



# Race to Regulation: Assessing the Impact of Proposed U.S. State Competition Bills on Small & Medium-sized Businesses

Policy Analysis

Informed by the DCI State Antitrust Law and Small Business  
Working Group

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## Executive Summary

Several U.S. states have considered new antitrust legislation that abandons the long-held “consumer welfare standard” of competition in favor of a reduced and less rigorous standard. Under this so-called “abuse of dominance” (AOD) legislation, it would become illegal for a company to obtain a “dominant position” in a market and “abuse” such a position.

The Data Catalyst Institute convened experts in business, economics, and law to discuss the effect that such legislation might have on America’s millions of small- and medium-sized businesses (SMBs). We explored these state bills in relation to existing state and federal antitrust laws and how they would likely directly or indirectly affect SMBs in those states. There was broad consensus on the following points.

- New state antitrust laws with varying standards from state to state will create a confusing patchwork of laws across the country, ultimately increasing uncertainty and compliance costs for SMBs.
- The broad language of the state bills does not provide SMB owners with clear guidance about what common practices will be covered by the regulations. This will have real economic consequences for SMBs.
- SMBs, despite their small size, could actually be declared “illegally dominant” in arbitrarily defined markets because these new state antitrust bills are written so vaguely that their enforcement will rely on interpretation by state law enforcement and “private right of action” cases.
- These new laws would ultimately increase the cost of SMBs doing business in the state, including new compliance costs and higher costs of “input” goods and services from larger businesses (for example, health insurance).
- The most likely place for one of these new state antitrust bills to pass would be in a “blue” state such as New York, Maine, or Minnesota. A side effect of this would be that some SMBs would leave such states or invest less in selling there.

# Background

Every issue is a small business issue. In the U.S., small and medium-sized businesses (SMBs) make up roughly 99% of all businesses and are responsible for about half of private sector employment. So, the needs and concerns of SMB owners and leaders are an important consideration in lawmaking, policy, and other areas, both at a local and national level.

Abstractly, what do SMB leaders want beyond obvious things, such as having lots of customers or earning more revenue? What does a perfect operating environment look like to them? For one thing, SMBs prefer operating environments with consistent and clear rules and regulations that help them decide on strategy, products, budgets, employment, and other day-to-day issues. Uncertainty threatens SMBs because new, vague, or fluctuating rules and regulations create confusion and can paralyze decision-making and action.

Another thing that SMB leaders prefer is a lower cost of doing business, all else being equal. This includes costs to obtain goods and services (say, wood to make furniture, hiring a local labor force, and obtaining health insurance for employees) and the cost of state taxes or certifications (which is why some SMBs are based in certain states and sometimes move). But it also includes less obvious but very real compliance costs for state and local rules and regulations, which can be a significant factor in the budgets of even successful SMBs.

Over the past few years, lawmakers in several U.S. states have introduced and considered new antitrust legislation that would abandon the long-held “consumer welfare standard” of market competition - which uses objective economic analysis and empirical evidence - in favor of a reduced and vague “dominance” standard. While different states are considering different bills with different provisions, and these bills are subject to change, generally speaking, it would become illegal for a company to (a) obtain a so-called “dominant position” in a market, which would be presumed to exist when a company reaches an arbitrary, and below-majority, market share, and (b) “abuse” such a dominant position, which is defined very broadly. A current list of such proposed state legislation is provided in Table 1.

**Table 1. Currently Proposed State-Level Antitrust Legislation**

State	Bill	Intro Date	Bill Information
NJ	<u>S3778</u>	May 2023	Amends "New Jersey Antitrust Act" to make monopsony illegal and regulate entity in dominant position in market
NY	<u>S6748</u>	May 2023	Relates to actions or practices that establish or maintain a monopoly, monopsony or restraint of trade, and authorizes a class action lawsuit in the state anti-trust law
ME	<u>No. 1815</u>	April 2023	An Act to Protect Maine's Consumers by Establishing an Abuse of Dominance Right of Action and Requiring Notification of Mergers
MN	<u>HF 1563</u>	Feb 2023	A bill for an act relating to trade regulations; prohibiting abuse of dominance
CA	<u>B-750*</u>	Nov 2022	Antitrust Law - Study B-750 (*note this is not a "bill," but the CA Legislature authorized the CA Law Revision Commission to study the issue formally)
PA	<u>HB2677</u>	June 2022	Pennsylvania Open Markets Act: An Act providing for cause of action for antitrust conduct, for indirect purchaser recovery under State antitrust laws and for premerger notice of health care mergers and transactions; and imposing criminal penalties

To explore this topic further, the [Data Catalyst Institute](#) (DCI) hosted a Working Group in June 2023 on the topic of "State Antitrust Law and Small Business," with several experts in law, economics, and small business participating. Together, we explored these state bills in relation to existing state and federal antitrust laws and how they would likely directly or indirectly affect SMBs in those states.

Broadly, the group had concerns that a combination of vague guidelines, uncertainty, and unintended consequences could create less attractive small business environments in states that pass such legislation - resulting in less profitable SMBs, fewer new business starts, and SMBs moving to other states with more favorable regulatory environments.

# The State Antitrust Law and Small Business Working Group

DCI Working Groups convene experts on a short-term basis to discuss and debate topical issues of major importance. To promote candor, Working Groups operate pursuant to the [Chatham House Rule](#), which prohibits quotation with attribution. Additionally, [DCI](#) writes Working Group reports, and Working Group participants were not directly involved in its preparation.

State Antitrust Law and Small Business Working Group participants have expertise in economics, law, and small business, in addition to antitrust:

- [David Audretsch](#), Distinguished Professor and the Ameritech Chair of Economic Development, Indiana University
- [Jonathan Barnett](#), Torrey H. Webb Professor of Law, Gould School of Law, University of Southern California
- [Seth G. Benzell](#), Assistant Professor, Argyros School of Business and Economics, Chapman University; Fellow, Stanford Digital Economy Lab; Fellow, MIT Initiative on the Digital Economy
- [Felix B. Chang](#), Professor, University of Cincinnati College of Law; Visiting Professor, Ohio State University Moritz College of Law; Fellow, Yale School of Management's Thurman Arnold Project
- [Kevin N. Hylton](#), William Fairfield Warren Distinguished Professor and Professor of Law, Boston University School of Law
- [Cameron Miller](#), Associate Professor of Management, Whitman School of Business, Syracuse University
- [Diana L. Moss](#), President, American Antitrust Institute
- [John T. Scott](#), Professor of Economics Emeritus, Dartmouth College (observer)
- [Liad Wagman](#), John and Mae Calamos Dean Endowed Chair and Professor of Economics, Stuart School of Business, Illinois Institute of Technology

## Key Findings

While there is never a complete consensus among a diverse group of experts, hours of discussion and debate resulted in several overarching conclusions.

- **Antitrust patchwork:** While there are state-specific laws in areas such as environmental protection and product safety, and many states already have antitrust laws that roughly mirror federal law (“baby Sherman Acts”), the creation of new state antitrust laws with completely different standards (not merely a matter of degree) than federal law is likely to result in serious conflicts and challenges to new state laws, should they pass. They will also result in a confusing patchwork of laws across the country, ultimately increasing uncertainty and compliance costs for SMBs. Since major antitrust law changes in one state can affect commerce in other states, federal antitrust law should take precedence.
- **Vague, varying guidance:** The broad language in the proposed legislation does not provide SMB owners with clear guidance about what common practices will be covered by the regulations were they to pass. Moreover, state antitrust law where AOD laws are in place will, via the state attorney general (AG), be tied to the political winds as different administrations inevitably come and go. This will have real economic consequences for SMBs, including hindering their ability to raise capital and attract and hire talent, reducing entrepreneurship, job creation, and economic growth.
- **Small yet dominant:** SMBs, despite their small size, could actually be declared “illegally dominant” in arbitrarily defined markets. In many respects, these new state antitrust bills are written so vaguely that their actual enforcement will rely heavily on their interpretation by state law enforcement (most likely the state AG’s office) and even people or organizations using a “private right of action” to challenge a competitor, in a form of regulatory capture. Because no one knows how such laws would actually be enforced in different states, it presents a real risk to successful SMBs in niche or emerging lines of business, or remotely located SMBs that are “dominant” in a limited geographical market.
- **Increased cost of doing business:** If passed, these new laws would increase the cost of SMBs doing business in several ways. For one thing, SMBs could be investigated for being dominant in niche markets, rightly or wrongly, which would cost time and money to deal with. Another way in which the cost to SMBs would likely increase is that larger companies providing infrastructure to SMBs - like health insurance providers, large equipment manufacturers, and logistics providers - would fall under new AOD laws and pass on the costs to SMBs. (We explore the latter point in more depth [here](#).)

- **First movers:** Generally, there was a feeling that blue states are more likely to pass such legislation than red states. The most likely state for such new forms of antitrust laws to pass was judged to be New York, based on past legislative activity. Because New York is a major headquarters for finance businesses (including many SMBs, which include, for example, well-heeled hedge funds), passing such legislation would also likely generate lawsuits and possible SMB migration out of state.

Based on this expert discussion and [additional research](#), DCI recommends that state legislators reconsider this antitrust legislation and, at a minimum, carefully contemplate and address its economic side effects and unexpected consequences, particularly on small businesses, before moving forward.

## Additional Discussion

Though the Working Group was presented with several questions and conversation-starters, the discussion was free-flowing and frequently returned to a relatively small set of themes. Below are summaries of the group's overall discussions and perspectives. (Text passages in quotes are direct quotations from participants, unattributed, under Chatham House Rule.)

### Are proposed state “dominance” bills the right tools to solve the problem?

**Tools in the toolkit to promote competition:** Competition is a hallmark of a market economy, and it must be protected: market-based systems are supported by democratic principles of consumers to choose what they will buy and entrepreneurs to choose to enter new markets and innovate. But if the goal is simply to preserve and encourage competition, antitrust laws are not the only way to do that. Intellectual property (IP) law, trade law, labor law, and specific sector regulation are all fundamental “tools in the toolkit” for promoting competition in the US.

Moreover, the analytical, economics-based consumer welfare standard can still work very well and is flexible, despite what neo-Brandesian antitrust advocates have stated. There is room for more enforcement of laws we already have now - without creating new ones. But viewpoints on competition have shifted and stretched over time. On the intellectual and political far left, there is some disaffection with the consumer welfare standard, and one can make the argument that harmful effects on labor, the environment, and other things are real but aren't policed under this narrow standard.

The neo-Brandesian school of antitrust is not born from economics, law, or business but rather “more from a journalistic policymaking place” and proposes significant overhauls to the laws with bright-line tests for market power, prohibitions on certain types of conduct, and other

policies. In the words of one participant, “A lot of people seem to want antitrust tools to do something that they weren’t designed to do.” For example, online misinformation about health or politics may very well be a problem on digital platforms and potentially serious social harm - but antitrust isn’t the right tool for fixing that.

**State bills go further than EU law, which could backslash on SMBs:** While the EU has generally followed reasoning similar to the U.S. on vertical mergers, at least in the case of the bills proposed in New York and New Jersey, their sponsors propose to go further. The language in these bills states that companies defending a vertical integration cannot show any pro-competitive effects to support their plans - in other words, there is no “balancing test.” This pretends that all economic analysis of vertical restraints since the 1960s is immaterial. Perhaps even worse, these bills also incentivize lawyers, who bear no cost here, to bring class action lawsuits. This is likely to be why those same lawyers and law firms strongly support these bills.

Is this a good operating environment for existing small or large businesses or newly established firms? “In that environment of uncertainty, a business person is going to want to move their business elsewhere, everything else being equal,” said one participant. Two issues are that (1) the statute is vague, and therefore, guidelines aren’t clear, and (2) the state AG has the power to define how it will be enforced, which itself will change over time with different people and parties in office. As one participant commented, “I think these statutes, however well-intentioned they might be, would do a disservice to businesses and to competition in these states; it doesn’t matter what size the firm is.”

**Unique impacts of these proposed laws on SMBs that are tech startups:** Of note is how this would affect SMBs in the tech sector that are frequently backed with venture capital funding (i.e., startups). Because some of the proposed antitrust laws also apply to acquisitions, startups will be less attractive to larger companies that want to acquire them. Most venture capital-backed startups fail, and of the small number that succeed, about 90% “exit” through an acquisition. Thus, these AOD bills would create a “cloud of uncertainty” over any acquisition of a startup in that state. Many startups will simply move out of the state to a different one where they are more likely to exit successfully - and may even be pressured to do so by their backers who want the highest returns possible on their investment.

### How would states actually enforce AOD legislation in practice?

**Political factors at work:** State-level antitrust laws tend to be “dominated by the interests of local factions, and if they have any effect at all, they probably interfere with the administration of national antitrust laws” (see: The Curley Effect in Massachusetts). States might find certain types of conduct that do not violate federal law as violations of their state laws. (To some extent, this might already happen, but that doesn’t mean it’s a good idea to go further - in fact, you could



argue cutting back on state intervention would be better.) Some people may have issues with how current laws and courts balance companies, competitors, and consumers – but as one participant asked, “Why would states be any better at dealing with those problems?” Additionally, state legislatures will try to restrain what state courts can do, and dominant state industries and lobbies will partly drive this. “This won’t result in something superior to the Sherman Act.”

**Potential constitutional issues:** To what extent should the Constitution restrain states from passing laws like this? There may be “dormant Commerce Clause issues” that the courts should examine because a patchwork of antitrust laws with differing “dominance” standards and other rules from state to state could, in effect, interfere with interstate commerce. (On the other hand, when current state antitrust law (“baby Sherman Acts”) generally evolves in conformity with federal laws, that creates a predictable business climate for companies large and small.)

Additionally, states already have their own regulations in many areas. For example, “States have their own product liability laws - so what if they have their own antitrust laws too?” While there’s no federal product liability law, there is federal antitrust law, and states can deviate - and that could be a problem. We can then ask, could state laws get in the way of federal antitrust enforcement? How will companies and courts determine what exactly is a “violation” and what isn’t? It’s true that in some cases, like environmental law, states can and do go further than the “floor” of federal minimum standards. “Sometimes federal preemption is a cudgel against state experimentation.” State laws may come into conflict with the enforcement of federal law, which is “supreme” to state law. This is separate from the Commerce Clause issue.

Potential issues of state supremacy also arise for businesses with operations in multiple states. If states impose competing laws on businesses within their borders, there could be conflict over which state’s standard should be followed or whether businesses must customize operations state-by-state. The latter would be a particular burden on relatively smaller businesses with more limited resources than giant corporations.

**How would enforcement be carried out in reality?:** Implementing these laws could be very hard, especially since the bills as written are so vague. One participant envisions “streams of court cases” related to these new laws, should they pass. No matter what the law says, it may take a while to understand what is and is not allowed in practical terms. Another dimension is that because state AG offices would carry out state enforcement, limited time and resources to investigate and bring cases would constrain AOD laws’ effectiveness.

While state-level experimentation might be a positive, ironically, it may also be the case that national-level experimentation would be better: the smaller the market, the greater the chance that a company may simply uproot and leave the state or severely reduce activity in that state, to avoid uncertainty due to new laws.

## Are there unique aspects of the digital economy to take into account?

**Economics of digital platforms:** Unlike traditional industries, digital platforms have extremely strong supply-side economies of scale - write the code once and sell it as many times as you want. There are also strong demand-side economies of scale or network effects - the more people use the platforms, the better they get and the more value they deliver to consumers. Because of this, there are real technological pressures on companies that own such platforms to get bigger, which could potentially have efficiency consequences.

In the past, if a company could do something slightly better than its competitors, it might become 10% larger than them. In the digital economy, a company doing something slightly better might grow to be two, three, or even ten times its size because of the technology that helps scale an already successful business model. So, this is not just about identifying potential harms - it's about having the proper remedies. "We don't want remedies that destroy the very network effects that make platforms valuable and that consumers like and want," said one participant.

**Big can be bad or good, depending on circumstances:** "There may be technological change that may have increased the efficiency of bigness without changing the badness of bigness," said one of our participants. In this view, the harms of bigness have actually gotten smaller. What if we consider that "big tech" companies often want to acquire and utilize small innovations rather than kill them?

Rigorous analyses can sometimes result in counterintuitive conclusions about second-order effects. Larger companies frequently acquire SMBs outside their main business area to diversify and commercialize them to differentiate. This is true across sectors (i.e., not just "big tech" or IT but also including manufacturing, mining, services, and infrastructure). Acquisitions can also have the benefit of, for example, bringing more capital into an emerging area and having positive downstream effects on jobs and innovation. But many cases like this could fall under the purview of these new laws and be blocked for being too dominant "right now."

## Can small businesses actually be "dominant" in some markets?

**General, non-tech markets:** While the logic behind AOD bills is to regulate the largest companies thought to be abusing their "dominance" of certain markets, under certain circumstances, even SMBs could be found to run afoul of these same laws. Because markets are arbitrarily defined in these proposed state competition bills, virtually anything could be defined as a "market" within which "illegal dominance" may occur.

One legal expert noted that while the casual observer - and perhaps the average state lawmaker - might think that SMBs can't be dominant, "that depends on the artfulness in measuring the relevant market because you can be pretty creative in defining a market in a way that might make a business that really isn't that big of a business...get labeled dominant." Artful definitions of the relevant market can trap an SMB into violating these broadly-written laws. (As one example of such a creative definition, in the recent Penguin Random House and Simon & Schuster proposed merger, the "pretty strange" relevant market supposedly harmed was bestselling authors obtaining advances above \$250,000. "That's a rather small group of people.")

"If you define the market as being very narrow - a small market niche, a product niche or service niche, or a geographic niche, then for sure SMBs run the risk of violating these laws," said another participant. There are many examples of SMBs with an 80% or higher share of a specialized product or geographic market. "They'd certainly be vulnerable to a charge against them."

Additionally, a SMB successfully entering a new market or defining a new market it created could be found to have "first-mover dominance." Or, if an SMB is very popular within an underserved market, it could be found to be "naturally dominant," as it would have little to no voluntary competition. Nobody knows whether a state AG would ever bring such a case against such SMBs, but it's certainly possible as these bills are written now. At the end of the day, these cases come down to a combination of prosecutorial discretion and "private right of action" challenges.

**Special relevance to high-growth startups:** Any SMB entering a fairly nascent market can easily be caught up in the indirect evidence of dominance (e.g., 40% market share) provision of state AOD bills like New York's. "I would think that large firms that are already on regulators or politicians' radar are more likely to be targeted," said one participant, but SMBs can be affected indirectly too, as in the Meta-Within acquisition that the FTC formally challenged for potential future dominance of the nascent "virtual reality dedicated fitness app market" (the government lost). This market is early-stage, minuscule, and peculiar. Meta aims to present a better suite of offerings to attract more users and developers and reach a critical mass. One participant commented, "For the government to step in and sue based on reducing competition is just plain ridiculous. It's bonkers."

Broadly, this type of behavior by the government creates a disincentive for people to launch startups. For virtual reality specifically, the ratio of exits in the U.S. via acquisition to IPOs is 32:1 (i.e., mostly acquisitions). There were only about 8 IPOs; some didn't do well post-IPO. One expert said, "Acquisitions are an essential incentive for entrepreneurs to enter [markets]. And for the government to step in and freeze that or show its intention to freeze is so harmful; it's so chilling. This mentality is bad." Another said, "You have to wonder how much potential value-creating activity might be sacrificed if firms who feel like they are targets forgo opportunities."

## Uncertainties, costs, and risks to small businesses in AOD-regulated jurisdictions

**State-level business uncertainty:** The broad language in the proposed legislation does not provide SMB owners with clear guidance about what common practices will be covered by the regulations. And because the state AG governs enforcement, as states generally don't have their own dedicated competition authorities, state antitrust law will be tied to the political winds as different administrations come and go. Finally, while larger businesses will have more resources to deal with such uncertainties, a good deal of the burden will unintentionally be borne by SMBs.

The less business-friendly environments in these jurisdictions could affect where SMBs headquarter themselves and whether and how much they sell within them, which can hurt SMB growth and indirectly hurt consumers in those states. More broadly, these conditions will have a range of economic consequences, including hindering the ability of SMBs to raise capital and attract and hire talent, reducing entrepreneurship, job creation, and economic growth. Ultimately, the effect would be to harm state economies with these laws enforced in the global marketplace.

**Second-order effects of uncertainty:** These environments are also likely to reduce investment in businesses located there, whether from private equity, venture capital, or other sources, which more broadly would negatively affect the finance industry, including M&A dealmakers. A participant commented, "If you wanted to invest in innovators, why invest in New York or elsewhere where you could be potentially penalized?" In a related issue, at least in New York, the acquisition level at which new regulations kick in is set so low that it would make it impossible to run a mutual fund or hedge fund there. This is because ownership in anything as low as about \$9 million would trigger a mechanism where there would be a waiting period to trade. (Continuing recent trends, financial firms will relocate their headquarters to economically favorable states based partly on local laws and policies.)

An unwritten assumption being made is that if these bills pass, egregious enforcement won't happen because regulators would realize it makes no sense or because of a lack of sufficient resources to undertake such enforcement. However, New York's bill, for example, contains stiff penalties, including a class D felony at the individual level. Given how broadly the bill is written and the power given to the New York AG, this kind of law being on the books will give some businesses pause. One surprise case in the news would substantially increase business uncertainty. If an SMB is caught on the wrong side of this law, right or wrong, it could cost them valuable time and money responding to the enforcement.

**Competition capture:** Perversely, another uncertainty under these laws, if passed, is the potential for businesses to preempt competition from an emerging SMB. Here, enforcement of these laws could be hijacked by a well-connected firm to thwart an SMB competitor that is a leader in a narrowly defined market the more dominant firm wishes to compete in - precisely the opposite of what those proposing these state bills intend.

### Why are these new state antitrust laws being introduced right now?

**New competition laws:** U.S. antitrust laws are flexible in nature; courts have developed decades of precedent that allows these existing federal laws to be applied to many situations. The state bills discussed in our Working Group vary in their details, but they all tie back to older EU laws that have the lower AOD standard for assessing harm - and represent a shift in thinking among some U.S. stakeholders to more heavily weigh competitor welfare than that of consumers, as U.S. federal law does.

The EU has had its competition laws on the books for decades, while U.S. regulators and courts have had a different “consumer welfare” standard in parallel. Why now, then, are U.S. states suddenly introducing these laws? In the words of one participant, these bills may represent “a reaction, a backlash, a new populist movement” against the power of big companies perceived as the most “dominant,” especially in the tech sector. The lack of new legislation at the federal level in Washington, DC, has led some state lawmakers to take more local action.

**EU’s competition laws as a model for U.S. states:** One participant believes that some states’ infatuation with the EU’s dominance framework isn’t too surprising, as it is “designed to open a market or set of markets and create a level playing field, which should really resonate for the goals of small business.” The idea here is that SMBs sometimes struggle to enter markets, can face high entry barriers, and have trouble remaining competitive in markets once they’ve arrived.

Conversely, another participant quipped that “the main innovation of the EU has been regulation.” Certainly, in recent years the EU has introduced many new regulations aimed at the digital economy: the General Data Protection Regulation (GDPR), the Digital Services Act (DSA), the Digital Media Act (DMA), and most recently, the AI Act (and now there is even talk about a GDPR 2.0). Has all of this regulation led to less-dominant tech firms and more small innovators growing into bigger, stronger competitors?

Not really. And aside from a more constrained environment for innovation, venture creation, and market entry, some even argue that these regulations have made “big tech” more dominant in the EU - obviously not the stated intention. For example, GDPR has been shown to not only not help as intended but also to reduce investments in new startup ventures and has resulted in numerous harms, in effect, “detering a whole generation of innovators” in the EU.

**Experimentation with antitrust law amongst U.S. states:** Several participants in the Working Group think experimentation with state-level competition laws would, at the least, be interesting to observe and track, the idea being that some abuses exist that aren't fully captured under existing federal laws. One remarked, "I think it might be interesting to see Federalism at its best, where you have different states experimenting with different approaches...among antitrust perspectives," while another stated, "I do think that experimentation across states is potentially good. I'm not sure what we have at the federal level is the perfect antitrust regime."

That said, where markets are interconnected, the advantages of uniformity outweigh those of experimentation. As one example, corporations going public used to have to file with not only the Securities and Exchange Commission (SEC) but also with state securities regulators, whereby regulatory patchwork sometimes led to less than optimal situations in which a single state held up an initial public offering (IPO). These state antitrust bills could have similar results if they become law - in effect, a single state setting antitrust policy for the entire country by holding up otherwise legal global deals from moving forward.

**A juncture point in U.S. antitrust law:** We may be at the brink of a "showdown between two visions of what U.S. antitrust law is about." In one vision, federal case law and decades of precedent preserve competitive markets by "minimizing false positive and false enforcement costs." (Note: "False positives" or "false convictions" are cases brought where there isn't actually a violation of the law; "false negatives" or "false acquittals" are when no action is taken when there is some violation of the law.) Here, enforcement has been robust against illegal horizontal mergers, collusion, and cartels, but there is disagreement about how much to restrain vertical mergers. This isn't necessarily lax enforcement but rather a reasoned approach to enforcement that has weighted the error costs that derive from false positives more heavily than false negatives. There is a fair debate about whether that's the correct approach; a lot of the disagreement about these bills falls along the lines of whether people think there are more false positives or false negatives.

The other vision is an ideological one of competition fundamentally not being about efficiency but rather about "fair outcomes encompassing a broader range of stakeholders, not just consumers, but workers and small businesses - even if that comes at the cost of higher prices to consumers, as some populist advocates have acknowledged." Because this vision doesn't fit within current antitrust case law or agency guidelines, its supporters must develop strategies to "detour around the brick wall of federal case law." Notably, based on this vision, the FTC has lost recent legal cases against Meta and Microsoft because they have failed on law and facts to demonstrate competitive harm in front of judges. (We note that there are other ways to address such broader concerns separately from antitrust law, such as through the National Labor Relations Board (NLRB).)



## Conclusions

Properly executed, antitrust law should benefit consumers, labor, and small businesses. SMBs “are the engine of growth and innovation in the U.S. economy, which is declining, and that should be of grave concern,” according to one participant. But are there anticompetitive effects associated with “big tech” acquisitions over the last decade? The evidence doesn't support a lot of the concerns that have been raised about such acquisitions.

In the Schumpeterian view of competition, big waves come and transform the landscape - like now with AI, as one participant pointed out. “As these waves come and they crash, some firms will do better than others. And this is part of the innovation process.” When the government, like the EU, which is already debating its AI Act to regulate a very nascent field, interferes with this evolutionary process, it can negatively affect SMBs. “I think that’s misguided.”

As states consider moving away from the consumer welfare standard, this begs the question: In such jurisdictions, what will be the role of rigorous analysis in decision-making under the new standards, and what are the future consequences of that change? How will lawmakers and courts consider unintended consequences, pros and cons? How will they measure what feels bad vs. what is objectively bad? It’s unclear at the moment, which could very well interfere with the innovation process.

In the words of one participant, “If you look at the way these bills are written, there are all types of unintended consequences that could hit SMBs, or at least make it less appealing for entrepreneurs to enter [the market], if they feel like if they come in and do well that they’re going to be restrained in some way. I think it’s a troubling trend, and it doesn’t seem to me that doing this at the state level will benefit consumers or have any of the potentially intended effects that they espouse to the general public.”

Perhaps a lesson from past antitrust enforcement decades ago must be relearned: “If antitrust law tries at once to protect the interests of consumers and small businesses, it cannot juggle both those balls in the air at once.” Take the classic example of Walmart coming to a small town with its massive economies of scale and buying power. They will underprice the SMBs in town, which will then be in danger of going out of business. Under the consumer welfare standard, this is a matter of efficiency - consumers have been better off with lower prices and more variety. But, SMBs in that market have arguably been made worse off.

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A state can make a policy choice about situations like this and determine it's more important for the state to have less efficient SMBs than to have maximally efficient larger businesses. But, that's a tradeoff and choice policymakers should be aware they have to make because "there's no way under current economic thinking to the best of my knowledge to avoid that in many circumstances." Put simply: the government can't protect everything from everything simultaneously. In the hypothetical example above, keeping Walmart out of that town would hurt Walmart, help local businesses, and ensure prices stay higher and variety stays lower for local consumers. Is the latter somehow more fair or just?

In wrapping up our discussion, one participant simply concluded, "My advice to states is to create a more business-friendly environment." They continued that day-to-day business issues like local crime have far more actual impact on SMBs than any problems this new state-level antitrust legislation purports to solve. "What's the real benefit for small businesses? The cost is potentially high with unintended consequences, higher costs of doing business, higher costs of compliance, and more concerns about doing business in the state."

Markets are not static but fluid and ever-evolving. In the end, new competition from existing and new firms and products relies on entrepreneurs who have incentives to compete. The new state AOD bills discussed in this report may reduce such incentives to compete in those states. Thus, such legislation may have the unintended effect of diminishing competition rather than promoting it.