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A Conservative Guide to the Antitrust and Big Tech Debate

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KEY TAKEAWAYS

Conservatives are right to be concerned about censorship by dominant Internet platforms but antitrust law is the wrong tool for addressing these concerns.

Federal enforcement agencies have the power to apply antitrust law to address any genuine anticompetitive conduct by Big Tech companies.

Conservatives should fight efforts to use antitrust law to expand federal power over the economy and to undermine the consumer welfare focus of antitrust law.

Policymakers across the political spectrum are debating the virtue of applying antitrust law to the technology sector. While some policymakers are proposing to radically reshape federal antitrust law in ways that would expand federal control over the economy, others appear to want to use antitrust as a way to punish "Big Tech."[1] For example, in 2019, Senator Elizabeth Warren (D–MA) released a proposed plan to break up Amazon, Google, and Facebook.[2] On October 6, the House Judiciary Committee's Antitrust Subcommittee released a majority report regarding digital market competition. The report recommended, among other things, legislation to change the business structure of dominant Internet platforms and limit the markets in which they can compete.[3] Representative Jim Jordan (R–OH), ranking Member of the House Judiciary Committee, succinctly explained that the report "advances radical proposals that would refashion antitrust law in the vision of the far left."[4]

Simultaneously with these far-left efforts, many conservatives are rightfully concerned with how dominant Internet companies are stifling certain speech on their platforms. This has led some conservatives to look to change antitrust as a possible tool to address this concern.[5] In addition, there is also a new federal antitrust enforcement action. On October 20, the U.S. Department of Justice and 11 state attorneys general filed a lawsuit alleging that Google is violating antitrust law.[6]

In light of these developments, this *Backgrounder* explores the concerns that policymakers should consider about the application of antitrust law to the technology sector. More important, though, it explains why conservatives and anyone concerned with free enterprise and economic freedom should be wary of far-left efforts to use Big Tech as the hook to radically alter antitrust law. These efforts, if successful, could give the green light for the federal government to more easily use its antitrust power to reshape the entire economy.

Important Points About Antitrust Law

In order to examine the application of antitrust law to Big Tech, it is important to highlight some key points and principles.

Monopolization Is Illegal, Not Monopoly Power. Section 2 of the Sherman Antitrust Act of 1890[7] does not make monopolies or monopoly power (by itself) illegal.[8] The law prohibits *monopolization*, which requires proof that the defendant has monopoly power[9] *and* engages in exclusionary conduct.[10] Even classic antitrust cases, such as *Standard Oil*,[11] were not focused on whether the companies were "too big" or "too powerful."[12]

More than 50 years ago, the U.S. Supreme Court in *U.S. v. Grinnell* described the exclusionary conduct requirement as "the willful acquisition or maintenance of that [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."[13] As Georgetown University scholars John Mayo and Mark Whitener explained, "Antitrust doesn't condemn a firm for developing a universally popular search engine, ketchup or pharmaceutical drug, even if that success leads to market dominance. It's how a monopoly is obtained or preserved that matters—not its mere existence."[14]

In *Verizon v. Trinko*, Justice Antonin Scalia, writing on behalf of a *unanimous* Supreme Court, reiterated the exclusionary conduct requirement and provided important context on monopoly power:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the

> free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.[15]

Antitrust Law Is Concerned with Harm to the Competitive *Process*, Not Competitors. One of the leading antitrust cases, *U.S. v. Microsoft*, provides a good summary of which exclusionary conduct is prohibited.[16] The U.S. Court of Appeals for the DC Circuit explained that in order "to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."[17] Antitrust law is not concerned with trying to help businesses that are simply being outcompeted by other businesses. Taking action to help them would undermine the competition that antitrust law is supposed to protect.

Modern Antitrust Law Is Focused on Consumer Welfare. During his Senate confirmation hearing, Justice Scalia humorously explained the past incoherence of antitrust law: "Indeed, in law school, I never understood [antitrust law]. I later found out, in reading the writings of those who now do understand it, that I should not have understood it because it did not make any sense then."[18]

Early antitrust law was inconsistent and unpredictable,[19] and reflected a desire to protect small businesses and achieve vague political and social objectives.[20] Numerous scholars, primarily from the University of Chicago, developed a principled and workable framework to consider antitrust questions.[21] Their work, including Robert Bork's landmark book *The Antitrust Paradox*, helped to shape modern antitrust law doctrine.[22] Antitrust scholars Geoffrey Manne and Justin Hurwitz nicely capture the paradox: "For Bork, the paradox of antitrust is that antitrust law, meant to shield *consumers* from anticompetitive business practices, had come to be used to shield *competitors* from competition, at the expense of consumers' welfare."[23]

The work of these scholars helped to provide a much-needed focus for antitrust law that had not previously existed. To these scholars, antitrust law should be concerned solely with economic welfare (as opposed to an approach that included vague non-economic objectives)[24] and it should help to ensure that consumers were protected from anticompetitive behavior. This approach won the day when the Supreme Court in 1979, citing *The Antitrust Paradox*, concluded that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[25] Today, the widely accepted purpose of antitrust law is to promote consumer welfare.[26]

Antitrust Should Be Used Judiciously and Not Used for Unrelated Issues. Unlike targeted regulations that address specific problems, antitrust law can be used to completely reshape an industry and potentially the entire economy by reshaping numerous industries. Therefore, antitrust is not a policy tool to be used lightly. Yet, many proposed reforms, such as in the recent House Subcommittee report, would use concerns about Big Tech as a way to make broad-based changes to antitrust law.

Just because a concern is raised about the power of Big Tech, this does not mean that antitrust is the tool to address that concern. For example, policymakers may want to address Big Tech's censorship of speech or address data and privacy issues. These issues, though, are distinct from the competition issues addressed by antitrust law. Trying to use antitrust to address these unrelated issues will undermine antitrust and gives the impression that the goal is simply to punish Big Tech.

Responding to Frequent Concerns About Antitrust and Big Tech

Antitrust law should apply to the technology sector just as it does to any other sector of the economy. There should be no preferences for the technology sector nor should the government seek to punish it. However, efforts to reform antitrust law to specifically punish the technology sector, or worse, to use grievances against Big Tech to justify broader changes that would affect the entire economy, are terribly misguided.

Nonetheless, these grievances against Big Tech are being presented as the predicate for why current antitrust law needs to be changed. These concerns, many of which are discussed below, fail to make the case for even narrow and targeted legislative reform, much less sweeping reform of antitrust law. Even among the reasonable arguments, there is nothing unique to the technology sector that is being identified nor is there a clear and compelling explanation as to how consumers are being hurt. Further, there is nothing to explain why the application of current antitrust law is insufficient to meet the challenges presented by technology, just as it has met new challenges in the past.

"Big Is Bad" and Neo-Brandeisian Thought. Like Supreme Court Justice Louis Brandeis,[27] some on the far left and other neo-Brandeisians believe that big business is bad, in and of itself. To them, antitrust should be used to go after Big Tech because big businesses[28] and a high concentration of power within an industry are problems to be fixed. Underlying this mindset is the misguided belief that the federal government (or anyone for

that matter) is capable of knowing what the size of businesses should be in a specific industry or what the concentration level should be. Antitrust law, however, rejects this "big is bad" mentality.

The neo-Brandeisians also seek to move from the consumer welfare standard and return to the failures of the past. They want antitrust to look at issues beyond competition and consumer welfare, such as labor rights and political corruption.[29] These could be issues that policymakers may want to address, but they should be addressed directly and not through antitrust. As if applying antitrust to market competition was not challenging enough, they would want to use antitrust to achieve these unrelated and distinct goals that should be debated on their own merits in Congress.

Big Tech and Monopolies. There is a common refrain that the dominant Internet platforms are monopolies. As explained, the Sherman Act focuses in part on the question of monopoly power, not simply on whether a company is a monopoly, let alone large. Establishing that a company has monopoly power involves (1) examining the market share of the company; (2) properly identifying the relevant product and geographic markets of the company (which is likely the most important and challenging issue); and (3) showing that the company has durable monopoly power (that is, as explained by the Federal Trade Commission, "the long term ability to raise price or exclude competitors").[30] All three conditions must be met to show monopoly power. For example, if a company has a large market share in a properly defined relevant market, but it is not considered to have durable monopoly power, then the company does not have monopoly power. It is important to remember that even if monopoly power is established, illegal monopolization still does not exist under the Sherman Act unless the company has also engaged in exclusionary conduct.

Market share, which is just one element of monopoly power, is frequently mentioned in the antitrust and Big Tech debate. As explained by the Congressional Research Service, the Supreme Court has never held that a party with less than a 75 percent market share has monopoly power, although there is no bright line number.[31] It appears, though, from the case law that a sufficient market share would likely be around 70 percent. The following are some market share numbers in Big Tech:[32]

- Amazon has a 39 percent market share of the U.S. e-commerce market.[33]

- Amazon has a 4 percent market share of the retail market (e-commerce and physical competitors).[34] The question of whether the

relevant market is e-commerce or retail generally is just one example of the importance of defining the relevant market.

- Apple has a 56 percent share of the U.S. smartphone market.[35]
- Facebook has a 22 percent share of the digital advertising market.[36]

The current Google case that the federal government brought against the company shows how important defining the relevant market is to establishing monopoly power. According to the government lawsuit, Google has an 88 percent market share of the "general search services" market.[37] However, an important question will be whether this is a relevant market. The federal government also asserts that Google has more than a 70 percent market share in the "search advertising market."[38] Defining search advertising as a relevant market is very questionable since advertisers have many different means to advertise on the Internet, and through other means. When defining the relevant market as digital advertising, Google has only a 38 percent market share.[39]

Network Effects. The dominant Internet platforms such as Facebook and Amazon display what are referred to as "network effects." When a larger number of people or participants use a good or service, the benefits of the good or service increase.[40] Facebook provides one example. The platform becomes more valuable to participants as more people join Facebook. This is considered a direct network effect because there are greater benefits when there are more users on the same side of the market (the Facebook users). When there are more people on Facebook, it is even more appealing to advertisers. This is considered an indirect network effect because there are greater benefits when there are more users on the other side of the market (advertisers are on one side of the market and Facebook users are on the other side). As a result of these network effects, some claim that it becomes very difficult for new entrants to compete against established platforms because the incumbents already have so many users.

These network effects admittedly can be challenges when competing against incumbents. However, there is nothing new to network effects; they did not just first appear with the dominant Internet platforms. Shopping malls, newspapers, television, radio, and telephones are just some examples of older industries with network effects.[41] Further, the companies enjoying network effects are not immune to significant competition, and their strong market position can be short-lived, such as when Google displaced Yahoo as the most popular search engine.[42]

The impact of network effects also might not be what they used to be, as Massachusetts Institute of Technology professor Catherine Tucker has argued:

> Social networks, ride-hailing apps, or digital marketplaces do not depend on any one type of hardware, and as a consequence it costs very little for users to try new ones out. Having five different social media apps on my phone is not a problem at all. Having five different desktops with different operating systems, on the other hand, is clunky.... These examples remind us that network effects only really work as a source of competitive advantage if your product is also "sticky." Scale will not bring future competitive advantage through network effects if your customers can all leave tomorrow.[43]

Big Tech and Mergers and Acquisitions. Two common arguments are that Big Tech companies are using mergers to get too big and that they are acquiring start-ups to avoid potential competition. These issues have garnered significant attention. The House Subcommittee report recommends radical changes that would amend Section 7 of the Clayton Act (which addresses mergers and acquisitions)[44] to shift the burden in mergers by placing "the burden of proof upon the merging parties to show that the merger would not reduce competition."[45] In terms of acquisitions, the report "recommends strengthening the Clayton Act to prohibit acquisitions of potential rivals and nascent competitors."[46] It does not *appear* that the report is actually suggesting a blanket prohibition, although it would make such acquisitions much more difficult.[47]

Incumbent businesses merging with and buying companies is not a phenomenon that began with Big Tech. Mergers and acquisitions can benefit consumers by creating efficiencies in the market, lowering prices and improving goods and services, among other benefits. If the federal government is going to intervene in these freely made voluntary commercial transactions, then it should, as it does now, have the burden of taking the extreme step to block them from taking place. The private parties, not the federal government, are in the best position to make decisions that will affect their private businesses because their decisions are shaped by meeting the demands of consumers. They are not shaped by what some government officials think a market should look like.

Quite simply, the recommended changes in the House Subcommittee report would be an assault on economic freedom. These merger and acquisition recommendations are not limited to Big Tech, thus providing further evidence that the House Subcommittee report is just an excuse to drastically change antitrust law across the board and potentially reshape the entire economy.

Further, this desire to make it far more difficult for incumbent businesses to acquire potential rivals and nascent competitors completely ignores the harm that it would cause to entrepreneurs and the targeted companies. In 2019, half of U.S. start-ups across the economy said that their most realistic long-term goal is to be acquired.[48] Making their desired exit strategy far less likely will discourage entrepreneurs from starting businesses in the first place. It will discourage innovation, harm the nation's technology sector, and hurt Americans who rely on the technologies in their daily lives.

Big Data. There are some concerns that the vast amount of data that dominant Internet platforms possess enable them to have an advantage that is very difficult for new entrants to overcome. For example, by having a significant amount of data, Google arguably can provide better search results than a new competitor.

This argument fails to acknowledge four important points. First, success does not come from just collecting data, but making effective use of the data. Second, the dominant platforms are not able to stop new entrants from gathering significant amounts of data, including the same exact data the platforms themselves possess. Data, like a public good, are non-rivalrous (the supply does not decrease as consumption increases) and non-excludable (it is available to all).[49] Third, Big Data collection is not just limited to the technology sector, and covers offline businesses, such as financial institutions and insurance companies.[50] Fourth, actual experience shows numerous examples of this alleged data advantage being overcome. As explained by David Evans and Richard Schmalensee in *Regulation*:

> AOL, Friendster, MySpace, Orkut, Yahoo, and many other attention platforms had data on their many users. So did Blackberry and Microsoft in mobile. As did numerous search engines, including AltaVista, Infoseek, and Lycos. Microsoft did in browsers. Yet in these and other categories, data didn't give the incumbents the power to prevent competition. Nor is there any evidence that their data increased the network effects for these firms in any way that gave them a substantial advantage over challengers.[51]

The Benefits of the Technology Sector

The misguided attempts to change antitrust law in order to target the technology sector should be considered in light of the technology sector's numerous benefits to the country. The consumer benefits are especially relevant given that the purpose of antitrust law is to promote consumer welfare. It would make no sense to reform (or apply) antitrust law in a manner that would impose more harm than good on consumers.

The U.S. is a leader in the technology industry. Almost half of the 2019 top 50 digital companies listed by *Forbes* were American businesses.[52] The sector's global leadership provides Americans with expanded employment opportunities and a vast variety of goods and services at different prices, often including free products. In 2019, the technology sector directly employed almost 8 percent of the U.S. workforce.[53] In 2018, the industry constituted nearly 7 percent of U.S. gross domestic product[54] and now accounts for nearly 40 percent of the S&P 500.[55] The success of these American companies should not be punished, but lauded, and policymakers should promote the free-market principles that made the accomplishments of these businesses possible.

The U.S. technology sector is not only the result of the competitive process, but is a driver of it. Almost all businesses are partially digitally enabled,[56] and digitalization has become a crucial feature of competitiveness. Technological innovation is pushing business models to evolve, blurring the lines between businesses that produce goods and businesses that produce services, creating companies that produce and supply a combination of both.[57]

For consumers, the technology sector has changed the way we live. Its impact on our lives is exemplified by its importance during the current pandemic. In a recently conducted study by the National Research Group, almost 90 percent of Americans surveyed expressed that their opinions about the role of technology has improved since the health crisis.[58] Amazon can deliver groceries and almost anything else. Food delivery businesses including Grubhub, Postmates, Uber Eats, and DoorDash can deliver food from local restaurants, and meal-prep kits, such as Hello Fresh and Blue Apron, provide the exact amount of ingredients for the meals consumers choose from the websites.

Social networks including Facebook, Instagram, and Twitter keep Americans in touch with far-away friends and family. Google, Apple, Dell, Microsoft, Cisco, Zoom, and others provide the hardware and software so that Americans can continue with work and school during the closures to contain the spread of COVID-19. Netflix, Hulu, Disney+, Amazon Prime, and other streaming sites provide an abundance of choices for movie nights. Exercise studios, such as SoulCycle and Pure Barre, have moved their classes online as gyms have been closed. While some of those businesses may not be defined as technology companies, their services are enabled by technology and without these capabilities, Americans would be worse off. In fact, it is scary to imagine what life would be like during the pandemic without these technological innovations. Of course, even in a non-pandemic world, these services are critical for consumers and will continue to improve many aspects of Americans' lives.

Policy Recommendations

The following recommendations primarily explain what policymakers should do to avoid the problems that would result from the misguided efforts to expand federal government control over the economy through the use of antitrust law. Specifically, policymakers should:

- **Reject efforts to radically expand federal government power through the use of antitrust law.** Policymakers should not only reject efforts to undermine the consumer welfare standard, they should express their strong support for it. For conservatives, the last thing they should want to do is undermine the consumer welfare standard, one of the most important developments in decades that promotes free enterprise and economic freedom. They should also reject other sweeping antitrust changes that would flip antirust on its head, such as shifting burdens of proof that would make it more difficult for private parties to engage in commerce, and anything that would expand the purpose of antitrust from being focused solely on economic welfare.

- **Recognize that they should not allow a dislike of Big Tech to cloud their judgments regarding the proper application of antitrust law.** Conservatives are right to be concerned about how dominant Internet platforms stifle conservative speech. This is an issue, though, that has nothing to do with antitrust law. Trying to squeeze a round peg into a square hole will only serve to hurt consumer welfare and competition, and give the far left its opening to use alleged concerns about Big Tech to radically change antitrust law. These changes could give the federal government the power to reshape industries and even the entire economy. Policymakers should only consider policies that directly and narrowly address any improper censorship issues, consistent with the rule of law.[59]

- **Allow federal antitrust enforcement agencies to properly apply antitrust law to address any anticompetitive conduct by Big Tech companies.** There is no need to amend antitrust statutes when modern antitrust law is flexible and is well-suited to address any potential antitrust violations within the technology sector. As for specific cases, such as the current federal lawsuit against Google, policymakers should provide necessary oversight to ensure that the

federal government is applying antitrust law in a way that does not inappropriately expand federal enforcement powers or hurt consumer welfare. They should also remember that antitrust is very fact-specific and case-specific. Therefore, any evaluation of the lawsuit or other lawsuits should be carefully considered based on the specific nature of the cases.

Conclusion

The United States should reward success, not punish it. Yet, the "big is bad" mindset is all about punishment. It would move the country to a misguided federal government intervention of "too big to succeed." This should be rejected. Some of the criticism of Big Tech is reasonable, but it fails to make the case for changing antitrust law. Conservative critics are right to be worried about censorship, but they should not let this worry lead them to use the wrong tool to address their concerns and thereby make bad policy choices.

Increasing the federal government's control over the economy by using antitrust law to go after the technology sector would be a bad policy choice. Even worse, many of the changes would not merely affect the technology sector, but all sectors of the economy. Policymakers should recognize that antitrust law is perfectly capable of addressing genuine anticompetitive behavior. Conservatives should be the stalwarts of economic freedom and liberty, fighting back against these measures that could undermine Americans' freedom and prosperity.

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Endnotes

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