Antitrust Goals, and Extremes to Be Avoided

• The goal of competition policy: **maximum output consistent with sustainable competition** – favors consumers with low prices and suppliers, particularly including labor, with opportunities for sales

• **Not** goals such as “competitive process,” a nothingburger which has been used by both the right and the left to mean anything they want; it becomes a way of avoiding the need to evaluate outcomes.

• Extreme to be avoided:
  
• 1. The digital platforms are great and everything they do is perfectly fine.

• 2. The digital platforms are inherently monopolistic and harmful and must be broken up
Under-enforcement ("Neoliberal") – lower output from excessive margins; too much monopoly: harms consumers, labor and other input suppliers

Over-enforcement ("Neo-Brandeis") – overly prone to structural remedies: insensitive to economies of scale and scope, as well as range of network effects; harms consumers, labor, and other input suppliers
The Williamson/Bork Model of Welfare Tradeoffs: “Blackboard economics”

- From Bork, Antitrust Paradox 107 (1978), describing a merger or other practice that simultaneously raised prices but produced resource savings.
- $A_1$ – deadweight loss of monopoly
- $A_2$ – cost savings (engineering/production costs)
- Square just north of $A_2$: wealth transfer (a “wash”)
- But Query: what practice (including merger) reduces output by half ($Q_1$ to $Q_2$) and yet produces large cost savings?
- --problems of fixed costs; IP
- Bork renamed it the “Consumer Welfare” model
- Coase: “blackboard economics” – fallacy of thinking that if you can show it on a blackboard it must correspond to a real world phenomenon.

What Bork ignored
Competitive Analysis of Large Digital Platforms: Starting Points

1. They have been important engines of economic growth, with significant consumer approval; their history with smaller firms is complex: they have harmed some, while they have benefitted others by providing distribution services or outlets or other sales opportunities.

2. Most of them are not “winner take all” markets – the reasons:
   A. Product differentiation (new entry likely to come from differentiated firms (e.g., Twitter; Tik-Tok)
   B. Interoperability – can reduce or even eliminate network advantages, depending on how it is constructed
   C. Winner take all most likely in the presence of significant network effects, and where neither product differentiation nor interoperability is present – general search? Ride hailing?

3. Historically, they have not been shown to be more durable than traditional monopolies such as U.S. Steel, IBM, Xerox (Myspace once thought to be a “permanent monopoly”)

4. Takeaway: If they are not winner take all, they need exclusionary practices in order to maintain dominance
3. Market Definition, Network Effects, & Entry Barriers

A. Network Effects, can create power but not decisive in the presence of product differentiation (e.g., magazines, email and dating sites); effects of multi-homing

B. Market Definition – Epic Games v. Apple – lock-in?

C. Cluster Markets?

C. Lowering the market share thresholds in the presence of network effects?

D. Direct Measurement? Residual Demand? Alternatives?

E. Principal factors: Network Effects (offset by product differentiation); preemptive acquisitions (e.g., Facebook and Instagram, WhatsApp)
Anticompetitive Conduct on Large Digital Platforms

4. They very likely engage in a variety of anticompetitive practices subject to injunction remedies

   A. (Quasi-) Exclusive Dealing; Tying (Epic Games: tying or refusal to deal”)

   B. Refusal to Deal? Essential Facility?  *Aspen* may apply in cases of reliance plus path dependence; can be applied to ANY input, including data; administrative problem of terms of dealing orders

   C. MFN Clauses – e.g., cases against Amazon; generally, Rule of Reason requires a 30% to 40% market share, but that is too strict

   D. Use of Defaults ?? (e.g., Google Search – cf. U.S. tying law)

   E. “Leveraging” – largely rejected by U.S. Courts, but is there a place for it, particularly in networks?  “Abuse of Dominance” may be a better approach.
Effective Remedies

1. Except for the Undoing of Mergers, “breakup” is rarely a good remedy, particularly for internally developed assets
   - A breakup must break **into** the monopoly, not simply break it off. Preventing and Undoing Mergers is Promising and where current remedies fall short.

2. Most line of business Restrictions should be avoided; most are procompetitive
   - E.g., Amazon third-party business v. AmazonBasics

3. One promising remedy when relevant: interoperability (AT&T; Facebook? Search?); may be facilitated by expanded refusal to deal doctrine

4. Injunctions should not be underestimated (very likely the most effective portion of the *Microsoft* decree), and this is where many violations will lie

5. Prospective Mergers: for the large digital platforms, there are very few merger specific efficiencies available; as a result, the best approach to acquisitions is a quasi-per se prohibition subject to a rebuttal by clear and convincing evidence; treat large platform acquisitions as exclusionary practices
Summary: Optimal Approaches to Anticompetitive Practices by Dominant Digital Platforms

1. The underlying goal is not to ruin firms or make them smaller, but to get firms to produce the highest sustainable output.
2. Market power measurement needs to be relaxed and more welcoming of alternatives to market definition.
3. For most violations, injunctions are the preferred remedy.
4. Breakups -- caution with respect to internally developed assets, but we need to be MUCH more aggressive with acquisitions.
5. Prospectively, we should pursue a much more aggressive policy on mergers, not limited to horizontal acquisitions, and treat them more like exclusionary practices.
6. In cases of true platform dominance, expansion of refusal to deal doctrine is warranted, particularly if it facilitates interoperability.