

Extra-Antitrust: Using the Takings Clause to Correct Anticompetitive Network Markets

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In this article, I consider use of the Takings Clause to “take” a license to critical intellectual property rights as a mechanism to correct anticompetitive digital markets.

Markets that exhibit network effects create some of the same problems as “first in time” real property rights. In both instances, first movers have a significant advantage, and that advantage makes it difficult for others to compete—in the case of digital markets—and to amass wealth and security—in the case of real property. A real property solution is the Takings Clause. The sovereign can take property so long as it is for “public use,” which is generally interpreted as providing for the health, safety, and welfare of the public. One such public use recognized by the Supreme Court is the dissolution of an “oligopoly” in land. In this article, I propose using the Takings Clause to “take” a license to critical intellectual property—patented or copyrighted software or technology—as a way of dissipating an oligopoly or monopoly in a digital market.

Using the Takings Clause in this manner overlaps with the antitrust doctrine known as the “essential facility doctrine,” and in this regard is seemingly redundant. But, importantly, the two solutions differ with respect to who has to pay to “correct” the market for the public benefit. The Takings Clause puts that burden on the public, which can transfer that cost to the beneficiary, whereas antitrust law puts that cost on the defendant. With these distributive concerns in mind, the Takings Clause is likely the better solution, particularly if the first-mover in a market that exhibits network effects creates significant value for society, at significant risk to itself.