benefits.[103]

Lastly, the FTC and DOJ can consider the likelihood of barriers against industry cooperation as a mitigating factor to allow mergers to proceed.[104] The ability of actors to collude appears implicit in the nature of concentrated markets, but the logic is that if sustainable barriers exist to thwart collusion then the degree of market concentration may be less important in the merger review decision. For example, it is possible that multiple actors compete in a concentrated market but utilize distinct methods or products whose pricing cannot be easily compared. Think of the medical device industry in which often multiple manufacturers produce patent-protected

---

100. *Id.* § 11.

101. *See, e.g.*, FTC v. National Tea Co., 603 F.2d 694, 698–99 (8th Cir. 1979) (allowing a merger to proceed when the acquirer produced evidence of financial weakness, poor competitive position, and plans to leave geographic market at issue for acquisition); United States v. Int'l Harvester Co., 564 F.2d 769, 773–75 (7th Cir. 1977) (authorizing a merger when the target company suffered financial and competitive weakness that threatened its ability to compete).

102. *Guidelines*, *supra* note 17, § 10.

103. The extent of discretion is captured well by the seminal (pre-Guidelines) case, *United States v. Philadelphia National Bank*, 374 U.S. 321, 371–72 (1963), which held that if every potentially anticompetitive merger could be saved by an "ultimate reckoning of social or economic debits and credits," then "the logical upshot would be that every firm in an industry could . . . embark on a series of mergers that would make it in the end as large as the industry leader."

104. *Guidelines*, *supra* note 17, § 7.1.

devices that perform convergent functions through different means. Alternatively, the ease of collusion may be more evident in industries which produce homogeneous products with transparent pricing that market participants can readily monitor.

B. The Desirability of Ongoing Oversight Rather Than One-Off Merger Review

One of the primary challenges with the existing merger review process is its one-off nature. The discussion of potential mitigating efficiencies highlights this point. Merging parties need to identify efficiencies from the merger that will ostensibly increase competition and consumer welfare in the long run. But the merging parties face no accountability if their projections turn out to be overstated or incorrect as the only time that these assessments matter is at the time of merger review. There is simply no provision for a one-, two-, or three-year look back to see if the promised efficiencies actually materialize because there is no ongoing oversight of oligopolistic markets.

An apt analogy is to the shortcomings of cost-benefit analysis of prospective rules and regulations. Ex ante government regulators can only engage in informed speculation as to the costs and benefits of a given regulation. This fact may naturally lead regulators to be overly optimistic about a regulation's benefits and to downplay systematically the costs. Because the relevant point in time for cost-benefit analysis occurs before the implementation of the rule, there is no way to know for sure to what extent the costs and benefits will materialize, and there is no systematic review process to assess whether the calculations of regulatory value truly were worth it.[105]

The difference with the regulatory context is that in theory regulators can revisit the costs and benefits of existing regulations and modify rules and regulations if they are not living up to their intended goals. If the partisan composition of the Securities & Exchange Commission commissioners changes, the SEC can revisit any rule or regulation and is only constrained by the timeline and costs associated with the rulemaking process. In contrast, the nature of FTC and DOJ merger review is that neither agency can revisit their analysis until confronted with another merger affecting a given industry. So, if the assessments of projected efficiencies are incorrect, the absence of ongoing or periodic oversight leaves the agencies powerless to address the impact on competition.

Part of the challenge of creating ongoing or periodic review of concentrated markets is that regulators are unaccustomed to playing that role. Merger reviews have traditionally "monopolized" the attention of regulators at the FTC and DOJ when it comes to oligopolistic markets, especially since the Hart-Scott-Rodino Act of 1976. Changing to ongoing or periodic review of highly concentrated markets may require the development of greater agency expertise on the affected markets as well as management of information flows to ensure that the agencies can effectively oversee this mandate. This approach may also require greater coordination with the primary regulators of oligopolistic industries that fall under greater antitrust scrutiny. But

105. *Cf.* Cass R. Sunstein, *The Regulatory Lookback*, 94 B.U. L. REV. 579, 590–94 (2014) (discussing Cass Sunstein's efforts while leading the Obama administration's Office of Information and Regulatory Affairs to review the burdens created by antiquated rules that slowed economic growth).

these problems are surmountable budgetary and human capital issues. The bigger challenge is making the case that periodic review of oligopolies is workable and can be used to foster greater competition in oligopolistic markets.

C. The Value of the HHI Highly Concentrated Market Measure

One challenge policymakers would face is determining what the trigger for regulatory scrutiny should be if ongoing or periodic anti-trust review of oligopolistic markets were implemented. It would unrealistically strain agency resources to require the FTC or the DOJ to review every industry systematically for evidence of anticompetitive activity. That is part of the logic of the existing system of merger review because a pending merger forces the FTC and DOJ to wrestle with a potentially significant shift in market concentration for a given industry. But the simple way of thinking about this issue is that mergers are akin to avulsions—one-time shifts that get regulators attention—while the growing problem in the economy is the issue of market concentration accretion—gradual shifts in market concentration, which over time entrench the dominant oligopolists. But avulsions and accretions may end up having the same effect in increasing market concentration and, therefore, may merit an equal amount of scrutiny.

Instead of trying to come up with a completely new marker for what additional signals of market concentration would merit greater scrutiny by antitrust regulators, regulators could build off of the existing Herfindahl-Hirschman Index (HHI) for market concentration. The HHI index provides a baseline of 2500 for a "highly concentrated" market.[106] While the HHI focuses on the relative impact of mergers on market concentration, this baseline for "highly concentrated" markets serves as a proxy for oligopolistic dominance, which may require greater scrutiny and potential remedial action.[107] For that reason, it would provide a sensible trigger for ongoing or periodic review. The underlying premise is the need for regular review of market activity at this level of concentration because of the intrinsic danger of collusion or conscious parallelism when a few dominant players dominate the market.

To put the 2500 HHI highly concentrated market score in context, that would be the equivalent of a market in which two dominant players had a 35.5% market share each with small fractional market shares for the other competitors. Alternatively, a market with three leading players with a 29% market share and small competitors would be just above the 2500 score to signal a highly concentrated market. When mergers in a highly concentrated market would have an effect of greater than 200 HHI points (roughly 4% market share increase), then the Merger Guidelines establish that the FTC and DOJ are highly likely to challenge the prospective merger and demand divestments, unless there is an extraordinary reason not to. The underlying rationale for using the HHI score of 2500 as a proxy for oligopoly is that, at minimum, such a highly concentrated market merits greater regulatory scrutiny because of the increased potential for tacit collusion among industry participants.

Another justification for using a 2500 HHI score as a trigger for regulatory review is that there are a number of different types of activities that could affect a highly

106. *See Guidelines*, *supra* note 17, § 5.3.

107. *See id.*; Department of Justice 1984 Merger Guidelines, *supra* note 90, at 26,830–31.

concentrated market that could have the same economic effects as a merger. For example, the exit from the market or even the decline in relative market share of a smaller competitor could have the same effect on the market as a whole as a merger or acquisition by a large player. For example, imagine a market in which three firms each enjoyed a 29% market share and only one firm had a 6% market share with the rest of the market being controlled by local firms with small fractional market shares. This landscape would lead to an HHI of 2559, a highly concentrated, oligopolistic market. If the 6% market share firm went out of business and stopped all production, then the market share of the remaining three dominant firms would increase to approximately 31%, which would create an HHI score of 2883, a dramatic increase of 324 in market concentration.

If this type of increase in market concentration took place through a merger, the FTC or DOJ would scrutinize the changes closely and be very likely to impose divestment remedies in an attempt to restore the market to the pre-merger level of competition. If anything, the failure of a smaller firm should justify regulatory scrutiny of the anticompetitive effects on the market even more since it would highlight the inability of a smaller competitor with some degree of scale to compete with the dominant oligopolists. But under the current system the exit from the market of a small player would receive no regulatory scrutiny at all, until or unless a dominant market player engaged in a subsequent merger that would trigger review of the impact of the merger on the regulatory landscape. In other words, if a dominant player bought up the failed smaller competitor in a "fire sale," then the FTC and DOJ would review the merger's effect on overall market concentration and potentially order divestments to remedy the competitive impact. However, the antitrust regulators would do nothing if the dominant players simply stood by and let the smaller competitor fail and its production cease and simply assumed larger percentages of market share over a market that did not contain the failed competitor's products. Ironically, even review of a "fire sale" purchase may miss the full story as by that point the target company's market share may already have dwindled down far enough to where its acquisition appears to be of little consequence to overall market concentration.

The failure of companies attracts headlines and attention and, therefore, it would seem plausible for the FTC to be in a position to monitor market exits in highly concentrated markets in an ongoing or periodic way. The conclusion from the analysis may be that the failure of an industry participant simply reflects the market success of the leading industry players. But it would be worthwhile for regulators at least to wrestle with the concern that the highly concentrated market itself is the problem in vesting the leading players with market power, which would suggest the desirability of trying to level the playing field for smaller participants to promote competition.

The same logic would apply to increases in market share through organic growth, which similarly escapes regulatory scrutiny under the current antitrust system. For example, if Amazon grew its e-commerce market share through strategic acquisitions, then those acquisitions would be subject to regulatory scrutiny. Amazon's growth has entailed some mergers, such as the multi-billion-dollar purchase of Whole Foods, which regulators did investigate and resulted in some minor divestments to remedy regulators' concerns about the impact of the merger on

regional markets.[108] But Whole Foods' online market share was small, and regulators primarily focused on the impact of the merger on the supermarket landscape rather than on e-commerce. Most of Amazon's remarkable growth has occurred organically through reinvesting revenues back into its online business and its distribution network, as well as making strategic investments.[109] That activity has largely avoided antitrust regulatory scrutiny because it has not entailed the merger trigger for regulatory review, even though the largely organic growth of Amazon's market share would incur regulatory scrutiny for increasing e-commerce HHI scores above 2500 were this growth taking place through mergers. The question this Article poses is that if either the exit or decline of a small competitor or organic growth has the same impact on highly concentrated markets as a merger, why should these similar impacts on markets be treated differently by regulators? The introduction of ongoing or periodic review would position regulators to treat economically similar changes in similar ways to anticipate and address potential anticompetitive effects.

D. Leveling the Regulatory Playing Field

The limitations of conventional antitrust regulation of oligopolies and the durability of oligopolistic entrenchment suggest the desirability of exploring alternative strategies to address this issue. I argue that the overarching theme of oligopoly regulation should be to level the playing field for smaller competitors. Oligopolies present a context of market failure in which the entrenchment of the dominant players potentially thwarts competition from smaller players and new entrants. Regulations paradoxically may deepen the hold that oligopolies have over the market by adding additional costs and burdens that disproportionately disadvantage smaller players and prospective new entrants who do not enjoy the economies of scale of their larger competitors.

1. The Case for Heightening Oligopolist Disclosures

One strategy antitrust regulators should consider would be to increase the burdens that larger companies face in oligopolistic markets. A context in which this strategy could be potentially productive is public company disclosures. The premise of public company disclosure rules is the desirability of overcoming collective action problems for investors and ensuring uniformity of information flows. The collateral benefit is that periodic public company disclosures provide information access for competitors

---

108. *See* Nick Wingfield & Michael J. de la Merced, *Amazon to Buy Whole Foods for $13.4 Billion*, N.Y. TIMES: DEALBOOK (June 16, 2017), https://www.nytimes.com/2017/06/16/business/dealbook/amazon-whole-foods.html [https://perma.cc/ZQB4-YSVU] (discussing how Amazon would have only 3.5% of the grocery market after the acquisition of Whole Foods, so significant divestments were unlikely to occur during the merger review process).

109. *E.g.*, Lauren Feiner, *Amazon is Spending Billions on Internet Satellites, Self-Driving Cars and More as Revenue Growth Slows*, CNBC (May 17, 2019), https://www.cnbc.com/2019/05/17/amazon-makes-several-start-up-investments-revenue-growth-slows.html [https://perma.cc/2Z4J-P7QZ] (discussing Amazon's organic growth and broad spectrum of strategic investments).

and for regulators to monitor regulatory compliance.[110] Ironically, public company information flows have the potential to facilitate oligopolistic behavior by making it easier for competitors to monitor what one another is doing. But the offsetting benefit is that smaller competitors can potentially leverage larger established companies' disclosures to equip them to compete more effectively. Existing disclosures alone do not appear sufficient to offset the prevalence and entrenchment of oligopolies, since the overwhelming majority of filtering oligopolists are publicly traded companies who often compete with smaller, privately held companies that do not have to make public company disclosures.

In theory, oligopolists could face more comprehensive disclosure obligations that go beyond the minimum disclosures for public companies set by the SEC. The logic is that regulators already have the power to demand broad flows of information from regulated parties to facilitate monitoring of regulatory compliance. Making these types of information flows more systematic and public for oligopolists would foster more effective regulatory accountability and greater competition. It would also be valuable for oligopolists to face mandates for disclosures of more detailed forward-looking information, addressing issues such as research and development, expansion plans, and investment projections in corporate infrastructure. Giving smaller competitors access to these types of information would not level the playing field by itself, but this approach would make it easier for smaller firms and new entrants to develop strategies on how best to compete.

Another option would be to empower antitrust regulators to craft industry-specific disclosures that could make it easier for both regulators and smaller competitors to monitor the entrenched oligopolists to guard against anticompetitive behavior and facilitate competition. For example, the type of disclosures that are useful in the rating agency context may be far different than what would be valuable for regulators and smaller competitors to know in the e-commerce context. But in a public company disclosure system that treats all industries as the same, regulators have failed to recognize the value of greater industry-specific transparency for both regulators and smaller competitors. This approach would require antitrust regulators to understand the industries they are overseeing in greater depth to be able to identify which types of additional disclosures could add value for both regulating oligopolists and increasing competition.

Another alternative would be to treat all oligopolists as public companies for disclosure purposes regardless of whether they are privately held. Many, if not most, oligopolists have assumed such a large size that they have evolved into public companies to gain access to the broad liquidity access that public companies enjoy. But treating all oligopolists as public companies for disclosure purposes would recognize that there is a potential regulatory and competitive value of having greater transparency of oligopolists. The underlying premise is that public company disclosures are a public good whose value to regulators, competitors, and the public writ large extends far beyond managerial accountability to the given company's

110. *See, e.g.*, Allen Ferrell, *The Case for Mandatory Disclosure in Securities Regulation Around the World*, 2 BROOK. J. CORP. FIN. & COM. L. 81, 82–85 (2007) (discussing the rationale and criticisms of mandatory disclosure rules in securities regulation).

investors.[111] The distinctive challenges of addressing the anticompetitive and anti-consumer dimensions of oligopolies could justify this effort to heighten scrutiny of oligopolies by imposing public company disclosures. The SEC could ensure the accuracy of these disclosures through the threat of public Rule 10b-5 suits if there are materially misleading disclosures or omissions (even in the absence of public shareholders). As I mentioned earlier, there is the danger that transparency could play into the hands of oligopolists by making it easier for the leading players in an industry to monitor one another's actions. But disclosure-based transparency is a two-edged sword that also would provide regulators and existing and prospective smaller competitors with the ability to assess the industry landscape in greater detail.

2. The Potential for a "Small Business" Exemption Approach

Another potential strategy would be to lighten the burdens that smaller players or prospective new entrants in oligopolistic industries face by treating them as the equivalents of small businesses, regardless of their size. The logic is that making smaller market participants eligible for existing or tailored small business exemptions would help to offset the advantages entrenched oligopolists enjoy and mitigate the regulatory obstacles that smaller competitors and new entrants face. One of the paradoxes of regulation is that larger companies benefit from and may push for regulation because of the higher burden regulatory compliance places on smaller firms and prospective new entrants.[112]The more invasive the regulation, the harder for small producers to compete because regulations magnify smaller companies' already higher-per-unit cost of production. The same logic applies to prospective new entrants who often face greater barriers to entry because of the costs involved in regulatory compliance.

One way to frame this issue is to conceptualize regulation as a regressive tax on companies that disproportionately falls on smaller firms. This framing is not meant to dismiss the potential significance of regulation in terms of public benefits but rather to recognize that regulations impose costs that smaller firms can less easily internalize than their larger competitors. Because of competition from larger firms with economies of scale, smaller firms are unlikely to be able to pass the higher costs imposed by regulatory compliance on to customers in the form of higher prices.

---

111. *Cf.* Jennifer S. Fan, *Regulating Unicorns: Disclosure and the New Private Economy*, 57 B.C. L. REV. 583, 584–85 (2016) (arguing that once a private company reaches a billion-dollar capitalization it should be subject to public company disclosure rules to increase transparency and protect minority investors).

112. *See, e.g.*, THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 115–16 (1991) (discussing how large companies ironically push for regulation to establish barriers to entry for prospective competitors); James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 310–12 (2000) (discussing how the rise of the administrative state entrenched larger businesses at the expense of their smaller competitors); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3–5 (1971) (discussing how industry leaders can leverage regulation to marginalize smaller competitors).

Small business exemptions are widespread throughout federal and state statutes and regulations, but they vary significantly in terms of what threshold companies must meet to benefit from lower regulatory burdens, as well as the scope of the exemptions. For example, only mergers with a combined value of over $200 million are subject to review by the Federal Trade Commission and the Department of Justice, while, in contrast, small business exemptions under labor law exist only for firms with less than $500,000 in annual revenues.[113] But if there is one common theme of genuine bipartisanship, it is politicians' calls for an ever-expanding number of small business exemptions to foster economic growth.[114] For this reason, Congress enacted the Regulatory Flexibility Act[115] and the Small Business Regulatory Enforcement Fairness Act, which require regulators systematically to consider lowering burdens on small businesses or exempting them entirely from rules and regulations.[116]

The landscape of regulatory treatment of small business is remarkably varied with comprehensive exemptions, partial exemptions, and exemptions of particular requirements based on the greater burdens imposed on small businesses. The criteria for small business exemption eligibility also varies widely with small size being measured differently in a range of contexts, such as by market share or the number of employees, income, assets, accounts, transactions, or shareholders.[117] The underlying point is that "small business" is already an elastic term tailored to fit the

---

113. *See, e.g.*, 15 U.S.C. § 18a(d)(1) (imposing the HSR merger review requirement on all companies whose combined value would be over $200 million except for certain categories of exempted companies); 15 U.S.C. § 78l(g)(1)(B) as modified by 17 C.F.R. § 240.12g-1 (registration under the Securities Exchange Act of 1934 required for companies with total assets exceeding $10 million and a class of equity securities held of record by 500 or more shareholders); 29 U.S.C. § 203(s)(1) (excluding from the definition of "[e]nterprise engaged in commerce or in the production of goods for commerce," and therefore from enterprise coverage under the Fair Labor Standards Act, entities with a gross volume of business less than $500,000); 17 C.F.R. § 230.504(b)(2) (2003) (exempting securities offerings from registration under the Securities Act of 1933 if, among other conditions, the amount of the offering does not exceed $1 million).

114. *See, e.g.*, Robert A. Peterson, George Kozmetsky & Nancy M. Ridgway, *Opinions About Government Regulation of Small Business*, 22 J. SMALL BUS. MGMT. 56, 59–61 (1984) (discussing how public opinion polls have consistently demonstrated favorable views towards small business exemptions and reduced regulation).

115. 5 U.S.C. §§ 601–612; *see also* Paul R. Verkuil, *A Critical Guide to the Regulatory Flexibility Act*, 1982 DUKE L.J. 213 (1982) (discussing the features of the Regulatory Flexibility Act).

116. 5 U.S.C. § 601; *see also* Thomas O. Sargentich, *The Small Business Regulatory Enforcement Fairness Act*, 49 ADMIN. L. REV. 123 (1997) (discussing the requirements regulators face to consider small business exemptions).

117. *See, e.g.*, 42 U.S.C. § 12111(5)(A) (defining as "employers" covered by the Americans with Disabilities Act only persons with 15 or more employees); 29 U.S.C. § 1161(b) (exempting group health plans from the continuation coverage requirement of ERISA if the employers covered by the plan have fewer than 20 employees); 15 U.S.C. § 80b-3(b) (excluding an adviser from the registration requirements of the Investment Advisers Act who, among other requirements, has fewer than 15 clients).

particular regulatory context, which would lend itself well to being interpreted in a broad way in the oligopoly context.

There are clear precedents for expanding the scope of small business exemptions, even for players that may not typically have the size to qualify for conventional small business exemptions. The most notable example would be the JOBS Act creation of the "emerging growth company" designation that is designed to encourage more initial public offerings by lowering the disclosure standards for first-time issuer companies with less than one billion dollars in annual revenue.[118] The logic is that many "unicorns," companies with market valuations over one billion dollars, have been content to rely on the private placement market for their capital needs and steered clear of public capital markets and the sweeping disclosure rules that come with that status.[119] By subjecting "emerging growth companies" to lower disclosure standards until they have assumed a larger size or been publicly listed for five years, the hope is that these companies will enter public capital markets and give the public writ large the opportunity to participate in these companies' growth, rather than limiting participation to well-heeled accredited investors and institutions.

The logic underpinning small business exemptions is straightforward. Size is relevant when it comes to the burdens of federal and state regulation because of the degree of fixed compliance costs inherent in statutes and regulations and the role of economies of scale in mitigating the impact of regulations on companies' bottom line.[120] For example, any regulation may entail fixed costs that have no relation to outputs, which results in a higher per unit cost for smaller firms. Think of environmental regulation compliance that may require the use of technologies to mitigate environmental impact that either have no direct correlation to outputs or are much more expensive on a per unit basis for smaller producers. Smaller firms are also disadvantaged in terms of the costs of monitoring regulatory responsibilities as well as documenting and reporting compliance.[121] Lawyers understand that issue intuitively as many legal and internal control functions have high fixed costs regardless of the size of the client. For example, the core disclosure requirements for small-scale private placements (of up to $1 million a year) under Rule 504 of Regulation D are generally fixed and vary little from the disclosure requirements larger players may use under Rule 506 of Regulation D to raise unlimited amounts

---

118. Jumpstart Our Business Startups Act, Pub. L. No. 112-106, 126 Stat. 306 (2012) (codified as amended in scattered sections of 15 U.S.C.).

119. *See* Fan, *supra* note 111, at 585–88 (discussing the significant increase in the number of "unicorns"); *see also* Evelyn M. Rusli, *Startup Values Set Records*, WALL ST. J. (Dec. 29, 2014, 7:50 PM), http://www.wsj.com/articles/tech-startup-values-reach-the-sky-1419900636 [https://perma.cc/Y7RJ-5YMN] (discussing how the scale of private placements for start-ups has come to rival the initial public offering market).

120. *See, e.g.*, WILLIAM A. BROCK & DAVID S. EVANS, THE ECONOMICS OF SMALL BUSINESSES: THEIR ROLE AND REGULATION IN THE U.S. ECONOMY 65–67 (1986) (discussing the significance of economies of scale in making regulatory burdens more manageable for larger companies).

121. *See, e.g.*, RICHARD LESHER, MELTDOWN ON MAIN STREET: WHY SMALL BUSINESS IS LEADING THE REVOLUTION AGAINST BIG GOVERNMENT 35–36 (1996) (discussing how record keeping and reporting requirements imposed by regulations are as burdensome as substantive compliance with the actual regulations themselves).

of funds from accredited investors.[122] Economies of scale also matter with variable costs as larger firms may be able to spread out variable costs more effectively over the larger scale of their production.[123]

One approach to empower smaller competitors in oligopolistic markets would be to allow antitrust regulators to designate the competitors as eligible for a broad range of existing small business exemptions by stipulating that they are "small businesses" for federal regulatory purposes. The appeal of this approach would be its simplicity in leveraging the existing small business exemption landscape to make smaller firms more competitive. It would also have the value of bypassing the need for large-scale interagency coordination in determining eligibility for a given regulator's set of small business exemptions or reduced regulatory burdens, which would be a time-consuming and costly process to navigate. The potential downside of a blanket strategy of designating the smaller competitors of oligopolists as small businesses for all federal regulatory purposes is that some regulations, such as labor law protections, may impose additional costs but may well be justified in having a broad-based application. For this reason, it may make sense to designate certain categories of small business exemptions or reduced regulations that smaller competitors of oligopolists would qualify for, while recognizing that the public interest underpinning other categories of regulation should continue to apply.

A related alternative is to design a new set of small business exemptions that would apply to smaller competitors in oligopolistic markets, such as lowered disclosure obligations, or to create small business exemptions that are tailored to address the regulatory barriers and public interests in particular oligopolistic industries, such as accounting or e-commerce. Either of these approaches would be consistent with the Regulatory Flexibility Act[124] and the Small Business Regulatory Enforcement Fairness Act, which require regulators systematically to consider lowering burdens on small businesses or exempting them entirely from rules and regulations.[125] It may not be necessary for new authority to be put into place to shift toward a framework in which non-oligopolists could be given regulatory advantages in oligopolistic markets.

For example, Section 23(a)(2) of the Exchange Act requires the SEC to consider the impact that adopting a new rule will have on competition and to consider whether any impact on competition is necessary or in the public interest. This requirement is imposed on the Commission's exercise of discretionary authority, such as with respect to its consideration of requests for exemptive relief. Section 3(f) of the Exchange Act requires the SEC to consider the impact that new rules will have on investor protection, competition, efficiency, and capital formation. A number of cases overturning SEC rules have interpreted these requirements as imposing a form of cost-benefit analysis in rulemaking, which could potentially encompass

---

122. C. Steven Bradford, *Securities Regulation and Small Business: Rule 504 and the Case for an Unconditional Exemption*, 5 J. SMALL & EMERGING BUS. L. 1, 23–29 (2001) (discussing the significance of the fixed costs of disclosure rules for private placements).

123. *See* BARRY A. STEIN, SIZE, EFFICIENCY, AND COMMUNITY ENTERPRISE 8–10 (1974).

124. 5 U.S.C. §§ 601–612; *see also* Verkuil, *supra* note 115 (discussing the features of the Regulatory Flexibility Act).

125. 5 U.S.C. § 601; *see also* Sargentich, *supra* note 116 (discussing the requirements regulators face to consider small business exemptions).

considerations of the differential impact of regulations on competition by smaller participants in oligopolistic markets.[126] These provisions only apply in the public company context or when a private company is applying to the SEC for accreditation to serve in a quasi-public role, such as a nationally recognized statistical rating organization. Because SEC disclosures and the related antifraud liability exposure form some of the most onerous regulatory burdens, requirements for the SEC to consider the impact of its rules on competition fit in well with the logic of lightening the regulatory burden on non-oligopolists in oligopolistic markets.

Either strategy of granting antitrust regulators discretion in terms of either designating smaller competitors as "small businesses" that qualify for existing exemptions or tailoring new small business exemptions for non-oligopolists has the potential to foster greater competition and to attract new entrants to oligopolistic industries. The challenge for regulators would be to experiment in seeing how the use of small business exemptions could affect the entrenchment of existing oligopolists and decrease market concentration. Because small business exemptions have not been used in the past to try to address oligopolistic dominance, employing a variety of broad, narrow, and tailored small business exemptions in different oligopolistic markets would be useful in giving data points for assessing the viability of this approach.

3. An Oligopoly Tax Versus Oligopoly Tax Relief

The case for giving smaller players in oligopolistic markets tax advantages builds on the larger case for granting exemptions and lower regulatory burdens for small competitors. The paradigm case for this analysis is the exemptions from state sales taxes that were historically given to online businesses which did not have any physical presence within the state in which the e-commerce customer resides.[127] This exemption gave the once fledgling online world systematic economic advantages over its brick-and-mortar competitors in order to encourage the growth of online commerce. But once dominant online players emerged, the sales tax exemption served to reinforce the cost advantages online actors had over their brick-and-mortar counterparts. The irony of Amazon is that once it launched its strategy of building a comprehensive national network of distribution centers, it became subject to sales taxes for transactions with customers in the many states Amazon has a physical presence.[128] Since Amazon already had the economies of scale to out-compete both brick and mortar firms and smaller online competitors, Amazon joined forces with

---

126. *See, e.g.*, Business Roundtable v. SEC, 647 F.3d 1144 (D.C. Cir. 2011).

127. *See, e.g.*, R. Lainie W. Harris, *Did the Supreme Court Do Congress's Dirty Work When It Killed* Quill*? States Sales Tax on Remote Sellers and* Wayfair, 72 TAX L. 671, 672–73 (2019) (discussing how prior to the *Wayfair* case a judicially created bright-line rule prevented requirements for remote sellers engaged in interstate commerce to engage in state sales tax collection).

128. Jean-Francois Houde, Peter Newberry & Katja Seim, *Economies of Density in E-Commerce: A Study of Amazon's Fulfillment Center Network*, 1–2 (May 1, 2017), https://faculty.wharton.upenn.edu/wp-content/uploads/2017/12/amazon_tax.pdf [https://perma.cc/W8LS-VSLW] (discussing how the creation of fulfillment centers exposed Amazon to state sales taxes).

sales-tax-hungry states to have sales taxes imposed on e-commerce.[129] The logic was that by doing so Amazon could pull the ladder that it used to achieve success to ensure that no emerging competitor could leverage this economic advantage to outflank Amazon.

After years of state legislative wrangling and litigation, *South Dakota v. Wayfair, Inc.* upended the e-commerce sales tax exemption by holding that out-of-state retailers must collect sales tax on purchases sent to state residents, even if the out-of-state retailer has no physical presence in the state.[130] The ironic implication of this change has been to reinforce the dominance of the leading e-commerce players that used this favorable tax treatment to gain market share from brick and mortar stores and now no longer have to worry that this tax loophole can empower smaller competitors. To address the example at hand, one potential solution for highly concentrated markets would be to introduce a sales tax exemption for smaller competitors to try to level the playing field for them with the dominant oligopolists. Some states, such as Virginia, already have small business sales tax exemptions for out-of-state e-commerce retailers, but with a low threshold for eligibility, which in Virginia is less than $100,000 in annual sales to Virginia residents.[131] Extending this exemption to a broader spectrum of non-oligopolist firms in a highly concentrated industry could help to increase competition in e-commerce.

A shortcoming of this approach is that it would require a multistate compact or action by a myriad of individual states to address a federal antitrust problem.[132] A more viable alternative would be to consider the merits of an alternative minimum corporate tax that would apply to the dominant players in oligopolistic industries or a small business tax exemption that would lower federal corporate taxes for smaller competitors in highly concentrated markets.[133] As discussed earlier, regulations often serve as a regressive tax that disproportionately affects smaller market participants because of the higher costs of regulatory compliance for lower output producers. But tailoring tax treatment as a tool to remedy market concentration has the potential to offset the economic advantages that oligopolists enjoy.

---

129. Darla Mercado, *10 More States Will Now Collect Sales Taxes from Amazon Shoppers*, CNBC (Feb. 1, 2017, 1:20 PM), https://www.cnbc.com/2017/02/01/10-more-states-will-now-collect-sales-taxes-from-amazon.html [https://perma.cc/DNC2-HA7U].

130. 138 S. Ct. 2080 (2018).

131. VA. CODE ANN. § 58.1-612 (2020).

132. The issue of collecting sales taxes on online, interstate purchases did spark an effort to solve the problem through an interstate compact, which suggests the potential plausibility of creating an interstate compact for a small company tax exemption in industries with oligopolistic dominance. *See, e.g.*, *Streamlined Sales and Use Tax Agreement*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/docs/default-source/agreement/ssuta/ssuta-as-amended-2018-12-14.pdf?sfvrsn=8a83c020_6 [https://perma.cc/ZZ99-8KA6] (last updated Dec. 14, 2018); *An Overview and Guide for State Lawmakers and Tax Administrators Explaining the Streamlined Sales Tax Project*, STREAMLINED SALES TAX GOVERNING BOARD, INC., https://www.streamlinedsalestax.org/docs/default-source/guides/state-guide-to-streamlined-sales-tax-project-2019-03-01.pdf?sfvrsn=5cc921f2_4 [https://perma.cc/57SB-DFJ2] (last updated March 1, 2019).

133. Reuven S. Avi-Yonah, *The Case for Retaining the Corporate AMT*, 56 SMU L. REV. 333, 334–38 (2003) (providing an overview of the current corporate alternative minimum tax and its underlying policy rationales).

Corporate tax is notorious for the extent of tax credit and deduction loopholes that corporations can and do exploit to keep their tax burdens far below the nominal 21% federal corporate tax rate.[134] For example, Amazon paid no corporate tax in 2017 and 2018 and paid corporate tax at a paltry 1.2% rate in 2019.[135] Add on Amazon's well-known propensity to leverage its market power to shake down states and localities for tax incentives for locating offices and warehouses,[136] and there is a clear story in which Amazon's scale and insulation from taxation has helped to reinforce its e-commerce dominance. In contrast, Walmart, one of Amazon's leading e-commerce competitors, had a corporate tax rate of 25% and 25.5% in 2017 and 2018 (when the corporate tax rate was 35%) and paid an effective rate of 19.3% in 2019, which is modestly below the newly created 21% federal corporate tax rate. Part of the explanation for this vast difference in tax exposure are the lower corporate income of Amazon compared to Walmart, Amazon's reinvestment in its distribution infrastructure, and the greater ease of an online company to choose the most favorable tax jurisdiction for revenue recognition.[137]

What is interesting about this contrast is that Amazon would be far more affected by an alternative minimum corporate tax for oligopolists than Walmart. But the underlying logic would be akin to the alternative minimum tax for individuals—limiting the ability of the wealthy to exploit tax credit and deduction loopholes.[138] The particular concern in the oligopoly context is that the market power oligopolists enjoy gives them greater leverage to secure favorable tax treatment at the federal, state, and local level, as well as to secure tax subsidies from localities. Having a uniform baseline of tax exposure would help to offset that advantage and make it easier for smaller market participants to compete. While in theory, an alternative minimum corporate tax could be tailored for the particulars of a given market, from an ease of administration perspective, it would make more sense to establish a uniform alternative minimum corporate tax that would apply to the leading players in any highly concentrated market.

Another alternative would be to provide tax relief to smaller competitors in oligopolistic markets in order to foster competition. This approach would be a variant of the small business exemptions that are widespread in many areas of regulation. Thinking back to the contrast of Amazon and Walmart, Walmart would benefit from

---

134. *See* Heather M. Field, *A Taxonomy for Tax Loopholes*, 55 HOUS. L. REV. 545, 552–60 (2018) (providing an overview of corporate tax loopholes).

135. Tom Huddleston Jr., *Amazon Had to Pay Federal Income Taxes for the First Time Since 2016—Here's How Much*, CNBC (Feb. 4, 2020, 3:19 PM), https://www.cnbc.com/2020/02/04/amazon-had-to-pay-federal-income-taxes-for-the-first-time-since-2016.html [https://perma.cc/D5X8-CPSK] (providing an overview of Amazon's recent federal corporate tax exposure).

136. Hayes R. Holderness, *The Unexpected Role of Tax Salience in State Competition for Businesses*, 84 U. CHI. L. REV. 1091, 1092–93 (2017) (discussing Amazon's success in extracting tax incentives for investments).

137. *See* Justin Fox, *Some Corporations Pay a Lot More Taxes Than Others*, BLOOMBERG, OPINION (Sept. 19, 2017, 8:00 AM), https://www.bloomberg.com/opinion/articles/2017-09-19/why-wal-mart-pays-a-lot-more-in-taxes-than-amazon [https://perma.cc/2CZ5-EZHV].

138. *See* Avi-Yonah, *supra* note 133, at 336–38 (explaining the policy rationales that underpin the corporate alternative minimum tax).

subjecting e-commerce competitors to an alternative minimum tax and would face only marginally more tax exposure as Walmart already pays federal corporate tax that is close to the current 21% tax rate. This same problem may arise in other highly concentrated markets in which the market power of the oligopolists does not necessarily show up in terms of reduced exposure to corporate tax based on the nature of the product. For this reason, providing oligopoly tax relief for smaller players and prospective new entrants may offer a more plausible way to offset the dominance of oligopolists.

Congress routinely grants tax relief for particular industries in the name of protecting jobs or incentivizing investment. The current calls for tax relief for airlines, cruises, and travel businesses illustrate this point.[139] The proposed coronavirus tax relief is expressly focusing on giving the greatest tax relief to small businesses connected to these industries. This approach is consistent with oligopoly tax relief that would be expressly designed to incentivize competition and new entrants to reduce the degree of concentration in oligopolistic markets. This tax relief could be phased out once the FTC or DOJ certifies that the given industry no longer falls in the 2500 HHI score category of being a highly concentrated market. That approach would be consistent with other tax incentives that exist until an agency certifies that the particular catalyst for the relief no longer applies.

The question of the extent of oligopoly tax relief could well turn on the degree of market concentration. It would be logical to offer the greatest tax relief in an industry such as rating agencies in which three leading firms have consistently accounted for 96.5% of the market.[140] In this context, minimizing tax exposure for small players and new entrants may be essential for inducing greater competition. In contrast, in markets which are closer to the 2500 HHI score of highly concentrated, more modest tax relief may be appropriate. If ongoing or periodic review of oligopolistic markets took place, the FTC or the DOJ would be in a position to make recommendations for progressively higher tax relief based off of the degree of market concentration. This approach would facilitate gradually reducing the degree of oligopoly tax relief as markets reached lower levels of concentration. Congress frequently grants broad discretion to agencies in interpreting and applying statutes, and granting the ability of the FTC or DOJ to make annual recommendations on tax relief based on their periodic determinations of market concentrations would be consistent with the broader approach to agency discretion.

4. The Potential and Limits of Divestments

As discussed earlier, one of the main problems with the current process for overseeing oligopolies is that it is a one-off process centering on review of prospective mergers. Organic growth of oligopolies, however anticompetitive its effects, generally escapes the eye of antitrust regulators who do not engage in

---

139. Steve Holland & Susan Heavey, *White House Considers Tax Relief for Airlines, Travel Firms Amid Coronavirus*, REUTERS (Mar. 6, 2020, 10:08 AM), https://www.reuters.com/article/idUSKBN20T226 [https://perma.cc/KLU9-848S].

140. *See* SECURITIES AND EXCHANGE COMMISSION, *Annual Report on Nationally Recognized Statistical Rating Organizations*, December (Dec. 2018,), https://www.sec.gov/files/2018-annual-report-on-nrsros.pdf [https://perma.cc/Z4B2-6T5U].

periodic or rolling oversight of oligopolistic markets. That means in practice that regulators generally fail even to consider using their ability to impose divestments to promote greater competition outside of the merger context. For this reason, regulators should potentially consider the desirability of periodic review of oligopolistic markets to determine if divestments may be needed to reduce the degree of market concentration in exceptionally concentrated markets.

The fundamental tension with the use of this policy tool is the concern that efforts to deconcentrate oligopolistic markets may punish market participants who are exceptional at what they do in winning and keeping customers. Simply put, it may be difficult to distinguish exceptionally successful capitalism from leveraging market power to suppress competition. The concern is that divestments are a heavy-handed, invasive tactic that are more prone to mistake and arbitrary application, compared to relying on disclosure rule changes, small business regulatory exemptions, or tax incentives to level the playing field and foster competition. This fact makes this policy tool the least appealing of the options this Article has addressed, but it is worth considering the merits of this tactic as a last resort in exceptionally concentrated markets if other efforts to mitigate oligopolistic dominance prove to be inadequate.

Understanding how regulators approach the questions of market concentration and remedies of divestments in the merger context is useful for considering how to recognize and potentially address market distortions by oligopolies. Since 1976, the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division have systematically reviewed pending mergers of combined value of $200 million or more for potential anticompetitive effects.[141] The Hart-Scott-Rodino Act ("HSR") of 1976 provides the basic framework for addressing market concentration issues in the merger and acquisition context. The primary principles behind the HSR are to limit the immediate anticompetitive effects of a merger and to sustain market competition in the long run.[142] The trigger for HSR merger review is modest—a net combined market value of $200 million for the potentially combined companies.[143] This trigger does not account for the size of the relevant market (as a merger of firms worth $200 million could be large in a small market). But the (relatively) small size does underscore the fact that the question of market concentration is incremental in nature as even the consolidation of small players could have anticompetitive effects in a concentrated market.

---

141. *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976); *see also* Federal Press Release, Fed. Trade Comm'n, FTC Announces Annual Update of Size of Transaction Thresholds for Premerger Notification Filings and Interlocking Directorates (Feb. 15, 2019), https://www.ftc.gov/news-events/press-releases/2019/02/ftc-announces-annual-update-size-transaction-thresholds-premerger [https://perma.cc/TU2G-KNLG] (announcing that parties engaging in prospective mergers with a size-of-transaction threshold of $200 million or more must disclose the proposed transaction to the FTC for antitrust review).

142. *See* FED. TRADE COMM'N, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS, at 1 (1999), https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf [https://perma.cc/E2FB-MTL7].

143. 15 U.S.C. § 18(a), (d)(1) (imposing the Hart-Scott-Rodino Act merger review requirement on all companies whose combined value would be over $200 million except for certain categories of exempted companies).

Parties seeking to merge or acquire other companies must comply with notice and waiting period requirements that equip the FTC and DOJ with time to review the merger, leverage to negotiate with the parties about ways to mitigate the impact of the merger or acquisition, and the opportunity to take preemptive steps to address the potential anticompetitive effects.[144] The antitrust regulators generally emphasize mandating premerger divestments to ensure that either the FTC or DOJ is in the best position to oversee compliance and to assess any resulting problems that may arise.[145]

The threat of the reviewing agency blocking the merger gives the agency leverage to demand divestitures as a condition for the merger to proceed. In practice, the overwhelming majority of consummated mergers are resolved through a negotiating process between the agencies and the parties, and only a small minority of cases end up being resolved through litigation.[146] The key feature of these negotiations and settlements is their ad hoc nature as there is not a clear blueprint for the contours of settlements.[147] The underlying objective of the agencies is to design remedial measures that maintain or restore the degree of competition that existed in the industry prior to the merger by using divestments to create a viable competitor that can offset the impact of the merger. The agencies typically allow the parties to restructure the proposed merger to mitigate anticompetitive effects, to require up-front buyers before agreement on a consent order, and to use "crown jewel provisions"[148] to require divestments of assets greater than the de minimis needed to restore competition in order to ensure that prospective buyers emerge in a timely way

---

144. *Id.* § 18a(b)(1) (laying out the thirty-day waiting period, which is frequently extended); H.R. REP. NO. 94-1373, at 8 (1976) (explaining how the notice and waiting period under the Hart-Scott-Rodino Act provides regulators with the time to identify issues and to develop a case for a preliminary injunction against a merger).

145. The merging parties file with both the FTC and the DOJ, and the agencies agree among themselves which agency will review the merger to avoid redundancy in oversight. The fact that each agency unilaterally conducts antitrust merger review in any given case may lead to differences on the margins in their exercise of discretion, but their powers and approach share common features. Both the FTC and DOJ enjoy broad powers to demand modifications of mergers to address concerns about anticompetitive effects, and either agency can seek injunctions to bar mergers from taking place if the anticompetitive concerns cannot be addressed. 15 U.S.C. § 53(b); *Guidelines*, *supra* note 17, § 1.

146. *See* FED. TRADE COMM'N, *supra* note 142, at 6–7 (noting that less than ten percent of agency merger reviews result in litigation as the overwhelming majority are resolved through negotiated settlements).

147. *See* United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 330–31 (1961) ("Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found."); U.S. DEP'T OF JUST., Antitrust Division Policy Guide to Merger Remedies at 7 (2004) ("Structural remedies are preferred to conduct remedies in merger cases because they are relatively clean and certain, and generally avoid costly government entanglement in the market.").

148. *See* William J. Baer & Ronald C. Redcay, *Solving Competition Problems in Merger Control: The Requirements for an Effective Divestment Remedy*, 69 GEO. WASH. L. REV. 915, 915–16 (2001).

and can function as viable competitors.[149] The agencies and parties can enter into a binding judgment or consent decree to remedy the anticompetitive effects of proposed mergers,[150] which are subject to judicial review that is limited to the narrow determination of whether the proposed divestitures are in the public interest.[151] The FTC and the DOJ rely almost exclusively on ex ante divestment remedies rather than conduct-based remedies because conduct-based remedies would require periodic regulatory oversight and greater scrutiny.[152]

In the merger review context, the FTC and DOJ generally presume that mergers in a highly concentrated market (with a 2500 HHI score or higher) that increase leading participants' market share by four percent is anticompetitive and requires divestments. Similarly, regulators generally enjoin or craft a divestment remedy for increases in market share of 1% or more if a merging party already controls 35% or more of the market.[153] The underlying rationale for the reliance on divestments to offset increases in market concentration is that regulators should generally give parties limited leeway in pursuing mergers in highly concentrated markets.

In theory regulators could apply a similar approach to divestments as part of a periodic review of oligopolistic markets. The same increases in market share that trigger merger review scrutiny can occur through organic growth or the exit of a smaller competitor. If the anticompetitive effects of organic growth or competitor exit are the same, then it begs the questions of what is different or whether the effects of organic growth or competitor exit should be treated differently by regulators if divestments are the remedy of choice in the merger review context. Part of the answer lies in the leverage that antitrust regulators have over mergers. Mergers not only get the attention of regulators, but regulators enjoy broad discretion to block mergers from taking place or to require divestments. The failure of a competitor may grab headlines (and therefore should arouse regulators' attention), but traditionally this event has not been a catalyst for antitrust review of oligopolistic industries since it results in growth in market share by subtraction. Similarly, antitrust regulators have generally cast a blind eye to the growth in market share of oligopolists occurring through unilateral expansion and attributed that to market success.

---

149. *See* U.S. DEP'T OF JUST., Antitrust Division Policy Guide to Merger Remedies at 3 (2011) (discussing efforts to have convergent practices on divestments for DOJ and the FTC).

150. *See Guide to the Antitrust Laws: The Enforcers*, FED. TRADE COMM'N, http://www.ftc.gov/bc/antitrust/enforcers.shtm [https://perma.cc/ZLW2-5YB9].

151. *See* 15 U.S.C. § 16(b)–(h) (requiring the Department of Justice to file consent decrees with a federal district court, as well as a competitive impact statement that details the agreed upon remedy). *But see* Farrell Malone & J. Gregory Sidak, *Should Antitrust Consent Decrees Regulate Post-Merger Pricing?*, J. COMPETITION L. & ECON. 471, 475–76 (2007) (noting that the Federal Trade Commission's consent decrees are not subject to judicial review because the FTC serves in the role of a trial court).

152. *See, e.g.*, U.S. DEP'T OF JUST., Antitrust Division Policy Guide to Merger Remedies at 7–8 (2004) (explaining how the DOJ generally favors divestments over conduct-based remedies because divestments are designed to address anti-competitive effects up front with less government intervention and to avoid the need for periodic government monitoring).

153. *See id.* at § 3.12 (1984), https://www.justice.gov/archives/atr/1984-merger-guidelines [https://perma.cc/9SRP-7WH2].

The challenge in applying a divestment approach to remedy the entrenchment of oligopolies is that there is no clear framework for how to address the issue of organic growth, both in terms of the trigger and the scope of the remedy.[154] The existing premise for merger review is the goal of using divestments to maintain or restore the degree of competition that existed in the industry prior to the merger. If the exit of a smaller competitor or organic growth by industry leaders triggered regulatory review of market concentration and mandatory divestments, then there is the legitimate concern that regulators would be imposing a draconian sanction on firms who have achieved greater efficiencies than their competitors due to innovation, better strategies, or better economies of scale.[155] The related concern is what the end goal should be. For example, if a competitor fails and the reduced supply of product increases the leading players' market share, would it be sensible to have the objective be to have divestments restore the earlier status quo of the leading players' market share?

The worry is that a broad reliance on divestments may lead to excessive and potentially arbitrary intervention to keep market shares at government-set levels. That was the underlying concern with the 1969 "Neal Report" that proposed the creation of a "Concentrated Industries Act," which called for affirmative efforts by the Department of Justice to identify oligopolistic markets and to "reduce concentration so that the market share of each oligopoly firm would not exceed 12 percent."[156] While this approach was a well-intended effort to foster competition, it failed because of objections that it would lead to excessive government intervention in the economy through mandatory divestments and undermine competition by disincentivizing companies from growing beyond 12% market shares.[157]

These concerns suggest the appeal of relying on less invasive tactics to level the playing field between dominant firms and their smaller competitors, such as the use of disclosure and regulatory exemptions and tax incentives, which this article has discussed. Regulators should only consider using divestments as a last resort in exceptionally concentrated markets if these other remedies are not sufficient to change the landscape of competition but should not be using divestments as a routine tool for overseeing oligopolistic markets. For example, regulators could rely on the 2500 HHI score as a proxy for an oligopolistic market, and only begin considering

---

154. *See, e.g.*, *Id.* at § 1 (discussing how "merger analysis does not consist of uniform application of a single methodology" but rather is a "fact-specific process through which the [a]gencies . . . apply a range of analytical tools . . . to evaluate competitive concerns").

155. *See, e.g.*, Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2006–07 (2018) (noting that "modern industrial organization economics strongly supports the view that antitrust policy must always be careful not to discourage firms, even large firms, from competing on the merits to attract more customers"); Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (positing that "the objective of anti-trust law is 'the protection of *competition*, not *competitors*'" (emphasis added)); *accord* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 906 (2007) (quoting Atl. Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338 (1990)).

156. Phil C. Neal et. al, *Report of the White House Task Force on Antitrust Policy*, 115 CONG. REC. S15933, S16036 (daily ed. June 16, 1969).

157. *See* Herbert Hovenkamp, *Introduction to the Neal Report and the Crisis in Antitrust*, 5 COMPETITION POL'Y INT'L 217, 220–22 (2009).

the extraordinary intervention of divestments (in the nonmerger context) if the market concentration is at 3500 HHI or higher. The logic is that at a high enough threshold of market concentration policymakers should consider whether divestments are needed to prevent the dominant players that are leveraging their economies of scale to crowd out small participants and new entrants from the market. Under these circumstances concerns of "punishing" companies for their market success may appear less tenable because their dominance makes it virtually impossible for competition to emerge, especially if regulators have already exhausted the use of other alternative tools to heighten competition.

To put this point in context, a 3500 HHI score is the equivalent of a market with two dominant firms with 42% market shares. Absent an innovation that entails creative disruption of the market, both smaller firms and new entrants may have great difficulty creating both the economies of scale and reputation to compete with the dominant players. Even in this context, the challenge would be to determine what the baseline should be for restoring competition as regulators would face somewhat arbitrary decisions about how far divestments must go to restore opportunities for competition. Given the blunt nature of the divestment approach, it should only be considered in extraordinary cases where the market concentration is exceptionally high, and other efforts at fostering competition have proven to be ineffective. For this reason, this Article argues that the focus of periodic review of oligopolies should be on crafting regulatory exemptions and tax incentives to level the playing field for smaller competitors to compete with oligopolists.

5. Applying Market Deconcentration Tools in the Filtering Intermediary Context

Instituting periodic review of oligopolistic markets and equipping regulators with tools to foster competition would be positive steps towards addressing the problems posed by oligopolies. But this approach's efficacy would turn on the case-by-case application of these tools, and filtering oligopolies offers attractive case studies for thinking about where these measures may be the most useful. The rating agency context offers the starkest example of where the full tool kit of regulators may be needed. The top three rating agencies have consistently accounted for 96.5% of the market. In 2018 S&P had a 49.2% market share, Moody's had a 33.1% market share, and Fitch had a 13.5% market share.[158] This case illustrates one of the most exceptionally concentrated markets with an HHI score of over 3700. Since the Dodd-Frank Act of 2010, the Office of Credit Rating Agencies has demanded increasing amounts of disclosures from nationally recognized statistical rating agencies regardless of whether the rating agencies are publicly or privately held. But to date

158. SEC. & EXCH. COMM'N, ANNUAL REPORT 2018, *supra* note 4 (documenting that three rating agencies dominate the market: S&P–49.2% market share; Moody's–33.1% market share; Fitch–13.5% market share; DBRS 2.3% market share; Other–1.9% market share); *see also* SEC & EXCH. COMM'N, ANNUAL REPORT ON NATIONALLY RECOGNIZED STATISTICAL RATING ORGANIZATIONS 11 (2016), https://www.sec.gov/ocr/reportspubs/annual-reports/2016-annual-report-on-nrsros.pdf [https://perma.cc/S7SU-YG4Z] (documenting that the top three rating agencies account for 96.5% of the market, a higher percentage than before the Dodd-Frank Act was enacted which initiated greater regulation and oversight of the rating agency market).

these disclosure burdens have disproportionately fallen on the smaller rating agencies. Regulations have made it more expensive and more difficult to compete with the dominant players by adding layers of internal controls and safeguards against conflicts of interest.[159]

Antitrust regulators should consider coordinating with the SEC to increase the extent of disclosures facing the dominant oligopolists. Their goal should be to secure more detailed disclosures concerning the quantitative and qualitative dimensions of rating agency methodologies, so that their ratings can be readily reproducible and confirmable. This approach would make it more difficult for business concerns to shape the substance of the rating process, would make it easier for comparisons of ratings to assess their accuracy, and would make it easier for smaller rating agencies to compete by giving them a clearer picture of the opaque processes that larger rating agencies employ. Similarly, antitrust regulators should work with the SEC to consider broadly employing small business exemptions to reduce the regulatory burdens of smaller competitors. For example, the SEC's rule prohibiting rating agencies from having a single client account for more than 10% of revenue is a well-intended safeguard against conflicts of interest.[160] But in practice, this measure makes it much more difficult for smaller rating agencies or new entrants to compete because of their limited client base, while the dominant rating agencies can easily meet this requirement. Small business exemptions should allow smaller rating agencies to meet the burdens of demonstrating their independence and absence of conflicts of interests in simpler, less costly ways that recognize the substantial barriers to effective competition.

Similarly, antitrust regulators should consider the potential for tax incentives to attract new entrants to the ratings industry or an oligopoly tax on the extraordinary returns that ratings firms enjoy. Of the leading three rating firms, only Moody's is a free-standing, publicly traded company. In the almost ten-year period from the collapse of Lehman Brothers in September 2008 through January 2017, Moody's shares increased at more than double the rate of increase of the S&P 500 index (180% to 81%). In the aftermath of the Dodd-Frank Act through January 2017, Moody's stock increased at triple the rate of the S&P 500 Index (355% to 112%). Moody's operating margins are 42%, higher than virtually any sector of the U.S. economy.[161] Standard & Poor's rating agency business accounts for about 50% of the firm's revenues, but it is more difficult to parse out the profitability of this segment of the business. However, S&P has disclosed to the SEC that each analyst brings in over one million dollars in revenue a year, which is a comparable figure to Moody's regulatory disclosures and suggests similar levels of profitability.[162] Fitch is privately held, which makes the financial comparison more difficult. The logic of applying an oligopoly tax to the dominant firms is that their high levels of profitability reflect the

---

159. *See* Jeffrey Manns, *Downgrading Rating Agency Reform*, 81 GEO. WASH. L. REV. 749, 776–78 (2013).

160. 17 C.F.R § 240.17g-5(c)(1) (2019).

161. Frank Partnoy, *What's Still Wrong with Rating Agencies*, 92 WASH. L. REV. 1407, 1426–27 (2017).

162. *See* Bloomberg News, *S&P, Moody's Boosting Rating Fees Faster Than Inflation*, FIN. POST (Nov. 15, 2011), http://business.financialpost.com/news/economy/sp-moodys-boosting-rating-fees-faster-than-inflation [https://perma.cc/N9WD-J7LV].

large economies of scale and reputational barriers that entrench their dominance and allow them to charge prices that reflect this market power. The scope of a potential oligopoly tax would be a fact-intensive question which regulators could consider and potentially expand depending on the impact of the tax in fostering competition. The mirror image of this approach would be applying similar analysis to design tax incentives for smaller competitors to offset the substantial economic damages that the dominant ratings oligopolists enjoy.

The high degree of market concentration in the ratings agency context may make it one of the most appealing contexts for considering the potential of divestments. Because the rating agency industry consists of numerous submarkets of government and private debt ratings, it is conceivable for regulators to consider mandating spinoffs or sales of parts of the leading firms' business to create ready-made competitors. The important caveat is that this approach should be a last resort, and that regulators should focus on the disclosure, regulatory, and tax strategies to level the playing field for smaller competitors, strategies that have never been tried in the oligopoly context.

Another context that illustrates the potential of preemptive oligopoly regulation is the social media market. Antitrust regulators could analyze the market in terms of the numerous sub-markets that exist, but for the sake of this discussion, I will focus on the overall social media market share based on site visits (which serves as a proxy for potential advertising and consumer information-based revenue streams). In May 2020, Facebook had 55.9% of site visits, Pinterest had 29.86% of site visits, Twitter had 9.01% of site visits, Instagram had 1.41% of site visits, YouTube had 1.82% of site visits, and the other players had less than 1% of site visits.[163] This market share distribution amounts to an HHI score of 4,097.60, a highly concentrated market that borders on the exceptional levels of concentration of the rating agency industry. The HHI further extends to above 4200, a level that the rating agency industry does not even touch, if Instagram and Facebook's shares are combined following Facebooks acquisition of the app in 2012.[164]

The challenge of regulating the social media market is that these firms vary tremendously in terms of profitability, and there is a striking absence of current regulation. For example, Facebook had a net income of $22 billion in 2019,[165] while Pinterest has never made any profits as it has focused exclusively on using investor dollars to build market share with the long-term promise of profitability.[166] For this reason, it would make much less sense to focus on the potential for an oligopoly tax

---

163. *See* J. Clement, *U.S. Market Share of Leading Social Media in May 2020*, STATISTA, (Jun. 18, 2020), https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/ [https://perma.cc/NE8X-RB4F].

164. *See* Sam Shead, *Facebook Owns the Four Most Downloaded Apps of the Decade*, BBC (Dec. 18, 2019), https://www.bbc.com/news/technology-50838013 [https://perma.cc/FQP3-X9J6].

165. J. Clement, *Facebook's Net Income from 1st Quarter 2010 to 2nd Quarter 2020*, STATISTA (Feb. 24, 2020), https://www.statista.com/statistics/223289/facebooks-quarterly-net-income/ [https://perma.cc/ZFV3-MUHY].

166. *See* Ari Levy, *Pinterest Stock Tanks 21% on Revenue Miss and Disappointing Forecast*, CNBC (Oct. 31, 2019, 4:07 PM), https://www.cnbc.com/2019/10/31/pinterest-pins-stock-falls-after-third-quarter-sales-miss.html [https://perma.cc/VG7J-94NW].

or tax incentives to foster greater competition in the social media market. Instead, the question of oligopoly regulation is tied into the broader landscape of what the regulation of social media should look like. As policymakers grapple with the question of what disclosures and regulations are appropriate for social media companies, they should recognize the potential market power of the dominant players and seek to ensure that smaller competitors face a lighter disclosure and regulatory burden to give them the chance to compete with entrenched incumbents. While the level of market concentration is high, the segmentation of the social media market that Facebook, Pinterest, Twitter, and Instagram cover suggests that regulators should be cautious in considering this invasive tool and should focus on the potential for using disclosure or regulatory tools to favor smaller competitors and new entrants.

At the same time, regulators should be cautious about whether additional measures are necessary to address high levels of market concentration. The U.S. digital advertising market offers an example of where there is market concentration, but not arising to a level where government intervention would be productive. As of 2019, Google had a 37.2% market share of digital advertising revenues, Facebook had a 22.1% market share, Amazon had an 8.8% market share, Microsoft had a 3.8% market share, and Verizon had a 2.9% market share.[167] These market concentration figures amount to an HHI score of 1,972.54, or roughly the midway point for the antitrust regulators' assessment of a moderately concentrated market. While the high market shares of Google and Facebook are matters of concern, the nature of the strong competitors that they face—Amazon, Microsoft, and Verizon—suggests that there is the potential for greater fluidity of market share over time. Amazon, Microsoft, and Verizon would not be referred to as smaller competitors in their primary markets of competition, but that fact suggests that they possess significant resources to bring to bear to build market share, even with sustained losses, in the digital advertising space. For this reason, while the digital advertising market should be on the radar of antitrust regulators, there is not a strong case for applying an expanded tool kit of measures to promote greater competition in this market.

The U.S. e-commerce market poses a more daunting challenge for whether to apply measures to mitigate market concentration. As of the fourth quarter of 2019, Amazon has by far the largest market of e-commerce at 46.7% of online revenue, followed by Walmart with 11.71%, Apple with 7.94%, Home Depot with 6.57%, Best Buy with 6.524%, Target with 4.17%, Macy's with 4.13%, Wayfair with 3.8%, and Costco with 3.33%.[168] These numbers place the e-commerce market just on the threshold of a highly concentrated market with an HHI score of 2509. In theory under this Article's approach, antitrust regulators could begin to employ disclosure,

---

167. *See* Felix Richter, *Amazon Challenges Ad Duopoly*, STATISTA, (Feb. 21, 2019), https://www.statista.com/chart/17109/us-digital-advertising-market-share/ [https://perma.cc/MQ2R-44T7]; EMarketer Editors, *US Digital Ad Spending Will Surpass Traditional in 2019*, (Feb. 19, 2019), https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019 [https://perma.cc/6NBC-4JB8].

168. *See United States: Top 10 Online 2018, by Revenue*, STATISTA (Apr. 30, 2020), https://www.statista.com/forecasts/646030/united-states-top-online-stores-united-states-ecommercedb/ [https://perma.cc/HP99-FYXU].

regulatory, or tax incentive tools to attempt to lower the playing field between the two leading players of the market, Amazon and Walmart, with the smaller competitors. But in practice even under this article's approach, regulators would be wiser to monitor the e-commerce market periodically to assess the landscape of market share rather than to engage in intervention. If the level of market concentration continues to increase, then regulators would have the toolkit available to begin to try to level the playing field for smaller competitors. But given the sizable, single digit market shares of a number of leading brick and mortar players, there is a strong case to be made for waiting and seeing how the e-commerce market share landscape unfolds before engaging in any type of government intervention.

However, examining this issue through the lens of the gross value of sales in the U.S. e-commerce market may give further insight that would suggest the need to consider preemptive regulation of this market. The difference between the data on revenue and sales by gross value is that sales by gross value account for the platform usage by third parties. In looking at the measuring stick of sales by gross value, Amazon's market share drops down to 38.7% from 46.7%, however the other competitors suffer more significant drops in market share. Walmart's market share drops by half from 11.7% to 5.3% and third-place Apple drops from 7.9% to 3.7%.[169] This leaves Amazon as the only market participant with a market share in the double digits. This revenue statistic shows that other competitors are still making a fair amount of revenue. But in terms of market control, which can be seen by the gross value of goods sold, it appears Amazon has a firmer grip on the industry than the revenue numbers may have suggested. This metric bolsters the case for instituting periodic review of the e-commerce market and the desirability of considering the use of tools to spur competition if Amazon continues to expand its domination of the gross value of sales.

CONCLUSION

This Article has made the case for oligopolies to be subjected to greater regulatory scrutiny and potentially proactive regulation. Antitrust regulators should sustain preemptive periodic oversight of highly concentrated markets (rather than react primarily in response to merger reviews), impose heightened disclosures on oligopolists to facilitate monitoring both by public and private, and seek to open up these markets to greater competition by lowering the regulatory, disclosure, and tax barriers to entry for small-market participants. There may be scope for use of divestments in extraordinary circumstances in which these other policy tools fail to open up greater competition. But the practical shortcomings of divestment strategies suggest that antitrust regulators should instead periodically monitor oligopolistic markets and find ways to level the playing field for smaller players and new entrants to increase competition.

169. *See Target Cracks Top 10 US Ecommerce Ranking*, EMARKETER (Feb. 28, 2020), https://www.emarketer.com/content/target-cracks-top-10-us-ecommerce-ranking [https://perma.cc/Y7EU-ANLX].