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The New "Trust Busters" Are A Danger to American Prosperity and Tech Dominance

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"I am not saying that dominant positions in industries cannot be maintained for extended periods. But I suspect in free competitive markets that it is possible only if dominance is maintained through cost efficiencies and low prices that competitors have difficulty matching…By the measures of what benefits consumers, such enterprises should not be discouraged."

–Former Federal Reserve Board Chairman Alan Greenspan

Executive Summary

Antitrust actions against large and profitable American companies have become increasingly popular on the political right and the left. Democrats in the House last year launched a 16-month investigation into the "monopolistic" behavior of companies like Amazon, Apple, Facebook, and Google. Democratic Senator Elizabeth Warren of Massachusetts continues to excoriate big tech for squeezing consumers, while Democrat Amy Klobuchar of Minnesota (the chair of the Senate Antitrust Subcommittee) recently introduced legislation to "modernize" our anti-monopoly laws in ways that could cripple American prowess in the new frontiers of technology products.

On the right, Republican Senator Josh Hawley of Missouri introduced a bill in early 2021 entitled: "Trust-Busting for the Twenty-First Century Act." Senator Hawley, whose background is as a lawyer, defends his bill by saying: "This country and this government shouldn't be run by a few mega-corporations." The Republican Party "has got to become the party of trust-busting once again."

Meanwhile, both the Justice Department and the Federal Trade Commission are ramping up antitrust actions against industries ranging from search engines and media companies to telecommunications, pharmaceuticals, and even bedding products. These actions began under President Trump, but are ramping up under the Biden administration. Multi-billion dollar mergers and acquisitions are being held up by government agencies, leading to multi-year delays and hundreds of millions of dollars of legal costs—costs that are absorbed by industry and the taxpayers.

There is even a movement in Congress to lower the legal standard for monopolistic behavior, moving from the current "consumer welfare standard," which focuses on the harm on consumers rather than competitors, to a new "protection of competition standard," which means a company could be condemned for engaging in a conduct that hurts its rivals. But this is such an expansive definition of monopolistic behavior. Almost every action a company, large and small, takes is to gain a competitive edge against its rivals, and almost any strategy that increases a firm's market share could be deemed anti-competitive.

This study documents the threats posed to America's technological leadership on the global stage from this hyper-aggressive "trust-busting" and anti-merger and acquisition activities of federal lawmakers and agency heads. This redefinition of monopoly, especially in an era of fierce global competition, could cost millions of jobs, sharply reduce America's global tech leadership (to the benefit of China and Europe), greatly reduce funding for small businesses and start-ups, and delegate unprecedented new regulatory powers to lawyers and federal regulators in Washington. The supposed benefit to consumers will be negligible in the short term and will lead to less innovation and thus higher prices in the medium- and long-term.

Here Come the New Trust Busters

The new mantra in Washington when it comes to business is "big is bad." This is a strange kind of paradigm where our political leaders seem to be saying to corporate America: we want you to be successful, but not too successful. We now have several companies with $1 trillion (or nearly $1 trillion) in market cap: Amazon, Apple, Facebook, Google, and Walmart. Of course, almost every American who owns stock, either individually, or through pension funds, IRAs, and 401K plans, owns a part of these companies, so when they get richer, the wealth of many American families expands as well. Given that the greatest economic and national security threat facing America in the 21st century is the rise of communist China, which wants to supplant the United States as global economic superpower, America's technological superiority in search engines, 5G technology, social media, artificial intelligence, bio-engineering, and robotics should be cheered and encouraged. Calls to break up high tech or prohibitions against their expansion in the marketplace only do a favor to our rivals in Beijing and Europe.

One irony of the rise of the trustbusters is that China, Germany, France, Britain, and other nations are suing American companies and trying to impose discriminatory taxes against them to reduce their technological lead. Washington loses any high ground in trying to defend these companies from bogus assaults when our own politicians in Washington and state capitals are making the same claims here at home. Would the trust busters rather see companies like Huawei, Tencent, and Alibaba assume the new top leadership role in tech?

But now we are seeing a new weapon of choice to rein in large and expanding companies: antitrust. It can be a powerful weapon that pits big government against big business.

The 2020 presidential campaigns of Senator Elizabeth Warren and Senator Amy Klobuchar both prominently featured promises to "Break Up Big Tech."[1] Last year, the Democratic-controlled House of Representatives took up the cause of vilifying America's most successful technology companies with its Antitrust Subcommittee conducting a 16-month investigation of Amazon, Google, Apple, and Facebook. This year, Senator Klobuchar, now Chair of the Senate Antitrust Subcommittee, has expanded her mission against Big Tech. She recently introduced a bill that overhauls our entire existing antitrust system and empowers the federal government to use antitrust law to punish successful American companies.

What makes this movement to expand the federal regulatory assault against business doubly-dangerous is that Republicans, who are normally cautious and even hostile to increased government intervention in the marketplace, are calling for an expansion of antitrust laws and enforcements in the technology and media industries. On the right, this embrace of antitrust laws emanates from a distrust of the discriminatory behavior of tech companies when it comes to their treatment of conservative causes and candidates. The liberal bias of Silicon Valley companies is incontestable, and the cancellation of Twitter and Facebook accounts of major conservative voices including President Donald Trump, the censorship of conservative voices and messaging on YouTube, and the algorithms

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[1] Elizabeth Warren, "How We Can Break Up Big Tech" (Mar. 8, 2019), https://elizabethwarren.com/plans/break-up-big-tech/? ; Li Zhou & Emily Stewart, "Amy Klobuchar enters 2020 race ready to take on Big Tech," VOX (Feb. 11, 2019), https://www.vox.com/policy-and-politics/2019/2/10/18205386/amy-klobuchar-2020-tech-policy-anti-trust-minnesota.

used by Google in its search engine to steer its customers away from conservative viewpoints and websites, are just a few of the complaints by Republicans in Congress and right-of-center political and charitable organizations.

Josh Hawley, the Republican Senator from Missouri, is just one of a myriad of voices in Congress that has targeted big tech with anti-monopoly actions. There have also been at least a dozen Republican state attorney generals that have brought antitrust actions lawsuits against big tech.

The Hawley bill is one of the mast economically destructive ideas from a Republican in many years. He wants to put new teeth into antitrust laws that were given birth during America's first "Progressive Era." His bill would:

- ban mergers and acquisitions by firms with a market cap over $100 billion;
- lower the threshold for prosecution under existing federal antitrust laws, replacing the prevalent "consumer harm" standard with one that emphasizes "the protection of competition";
- require companies that lose federal antitrust lawsuits to "forfeit all their profits resulting from monopolistic conduct"; and
- give the Federal Trade Commission new power to designate and regulate "dominant digital firms" in different online markets.

Sounding much like Bernie Sanders, Hawley told Axios: "This country and this government shouldn't be run by a few mega-corporations." This kind of anti-business rhetoric would normally be dismissed by Republicans, except for the rage that so many in the GOP feel toward high tech censorship right now.

Although Big Tech firms are rightly criticized for their anti-conservative bias, antitrust law is simply the wrong weapon for that fight. As Republican Representative Ken Buck cautioned in his superb antitrust report last year, conservatives should be wary of efforts to expand the scalpel-like precision of our current antitrust policies into the "chainsaw of regulation."[2] A chainsaw is a good metaphor for current antitrust reform proposals, which are guaranteed to gut our modern restrained approach and authorize the government to intervene in the market at will. These interventions will harm competition across our economy, including businesses, entrepreneurs, workers, as well as consumers—the very group antitrust claims to protect.

The Progressive Origins of Antitrust Laws

Trust-Busting is based on a century-old leftist myth that America had been taken over by rapacious "robber barons" with their "vast storehouses of wealth." The first progressive era of American politics began in the late 19th century calling for vast expansions of government intrusion into the marketplace. One major new power given to the federal government was the Sherman Antitrust Act to break up monopolies, a law that was then was amended in 1909 with the passage of the Clayton Antitrust Act.

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[2] Rep. Ken Buck, "The Third Way," 6 (2020), https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf.

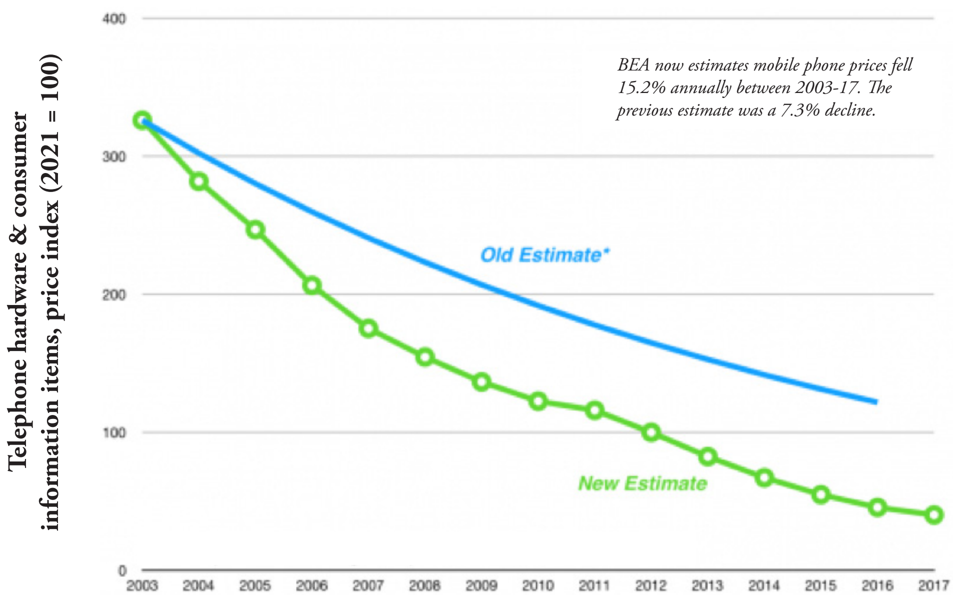
At the time, the industries under attack were not “high tech.” They were railroads, banks, energy companies, steel and aluminum firms, and then the nascent auto industry. Economist Burt Folsom has exploded the progressive movements fabrications in his classic book The Myth of The Robber Barons. This book corrects the historic record by definitively showing that J.P. Morgan, Henry Ford, Andrew Mellon, Andrew Carnegie, Cornelius Vanderbilt, and John D. Rockefeller were anything but villains who pillaged consumers with their monopolistic behavior.

They were the captains of whole new life-changing industries. The left disparaged the prosperity from the “Gilded Age” even as these titans of industry helped convert America into the unrivaled industrial superpower that it became in the 20th century. They were heroes whose railroads, steel, cars and engines, along with the modern financial system that financed it all, gave birth to the modern industrial age.

Monopolies were supposedly harmful because they used their market power and domination to gouge consumers with ever-rising prices. But then, as now, prices fell rapidly in every industry that was supposedly controlled by monopolists, including energy, transportation, and mass consumer items. The prices across these industries became affordable to the middle classes for the first time in world history.

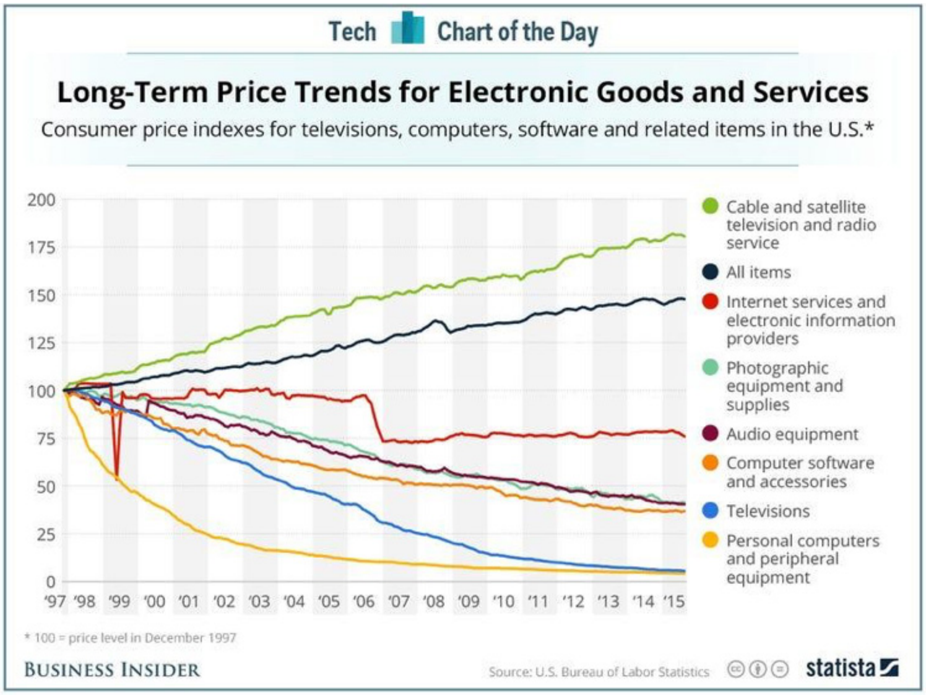
The same is true of modern technology products, like cell phones, which have fallen by about 7% per year in price (adjusted for quality improvements). A cell phone in 1985 cost roughly $3,000 and had unreliable reception, no GPS system, no cameras, no apps, no internet access, no video streaming, music or maps or calendars. Today, a smartphone with all of these features sells for one-tenth that price.

Mobile Phone Prices Fall Twice As Fast As Previous Estimates



Source: Bureau of Economic Analysis
* estimate of previous data, which averaged annual price decline of 7.3%, 2003-16. Nominated for 2003.

Another example is the price of personal computers, internet services, and media. Only cable TV prices, a market that tends to be regulated by government, have risen.



It is true that monopolies can gauge consumers and cause societal harm by blocking competition. When firms engage in violence or bribes or other techniques to kill competition, those actions should be prosecuted. The historical record also shows that the real "monopolies" are those that are given a special monopoly status by the government. Government often confers monopoly and non-compete advantages to certain industries like the railroads, transit systems, schools, and sometimes hospitals, and so on. Those are the monopolies that politicians should be targeting.

IV. Antitrust in the Era of Technology and Trillion Dollar Companies

To be clear, antitrust law is regulation. It is therefore odd that some free market conservatives want government officials to intervene in competitive markets, or markets where a firm has gained dominance through fair methods such as innovation, efficiencies, and brand development. Traditionally, antitrust was defined as when a firm controlled a large share of the market. This was a murky and inappropriate standard because a firm might win high market share simply by finding ways to provide the goods or services at prices that consumers are willing to pay. Markets should generally be left alone with firms free to set prices and output levels that they choose. And exceptions should be rare, such as where firms operate in an industry that is a "natural monopoly," or where the government or industry has created barriers to entry so that competition is stifled and prices are artificially raised on consumers.

The conservative legal movement shaped a middle ground position on antitrust actions grounded in economics.[3] Under this standard, government intervention anticompetitive behavior must be shown to harm the competitive process and therefore consumers. Yet the new definitions of antitrust that have been recently proposed would find a firm in violation of the laws simply by gaining a dominant market position, even if the consumers have not been harmed. Clearly that would seem to be the case with respect to search engines, social media, or mass retail services.

The reason that the United States has led the digital revolution and produced companies like Apple, Amazon, Facebook, Google and others in the first place is due, in part, to our restrained approach to antitrust, as well as broader pro-competition tax and regulation policies. That's not to say that all criticisms against these companies are unfounded. For example, beyond anti-conservative bias, some Big Tech companies have also dedicated millions of dollars to weaken patent rights in the United States at the cost of innovative start-up companies and inventors. Patent rights are key to protecting profit-maximizing incentives and driving economic growth, and efforts to denigrate these rights are concerning. Overhauling or "putting new teeth" into our antitrust policy is not the answer, however.

As misguided calls to radically expand our antitrust laws and enforcement policies grow louder, it is important to separate the facts from fiction. This paper takes a hard look at the claims behind some of the most popular narratives being spun by antitrust reform advocates and previews the very real consequences of gutting our current approach to antitrust law.

Fiction: Large U.S. companies are harmful to our economy.

Many recent antitrust reform proposals rely on "big is bad" rhetoric to target large, successful U.S. companies. This approach ignores the obvious caveat that many companies grow to a certain size in the market because consumers value the high-quality, low-cost products, and services they provide compared to their competitors.

The Supreme Court has been clear that the purpose of antitrust law is to protect competition, not competitors.[4] Using antitrust to punish successful companies favored by consumers just to artificially prop up less efficient, less innovative competitors flies in the face of that tradition. Such policies would inevitably lead to bad outcomes for consumers and American competitiveness in the form of less innovation, higher prices, and diminished quality.

Modern antitrust law safeguards the incentive to innovate by allowing companies to reap the benefits of their investments. As late conservative Supreme Court Justice Antonin Scalia famously explained:

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3 Joshua D. Wright & Jan M. Rybnicek, A Time for Choosing: The Conservative Case Against Weaponizing Antitrust, NATIONAL AFFAIRS (2021), https://nationalaffairs.com/time-choosing-conservative-case-against-weaponizing-antitrust.

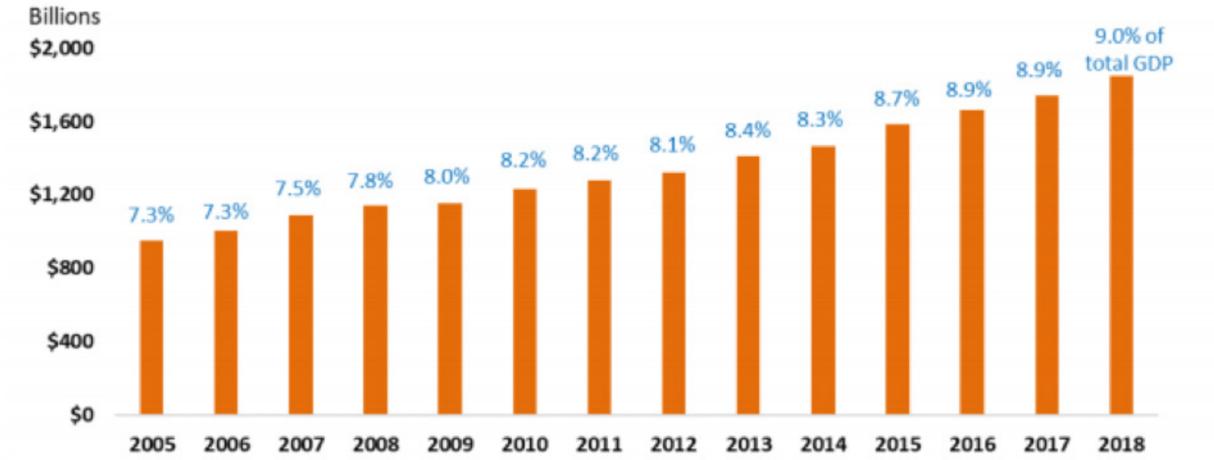
4 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting Brown Shoe v. United States, 370 U.S. 294, 320 (1962)).

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.[5]

Our current system rightfully rewards the risks taken by innovative, successful companies. What incentive will U.S. companies have to invest, innovate, and grow if doing so will make them a target of increased antitrust scrutiny? We should strongly oppose weaponizing antitrust against successful American businesses to avoid dulling the natural incentive in a free market for companies to compete aggressively on the merits.

Given all that our country has endured from the COVID-19 pandemic, we should be focused on efforts to help our economy recover, not creating regulatory regimes hostile to our most successful companies. The digital economy—which includes high-growth companies like Amazon, Apple, Facebook, and Google—is one of the most powerful drivers of the U.S. economy. According to recent estimates, the digital economy accounted for nine percent of U.S. GDP or $1.8 trillion in 2018, up from 7.3 percent ($943.4 billion) in 2005.[6] Real value added from this sector grew at an average annual rate of 6.8 percent per year from 2006 to 2018, compared to 1.7 percent growth in the overall economy.[7] That trend has continued during the pandemic and through the early stages of recovery. Many Americans regard big tech as a savior during the months of pandemic, not as economic predators.

Digital Economy Current-Dollar Value Added and Share of Total Gross Domestic Product



Source: Bureau of Economic Analysis

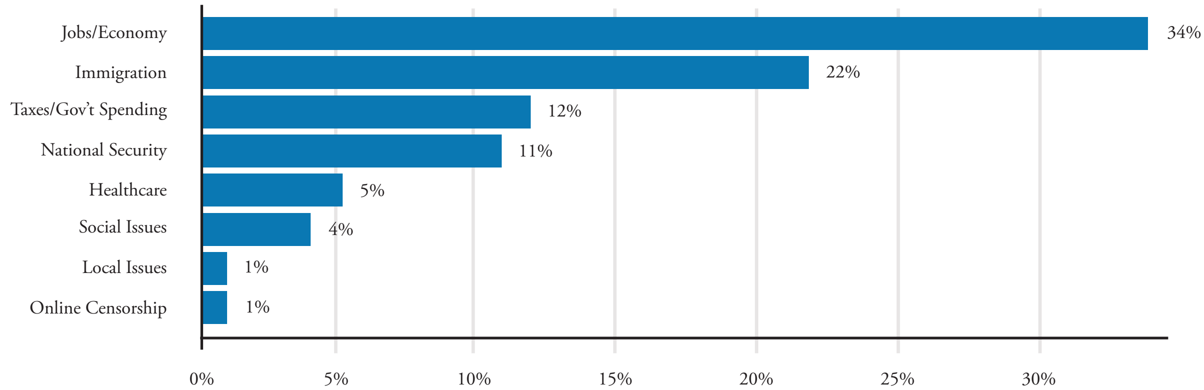
5 Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398, 407 (2004).

6 Bureau of Economic Analysis, "New Digital Economy Estimates" (August 25, 2020), https://www.bea.gov/system/files/2020-08/New-Digital-Economy-Estimates-August-2020.pdf.

7 *Id.*

The digital economy also employed an estimated 8.8 million U.S. workers in 2018, accounting for 5.7 percent of total U.S. employment.[8] The average annual compensation of these employees was $105,473, significantly higher than the $70,858 average annual compensation per worker for the total U.S. economy.[9] According to recent polling conducted by Remington Research Group, conservatives rate jobs and the economy as the most important issues they take into consideration when casting a vote for federal office.[10] It's clear from the data that the digital economy is driving job creation and economic growth in our country—key issues for many Americans. So why is Congress committed to rewriting our antitrust laws to punish these successful companies?

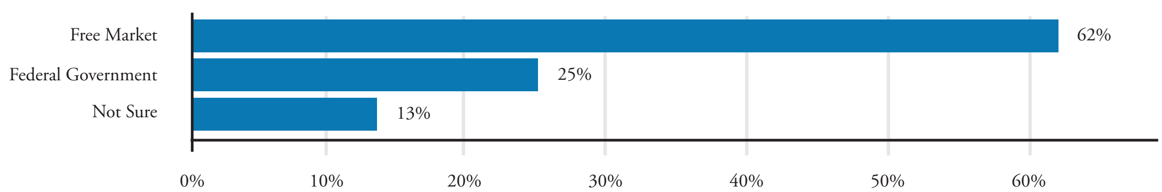
What issue is most important to you when casting your vote for federal offices like the U.S. Senator and U.S. House Representative?



The same Remington Research Group study found that the majority of conservatives polled believe that the free market, not the federal government, should regulate Big Tech companies.[11] If free market competition has enabled these companies to spur innovation, create millions of jobs, and pump money into our economy, it remains unclear what problem reform advocates are trying to fix and why are they using big government tactics to do it.

The Majority of conservative activists believe the free market should regulate big tech companies like Google, not the federal government.

Who do you think should regulate big tech companies like Google: the federal government or the free market?



8 *Id.*

9 *Id.*

10 Committee to Unleash Prosperity & Remington Research Group, "National Study Online Censorship Public Opinion Survey" (May 2020), https://remingtonresearchgroup.com/wp-content/uploads/CensorshipMemo.pdf.

11 *Id.*

Fiction: In the Era of Big Tech, antitrust law needs to be overhauled.

Do the 20th century antitrust laws, which were designed for the industrial age dealing with steel, oil, autos, and telephone companies need to be modernized in the new digital age? No. In fact, technology and rapid speed innovation have rendered 20th century antitrust concerns on their heads. Prices of nearly every digital age product have fallen rapidly in price, which is the opposite of creating a harm to consumers.

Leading antitrust scholars and economists have described the body of antitrust law that developed in the period from the passage of the first federal U.S. antitrust statute in 1890, the Sherman Antitrust Act, through the 1970s as "fundamentally marred by internal contradiction" with incoherent doctrine that promoted "vague social and political goals" and prohibited "economic analysis and fact-based defenses."[12] Antitrust standards became like those for pornography: the courts said "we know it when we see it." Without a clear guiding principle, antitrust law during this period often condemned business practices that actually enhanced competition, like outcompeting rivals on price or vertical mergers that increase efficiency.

Antitrust scholars Joshua D. Wright and Jan M. Rybnicek may have captured the chaos of this period best:

> [Y]esteryear's antitrust was intellectually bankrupt and an insult to the rule of law. It pursued an unfortunate amalgamation of contradictory doctrines, including undefined notions of populism, protection of individual industries, and reducing firm size, that could be used to justify nearly any result. For instance, antitrust law allowed the market-leading frozen pie manufacturer in Utah to successfully sue its three national-brand competitors for eroding its high market share through a series of price cuts—thereby preventing precisely the type of competition the law was intended to protect. Antitrust law was so unprincipled and incoherent at the time that it led Justice Potter Stewart to observe while reviewing a government suit to block a merger between two grocery stores with a combined market share of 7.5% that, "The sole consistency that I can find is that, in litigation under [merger laws], the Government always wins."[13]

Thankfully, roughly 40 years ago, scholars from the University of Chicago and elsewhere stepped in to bring order and consistency to this chaos by developing a framework to guide antitrust inquiries based on economic theory. In his influential 1978 book, The Antitrust Paradox, Robert Bork argued that Congress enacted the Sherman Antitrust Act as a "consumer welfare prescription" with the goal to protect consumers and promote economic efficiency. The Supreme Court formally adopted Bork's interpretation the following year and what we now call the "consumer welfare standard," the standard that guides modern antitrust law, was born.[14] Antitrust scholars credit Bork and the consumer welfare standard for transforming antitrust law "from an often scattered, incoherent, and contradictory set of policy objectives to a disciplined and focused enterprise." [15]

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12 Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets, 3–5 (May 15, 2020), https://laweconcenter.org/resource/joint-submission-of-antitrust-economists-legal-scholars-and-practitioners-to-the-house-judiciary-committee-on-the-state-of-antitrust-law-and-implications-for-protecting-competition-in-digital-market/.

13 Wright & Rybnicek, supra note 4.

14 Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979).

15 Daniel A. Crane, The Tempting of Antirust: Robert Bork and the Goals of Antitrust Policy, 79 ANTITRUST LAW JOURNAL 835, 853 (2014).

The consumer welfare standard uses economic analysis to determine whether certain business activity harms competition by evaluating whether it is likely to harm consumers. Harm to consumers could be shown in various forms, including higher prices, reduced output, or decreased product quality. The standard provides courts and antitrust enforcers with enough power to condemn truly anticompetitive behavior, but also prevents arbitrary government interventions by demanding proof of likely harm based in economics rather than immeasurable social or political goals.

Modern antitrust law, guided by the consumer welfare standard, represents a major victory for conservatives because it limits government enforcement and reduces regulatory uncertainty for U.S. businesses. Abandoning the consumer welfare standard or otherwise expanding antitrust law to address non-competition concerns like free speech is opening the door to big government control over our economy.

What is clear and concrete is that under the modern-consumer welfare standard, most companies accused by the Federal Trade Commission, Justice Department, or State Attorney Generals as "monopolistic" are aiding consumers.

We once thought of General Motors, Microsoft, AT&T and the steel companies as monopolistic, but no one believes that today. Two developments have made it much more difficult for a firm to gain monopoly pricing powers. First, international trade. As markets have expanded from a single town, to a state, to the globe, international competition has driven prices down. Now we live in an age where our domestic companies—such as electric appliances, autos, electronics, and home furnishings—run to the government for protectionist trade tariffs or quotas, not because the prices are too high to consumers, but because they are too low.

Many of the monopoly complaints against the tech and telecommunications firms are that these firms have driven prices down so far that they are stifling competition. These were the charges that were and continue to be made against retailer Walmart, driving local hardware and general stores on Main Street out of business.

Ironically, the computer and high tech age has not created but rather has reduced barriers to entry in markets. The digital age has crushed the price gouging practices of stock brokers, travel agents, ticket vendors, taxicabs, and airlines. Not long ago the government was blocking airline mergers even as the airlines were losing money. The Microsoft antitrust actions went on for many years and cost the taxpayers and Big Blue hundreds of millions of dollars in lawsuits, but no one today believes Microsoft has a monopoly. Is Apple a monopolist because of the hundreds of millions of sales globally of iPhones? Hardly. Cellular phone services (when adjusted for the quality of the product and the array of services provided) have fallen by 80 to 90%. Facebook and Twitter are accused of being monopolies because they can control and censor messaging. While that activity is highly objectionable, there are scores of alternative social media platforms that consumers can choose.

If companies are continually building better products than their competitors, that kind of innovation should be praised and encouraged, not penalized.

Fiction: Mergers and acquisitions are harming start-ups and small businesses.

Many recent proposals, including Josh Hawley's, want to make it harder for companies to engage in mergers and acquisitions by shifting the burden of proof to merging parties to show that the merger would not reduce competition. Traditionally the government has the burden when challenging a merger to demonstrate that the merger may substantially lessen competition. Uprooting this tradition would be an alarming expansion of government control over private business decisions in our free market system. Mergers and acquisitions are often a boon to competition and consumers as they create more efficient companies that can offer lower prices and more innovative products.

In recent years the Justice Department has tried to block a number of blockbuster deals, especially in the technology sector. The Trump administration challenged the $85 billion AT&T and Time Warner merger and is now looking into the $26 billion merger between two large telecommunications giants: T-Mobile and Sprint. Fortunately, the government lost its case, and we now have an American company with the scale and resources to move the United States into the lead in the global race for 5G.

Still, the popular press portrays the take-over artists in almost universally unflattering and monopolistic terms. Targeted companies, their shareholders, and their customers are warned that they are the victims of Wall Street greed. "Eat or be eaten," is the way one news story described the breakneck pace of M&A activity. Private equity deal makers are described as "on the prowl" and no company large or small is "safe" from the corporate raiders. All that has been missing is the theme music from Jaws.

That interpretation is precisely backwards. Virtually all of the recent evidence and academic studies confirm that when the M&A sharks start swallowing the minnows, the biggest financial winners are the minnows—and their shareholders. On average, the raiders bid up the share prices by 20 to 30% and in some cases, as in the takeover bid for Dow Jones, more than 50%.

A 2019 study by the consulting firm, Towers Perrin, reveals that "M&As from the year 2004 onwards are outperforming the market by 7% in terms of shareholder value." We'll see if that outperformance holds up over time.

Regardless of that, corporate take-overs, both friendly and hostile, have big but mostly invisible benefits for the efficiency of the financial markets, for shareholders and the economy at large. M&A activity creates a powerful incentive for entrepreneurs to set out a shingle and start a new business. Small business activity is a hallmark of the U.S. economy's dynamism. The entrepreneurs who launch these enterprises and the angel investors who put capital at risk to finance them often do so with the very intention of someday being bought out at high price by a competitor or a Blackstone Group.

M&As also help restructure companies that are ineptly managed. Even the hated corporate raiders can help enrich shareholders by ridding corporations of arrogant, abusive, excessively compensated, and ineffective management. For all the vilification of Michael Milliken, his firm Drexel Burnham easily created more wealth for American shareholders singlehandedly than all the trustbusters in American history combined. One of the biggest corporate raiders in the world today is General Electric, which budgets roughly $500 million a year for corporate acquisitions. Those who are convinced that company CEOs and top management are grossly overpaid relative to the value they provide to shareholders should be the biggest fans of the M&A industry and its chopping block.

The economic literature is clear that the biggest gainers from M&A activities are not the acquiring firms, but the owners of the acquired firms. One value of the raiders is that they serve as the ultimate oversight on the financial market beat, searching out and destroying flab and inefficiencies. Virtually every hostile takeover, even those financed with "junk bonds," made hundreds of millions, if not billions of dollars for stockowners.

Some trust busters at the Federal Trade Commission and Justice Department have argued against ever allowing two of three leading competitors in an industry attempt to consolidate, and the Justice Department treats this as a de facto monopolistic endeavor. If the Beatles came along today, the Bush Justice Department would no doubt try to break up Lennon and McCartney for cornering too much of the pop music market.

Companies should have the economic freedom to pursue mergers and acquisitions as part of their business strategy and the government should retain the burden of proof in a merger challenge. Given that our country's antitrust enforcement agencies, the Department of Justice and the Federal Trade Commission, have won nearly 85 percent of the merger challenges they brought over the last 20 years, it seems that the system is already unfairly stacked in the government's favor.[16] Adding restrictions on mergers and acquisitions will only serve to hurt U.S. workers, consumers, and shareholders as well as reduce U.S. competitiveness globally.

The popular narrative accompanying these merger reform proposals is that preventing consolidation will help the start-up and small business community. In reality, these proposals will discourage entrepreneurs and innovative U.S. start-ups from entering the market in the first place by blocking the critical exit strategy of being acquired by a larger company. Data shows that most start-ups or small businesses rely on the potential promise of being acquired by a larger company as part of their initial business plan.[17] Recent estimates show that approximately 50% of venture-backed companies exit through a merger or acquisition, while only 15% exit through IPOs.[18] The presence of trillion dollar companies like Google and Apple with hundreds of billions of dollars for asset acquisitions is one of the greatest spurs to new companies being formed in the history of America. A firm that starts with $2 or $5 million of startup capital lures venture capital and angel investors on the promise that in five years the firm can be sold to a large buyer at ten or twenty times the startup finances.

The promise of potential acquisition enables start-ups and small businesses (and the venture capitalists that often fund them) to justify the upfront costs and R&D investments necessary to develop and launch innovative new products and services. And the U.S. start-up and venture capital ecosystem is thriving. In 2019, the United States had the most new "unicorn" companies—venture-backed privately held companies valued at $1 billion or more—in the world, outpacing the closest rival (China) by 56 companies.[19] Merger reforms risk discouraging venture capital investment in the U.S. start-up community due to increased risk on potential returns. Reports show that the share of global venture

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16 Jan Rybnicek, "Op-ed: Recent antitrust proposals could 'throw sand in the gears' of economic recovery by stalling M&A," CNBC (Feb. 12, 2021), https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html.

17 Silicon Valley Bank, "2020 Global Startup Outlook", 7 (2020), https://www.svb.com/globalassets/library/uploaded-files/content/trends_and_insights/reports/startup_outlook_report/suo_global_report_2020-final.pdf.

18 National Venture Capital Association, NVCA Yearbook, 10 (March 2020), https://nvca.org/wp-content/uploads/2020/04/NVCA-2020-Yearbook.pdf.

19 Gene Teare, "The New Unicorns Of 2019," Crunchbase (Dec. 27, 2019), https://news.crunchbase.com/news/the-new-unicorns-of-2019/.

capital invested in the United States has already fallen more than 30% in the last 15 years so new regulatory uncertainty will likely only add to this alarming trend and cause innovative start-ups and venture capital funding to move to other countries with more business-friendly policies.[20]

Fiction: Expanding U.S. antitrust law and enforcement policy will improve American competitiveness.

Despite claims by reform advocates that greater antitrust enforcement will fix all manner of social and political concerns, antitrust actions often end up benefiting not American consumers and workers, but instead aid and abet America's international rivals, especially China. Innovative American companies, especially in the high tech field, are often the target of discriminatory antitrust and trade actions by foreign competition authorities. The European Union, for example, has accused American firms of charging monopolistic pricing, a charge that is meant to suck investment money out of the United States and to the countries bringing the charges. The United States should be vigorously protecting these U.S. companies from spurious charges. Instead, when the federal government brings actions against our domestic companies it plays into the hands of our international competitors and costs America jobs and capital.

Most other countries in the world subsidize and build-up their successful companies. The United States is nearly alone in punishing firms for gaining market share at home and abroad. Aggressive antitrust and anti-merger actions here at home don't protect American consumers, they put Americans' jobs at risk. Sending jobs to China is hardly in the interest of American consumers.

Simply put, the 130+ different antitrust and competition authorities around the world do not all share the same commitment to the rule of law, due process, and fair procedures as the American system. Further, some foreign jurisdictions already use antitrust action and enforcement against innovative U.S. companies to advantage their domestic companies. Adopting overly broad antitrust policies here in the U.S. will only encourage these discriminatory practices abroad.

The International Competition Policy Expert Group, a bipartisan group of competition law and economic experts, found that foreign jurisdictions that did not follow the consumer welfare approach to antitrust experienced more inconsistent outcomes "driven by ad hoc political considerations," "political cronyism," and subjective considerations that undermined business planning and investment.[21] Why would we want to emulate such regimes?

Hamstringing successful U.S. companies, particularly in the technology space, is also a national security risk. The "big is bad" mentality motivating recent reform proposals threatens the necessary role of large companies in maintaining our country's global leadership in innovative technology. Larger companies have the ability to drive innovation by attracting top talent and investing in research and development. Next-generation technology—like 5G, the Internet of Things, and artificial intelligence—requires an enormous amount of costly, high-risk investment in research and development.

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20 NVCA Yearbook, supra note 19, at 13.

21 International Competition Policy Expert Group Report and Recommendations, 20–21 (March 2017), https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf

The United States and China are currently competing to lead in a number of crucial next-generation technologies, including artificial intelligence and 5G, and the United States is struggling to keep pace. China has publicly committed $1.4 trillion over five years for digital infrastructure and would be eager to fill any void left by the United States, particularly to develop standards that favor their domestic companies.[22] Having to rely on infrastructure and equipment funded and controlled by foreign companies, like Huawei, which has ties to the Chinese Communist Party, puts U.S. data and national security secrets at risk. There is nothing the Communists in Beijing would like more than to replace innovative U.S. companies with state-assisted enterprises such as Huawei or Alibaba.[23] We need to ensure that our antitrust policy does not undermine the important role successful U.S. companies have in this race.

[22] Liza Lin, China's Trillion-Dollar Campaign Fuels a Tech Race With the U.S., WALL STREET JOURNAL (June 11, 2020), https://www.wsj.com/articles/chinas-trillion-dollar-campaign-fuels-a-tech-race-with-the-u-s-11591892854.

[23] Stephen Moore, "Don't Break Up Big Tech," (June 16, 2020), https://www.creators.com/read/stephen-moore/06/20/dont-break-up-big-tech

Conclusion

Our political class in Washington and in the states should be engaging in regulatory, antitrust, and tax policies that put America first. This isn't just a campaign slogan. It is a smart economic self-preservation strategy to benefit our own citizens, workers, and families. Putting new teeth into our antitrust policies isn't modernizing these market interventions. It is failing to see and appreciate the enormous benefits to consumers in the United States and the entire world from the digital age driven, thankfully, by great American companies. The consumer surplus created by our Silicon Valley technological supremacy to American workers and families is estimated to be in the trillions of dollars. Google, for example allows tens of billions of computer searches that might have taken the users hours or days to find the data or information, in a matter of seconds—literally with the click of a button. And the wonder of it all is that Google offers this incredible service…for free.

How is that monopolistic? Trustbusters contend that Google has such a superior search engine that they are able to capture up to 80 or 90% of online ad revenues. But there is no shortage of thousands of media and online companies that will sell advertising to a company.

The trust busters also fail to appreciate the history of antitrust actions in America over the last century teaches us that today's monopoly is tomorrow's Sears Roebuck or Circuit City or IBM or U.S. Steel. It isn't easy to maintain market dominance—especially when free markets are allowed to reign.

The real service the trustbusters could provide for American consumers and American global prowess would be to search out real restraints of trade. Rival companies cannot be allowed to conspire with each other to set prices. Protectionist trade policies lower competition and force consumers to pay higher prices. Finally, some of the most abusive restraints on trade are not initiated by companies, but government itself. Government licensing rules are often designed to stunt competition in local markets. Government at times gives exclusive franchise rights to certain companies to provide goods or services. Those are true anti-consumer measures that make Americans poorer.

As the saying goes, better the devil you know than the devil you don't. While free market conservatives may prefer a market completely free of regulation, the consumer welfare standard is a key restraint on the federal government's interference in the economy that conservatives must protect. Abandoning this standard and expanding antitrust enforcement will have dire consequences not just on our economy and consumers, but also on American innovation, entrepreneurship, global competitiveness, and national security. We must not be fooled into trading the scalpel of antitrust for the chainsaw of regulation.

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