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Antitrust Laws Will Make Inflation Worse

Sen. Amy Klobuchar's Antitrust Bill Will Vastly Expand the Regulatory State, Make Inflation Worse, and Crush American Consumers

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About the Authors

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Arthur B. Laffer is the founder and chairman of Laffer Associates, an economic research and consulting firm. As a result of Dr. Laffer's economic insight and influence in starting a worldwide tax cutting movement during the 1980s, many publications have named him "The Father of Supply Side Economics." He is a founding member of the Congressional Policy Advisory Board, which assisted in forming legislation for the 105^{th}, 106^{th}, and 107^{th} Congress. Dr. Laffer served as a member of President Reagan's Economic Policy Advisory Board for both of his two terms and was an adviser to President Trump.

In March 1999, Dr. Laffer was recognized by Time Magazine as one of "the Century's Greatest Minds" for his invention of the Laffer curve, which has been called one of "a few of the advances that powered this extraordinary century." He has received many awards for his economic research, including two Graham and Dodd Awards from the Financial Analyst Federation, the Hayek Lifetime Achievement Award in 2016 from the Hayek Institute and Austrian Economics Center, and the American Legislative Exchange Council's Laffer Award for Economic Excellence. Dr. Laffer was awarded the Presidential Medal of Freedom by President Trump on June 19, 2019. He graduated from Yale with a Bachelor's degree in economics in 1963 and received both his MBA and Ph.D. in economics from Stanford University.

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Abstract

This paper is the first in a series of Working Paper Studies by economist Arthur Laffer and others, to be published by the Committee to Unleash Prosperity, on the perils of legislation in front of Congress. These laws—pushed by Democratic senators Amy Klobuchar and Elizabeth Warren and Republican senator Chuck Grassley—would apply and expand antitrust regulations on America's multi-trillion-dollar high tech industry. Democrat David Cicilline of Rhode Island and Republican Ken Buck of Colorado have a similar bill in the House. These laws would negatively impact the very companies that have become the planetary leaders in innovation, consumer benefits, and productivity improvements with trillions of dollars of benefits to the U.S. economy.

This first study (presented here) offers a sober, clear-headed assessment of the potential economic impacts of recent antitrust proposals and offers persuasive evidence that digital products and services steadily lower prices—which is the opposite of monopolistic behavior. Allegations of monopolistic pricing behavior in the technology sector are misplaced. We show that many of the technology companies that would be affected by the antitrust bills before Congress have driven dramatic *reductions* in prices paid by consumers. The Klobuchar bill could add dramatically to the prices that consumers pay for routine tech services from package deliveries, to cell phones, to search engine services.

This study reaffirms the importance and value of the consumer welfare standard in assessing "monopolistic" behavior. The proposed shift away from the consumer welfare standard will prevent digital services from doing what they do best—driving down prices. In the long run, the expense borne by the consumer will be matched by injuries to the dynamism of the American tech industry, companies small, medium, and large, and the American economy.

In this and future Working Papers we offer abundant historical, legal, and economic evidence for the harm that bills like the Klobuchar proposal would do to the overall competitiveness of the U.S. economy. We show that very few industries have reduced costs and prices more than the tech companies that would be negatively affected by this regulatory assault. For instance, there is simply no evidence that Amazon is a monopoly, let alone a monopoly that is harming its Marketplace sellers—a distinction that is important according to the Supreme Court's interpretation of the Sherman Act.

Supporters of Sen. Klobuchar's S. 2992 and other recent antitrust bills have offered no serious broad-based research to support their efforts to make substantial and potentially harmful changes to the American economy and consumer. In fact, as provided by Sen. Warren's S. 3847, antitrust regulations are "without limit," requiring little or no evidence for the government to break up existing companies of any size, including mergers that happened over 20 years ago.

The desire for more government power to intervene in the economy, while excusing future regulators from having to offer any meaningful scientific evidence to exercise that power, has left us questioning the Department of Justice's claim that, as stated in support of S. 2992, such antitrust bills are truly part of an effort to preserve the democratic process.[1] Denying consumers the benefits of tech products with low and falling prices is not "democratic."

Executive Summary

Democrats say they want to "make antitrust cool again,"[2] But the reality is that the recent wave of antitrust legislation—some supported by Republicans, most notably Sen. Klobuchar's American Innovation and Choice Online Act, S. 2992—would harm consumers, increase inflationary pressures, and by installing European-style antitrust rules, threaten to weaken America's leading technology firms and relegate them to the same status as their European counterparts. The biggest beneficiary will be U.S. international competitors, mostly notably China.

The objective of antitrust legislation, as passed by Congress and interpreted by the Supreme Court, has never been to enforce—as some of the bills would like to do—environmental protections, labor laws, to maintain stable levels of employment, to encourage minority-owned businesses, or to attempt to remedy every problem under the sun, no matter how seemingly just—it has been to protect the consumer against *monopolistic behavior*.[3]

The recent antitrust legislation also neglects over a century of evolution in antitrust philosophy, including the consumer welfare standard, and represents what Americans are growing increasingly tired of: *corporate welfare*. Corporate welfare protects a handful of politically connected special interests at the expense of the public.

Here are the key takeaways from this study:

- **"Big Tech" businesses aren't monopolies according to objective interpretations of publicly available data.**

    - The most recent industrial concentration data from the U.S. Census reveal that between 2002-2017, the Information Technology sector was less concentrated than the average U.S. industry and the Information Technology sector was also declining in concentration over that period.

- **The digital economy is a powerful force for lowering prices throughout the economy, while prices from traditional businesses tend to rise with inflation.** Bills such as S. 2992 will mitigate the digital economy's strengths and in all probability raise prices for consumers.

    - According to the Digital Price Index (DPI), which measures prices of goods sold in the digital economy, a good that was $100 in 2014 would cost $84 in 2022, a decrease of 16% (see pages 41). According to the Consumer Price Index (CPI), a good that cost $100 in 2014 would cost $122 in 2022, an increase of 22%. And prices don't account for innovation—a smartphone in 2022 is considerably more powerful and useful than a smartphone in 2014.

    - According to the Producer Price Index (PPI), digital advertising costs have plummeted, due in large part to Google's innovation and business practices. Digital ad time and space that cost $100 in 2009 would cost $71 in 2022, a decrease of 29%. Newspaper advertising only fell 7% during that same period. Overall advertising, which includes digital, was entirely flat, suggesting that excluding digital advertising, advertising costs rose dramatically between 2009-2022 (see page 44).

- **These bills mandate tech stagnation:** S. 2992's ban on self-preferencing and vertical integration would adversely reshape the current consumer experience online, stifling and disrupting consumer favorites such as Google Maps and Amazon Prime. The vertical integration inherent in today's smartphone is exactly the type of product evolution Sen. Klobuchar's S. 2992 would prohibit. Had that legislation existed in the 1990s, we'd still be buying separate alarm clocks and video cameras. We certainly wouldn't have smartphones or access to all the software applications they provide.

Antitrust legislation, such as Sen. Klobuchar's S. 2992, will injure the digital economy and prevent industry leaders from doing what the digital economy does best: Driving down prices and providing new generations of technology-based products that expand the productivity of the American economy and provide consumers with new generations of exciting and popular new products.

Introduction

"Many people want the government to protect the consumer. A much more urgent problem is to protect the consumer from the government."
- Milton Friedman

It is hard to discern what the antitrust warriors on Capitol Hill are trying to accomplish or what problem they are trying to fix.

The advertisement on the following page features a handful of items unrecognizable to many of those under the age of 30. We may mourn the loss of the daily newspaper or trips to Radio Shack, but we likely feel little nostalgia for the VHS camcorder, the AM/FM clock radio, and cassette tape recorder.

These products are now integrated in a single device, making them easier to use and much, much cheaper.[4] If Sen. Klobuchar's bill had been law back in 1991, the smartphone would not exist, let alone have all these features today.

- 15 electronic items, 13 of which are now delivered via software in your smartphone. Not to mention a near infinite amount of software applications and internet access.[5]
- Cost in 1991: $3,055
- Cost in April 2022 dollars: $6,485
- **Average smart phone cost in 2022: $208**
    - **$208 / $6,485 = 3% of the cost of purchasing the 15 devices in 1991.**

Source: Huffington Post

In addition to integrating the items in the ad—at a fraction of their combined costs—a typical smartphone also includes many features not included in the ad. For example, rather than paying $30 for a single compact disc in 1991, downloading the Spotify app allows a music fan access to millions of titles for free, offering a $9.99 monthly subscription to listen without ads. And smartphone apps also serve greater purposes, by saving lives with real-time weather information delivered directly to the user, time-critical alerts for missing children, and medication check-in reminders for seniors and those living alone. Moreover, smartphones are compatible with smart watches that read a person's heart rate and blood oxygen level, monitor sleep patterns, detect falls, count steps, track fitness routines, and trace running routes.[6]

This is what economists refer to as “vertical integration,” which the Harvard Business Review, in an article discussing the merits and challenges to profitability inherent in vertical integration, defines as the following:

> “Vertical integration is the combination, under a single ownership, of two or more stages of production or distribution (or both) that are usually separate. In the oil industry, for example, the process that takes the oil from the well to the service station is divided into four stages—crude oil production, transportation, refining, and marketing. Some companies specialize in just one of these—Buckeye Pipe Line Company, for instance, focuses on the transportation stage. Other companies combine two or three stages, and the fully integrated major oil companies are involved in all four.”[7]

The vertical integration inherent in today’s smartphone is exactly the type of product evolution one of Sen. Klobuchar’s antitrust bills would prohibit. If that legislation existed in the 1990s, we’d still be paying much higher costs for numerous electronic gadgets from Radio Shack (that we learned about from advertisements in newspapers). And we certainly wouldn’t have smartphones, or access to all the software and hardware features they provide.

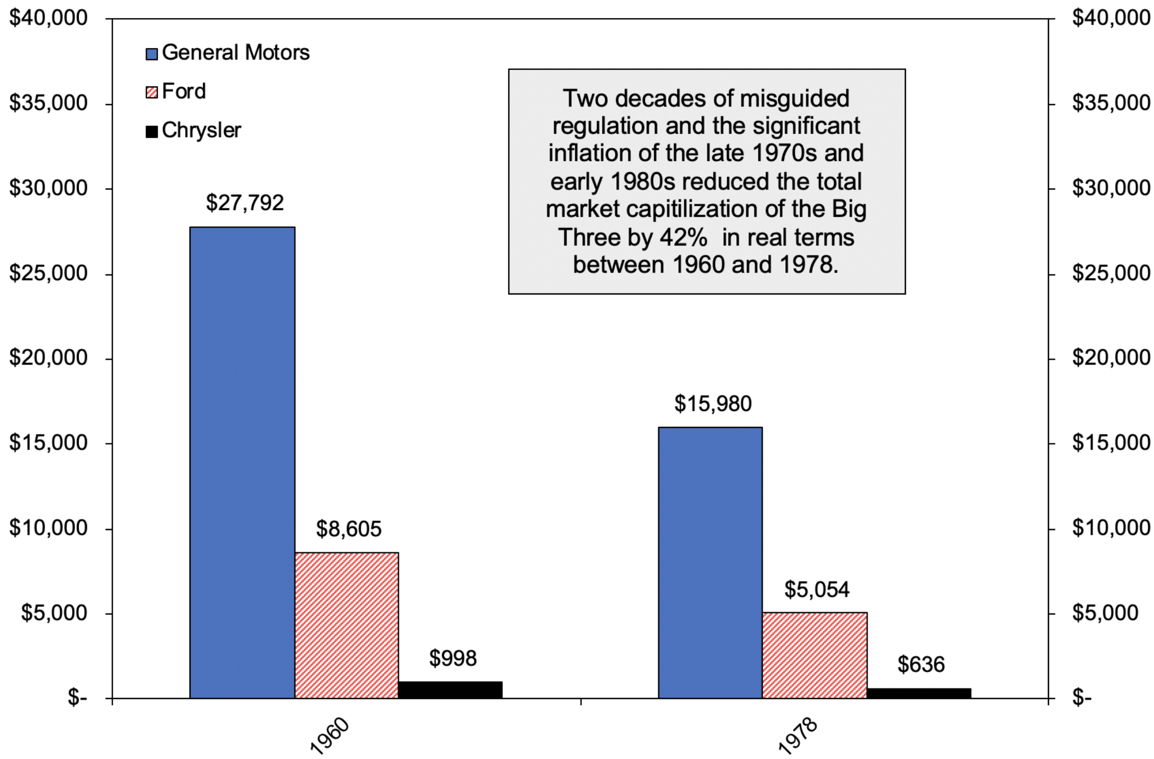
A ban on self-preferencing and integration would prevent U.S. companies from inventing the next generation of technologies. **It is mandated tech stagnation that benefits niche players, not the people who use these products and services.**

Great caution should be exercised with antitrust law lest we significantly negatively alter our standard of living and the United States’ position as a global tech leader.

There is precedence for the similar unwinding of American industrial dominance: the misguided regulation and antitrust worldview of the 1960s (in addition to poorly designed tax policy, other unfortunate regulation, and the significant inflation of the 1970s and early 1980s) reduced the inflation-adjusted market capitalization of the Big Three U.S. auto manufacturers by 42% between 1960 and 1978 (see Figure 1 on the following page).[8]

Figure 1: Total Inflation-Adjusted Market Capitalization of the Big Three U.S. Auto Manufacturers[9]

(1960-1978, USD in millions of 1977 dollars)



Do we really want a similar outcome for our tech industry—or any American industry—for that matter?

The Economic Folly of Proposed Antitrust Legislation

The current wave of politicized antitrust policy being threatening America's global tech leaders mirrors similar efforts around the globe. Notably, Europe has turned to antitrust regulation in an effort to reshape the digital economy. This approach focuses not on consumers' experiences and benefits, but rather on protecting small competitors and implementing government-imposed standards regarding concentration and other metrics.

The Biden Administration rightly criticized Europe's proposed Digital Markets Act (DMA)[10,11] and its potential impact on American companies.[12,13] The DMA would not be Europe's first tech regulation folly; the combination of the EU's labor laws, antitrust policy, and other regulatory burdens are generally regarded as the reasons that no major global tech leaders arose in Europe. Consider this: Facebook (now Meta), Amazon, Apple, Microsoft, Google (now Alphabet), and Netflix are worth approximately $6 trillion,[14] whereas **all of Europe's tech companies are worth about 30% of any one of Amazon, Apple, Google, or Facebook**. SAP, by far the largest European technology corporation, is only worth around 14% of Amazon or Microsoft.[15] Yet by promoting antitrust legislation here at home against our most successful American tech companies, we only legitimize the attacks from foreign countries and foreign competitors against U.S. firms that should be defended by the U.S. government against baseless attacks.

Despite the Biden Administration's well-founded concerns and criticisms, several Democrat proposals will mirror the mistakes of European policymakers that have restrained their information technology industry. Sen. Warren's bill is the most extreme, though it would be a grave mistake to consider Sen. Klobuchar's S.2992 a moderate alternative. Sen. Klobuchar's S.2992 also has the most momentum.

The American Innovation and Choice Online Act (S. 2992)

Sen. Klobuchar's public statements suggest her intentions with antitrust legislation are to provide balance to the marketplace and protect consumers and small businesses. But a thorough reading of her antitrust legislation, including and especially Sen. Klobuchar's American Innovation and Choice Online Act (S. 2992),[16] reveals the potential for legal and economic instability.

If S. 2992 is passed, the reshaping of the digital economy will disrupt beneficial vertical integration practices and harm the consumer—while at the same time sheltering preferred industries from its provisions. S. 2992 has been marketed much like Sen. Klobuchar's Opportunity Act (S. 3197), as the "reasonable" alternative to Sen. Warren's approach; unlike Sen. Warren's legislation, however, S. 2992 has gained momentum and attracted a few Republican supporters.[17] A thorough reading reveals S. 2992 to be hardly the reasonable alternative some have mistaken it for.

S. 2992 is likely the most expansive and intrusive antitrust legislation in decades, harkening back to the days of railroads, when the Court ordered private companies to share their facilities with competitors via the essential facilities doctrine, or the 'Essential Facilities Diktat' as one might call it. Now the target is control over e-commerce platforms built by Amazon, search engines from Google, and smartphones built by Apple. In this section, we will review the underlying philosophy and key provisions of the bill. Please refer to the Appendix (page 31) for expanded analysis of its provisions.[18]

- **Defining "Covered Platforms" and "Critical Trading Partners":** Section 2 of S. 2992 defines a "covered platform" and "critical trading partner," that is, which entities will fall under the purview of S. 2992, and which will not.[19] Rather than being based on market share or some quantifiable means of assessment of the market, S. 2992 "arbitrarily" considers the threshold beyond which an internet company is a covered platform to be $550 billion. Here are a few selection provisions that S. 2992 uses to determine if an online platform is a covered platform:
  - "has been designated as a covered platform under section 3(d)
  - is owned or controlled by a person that:
    - at any point, is owned or controlled by a person with United States net annual sales of greater than $550,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; or
    - during any 180-day period during the 2-year period, had an average market capitalization greater than $550,000,000,000, adjusted for inflation on the basis of the Consumer Price Index, or
    - has 100,000 United States-based monthly active business users on the online platform."[20]

Note that Walmart's current market capitalization of ~$350 billion would shield it from immediate coverage, although Walmart will likely grow into coverage sometime in 2023.

If the 3(c)(6)(B) "arbitrary" market capitalization fails to identify a monopolist, the FTC could always impose "critical trading partner" status on a company—a status that would last for 10 years—to place them under the purview of S. 2992.

  - "The term "critical trading partner" means a person that has the ability to restrict or materially impede the access of:
    - (A) a business user to the users or customers of the business user; or
    - (B) a business user to a tool or service that the business user needs to effectively serve the users or customers of the business user."[21]

- **No "Self-Preferencing":** S. 2992 is a wide-ranging bill that at its heart, by banning self-preferencing, seeks to vertically disintegrate large companies in the digital economy. A ban of self-preferencing may seem nonconsequential; we assure you it is not. On pages 30-32, we provide examples of how much S. 2992 will negatively disrupt the consumer experience. Here is a summary of vertical integration, according to the *Harvard Business Review*:

  > "[vertical integration] is the combination, under a single ownership, of two or more stages of production or distribution (or both) that are usually separate. In the oil industry, for example, the process that takes the oil from the well to the service station is divided into four stages—crude

> oil production, transportation, refining, and marketing. Some companies specialize in just one of these—Buckeye Pipe Line Company, for instance, focuses on the transportation stage. Other companies combine two or three stages, and the fully integrated major oil companies are involved in all four."[22]

Past efforts to vertically disintegrate firms have reduced economic efficiency and harmed the consumer. According to the Global Antitrust Institute:

> "economic evidence from forced vertical disintegration in other industries shows that similar proposals [to S. 2992] to force vertical disintegration to protect competitors reduce consumer welfare. For example, evidence from state laws that prevented gasoline refiners from operating retail gas stations found that these laws raised prices and lowered the quality of retail gasoline services in these states relative to states that allowed the use of vertical integration. Moreover, recent evidence from the recent voluntary exit of refiners from gasoline retailing also show the opposing unilateral price effects involved in vertical integration and de-integration consistent with the approach contained in the 2020 U.S. Department of Justice and Federal Trade Commission Vertical Merger Guidelines."[23]

Such outcomes are exactly what we can expect if S. 2992 passes. While offering crony protection for a handful of companies and industries, the inherent price efficiencies of vertical integration in the digital economy will be reduced, potentially reversed, and prices will tend to resemble the same upward trajectory we see in the traditional economy (see pages 41-45 for price comparisons in the digital vs. traditional economies). In the long-term, America's position as a global tech leader would also be at substantial risk, along with Americans' investment portfolios.

- **Interoperability and Data Sharing Mandates:** Sen. Klobuchar's S. 2992 would force companies to allow competitors to achieve interoperability with their own products. The stated objective is to increase efficiency. The bill states it would be unlawful to:

> "(1) materially restrict or impede the capacity of a business user to access or interoperate with the same platform, operating system, hardware or software features that are available to the covered platform operator's own products, services, or lines of business that compete or would compete with products or services offered by business users on the covered platform."

As an example, under S. 2992, Microsoft would need to allow competitors to integrate their communication tools into Microsoft Teams. It comes as little surprise that over 40 small-medium sized tech companies signed a letter in support of S. 2992.[24] While this provision might provide a much-needed economic lifeline to these companies, there are substantial security concerns. According to the American Consumer Institute, the interoperability mandate poses:

> "…increased risk for user privacy, security, and prohibition to using certain data: Covered platforms would be prohibited from using data that is generated from its consumers' accounts purchasing history. The bill stipulates that a covered platform cannot "use non-public data that

> are obtained from or generated on the covered platform and activities or data." Additionally, covered platforms cannot "materially restrict or impede a business user from accessing data generated on the covered platform." For consumers, this would translate into restricting platforms' abilities to meet consumer demand and putting consumers' data at risk for privacy and cybersecurity breaches."[25]

Despite bipartisan concern about Cambridge Analytica using Facebook data to impact the 2016 election, S. 2992 may increase the prevalence of such problems:

> "Given that large tech platforms operate sophisticated cybersecurity programs and offer substantial data privacy protections, mandating smaller companies with fewer protections to be given access to consumer data means cybercriminals and hackers have greater opportunities to take advantage of these vulnerabilities."[26]

- **Excessive Penalties:** Section 3(c)(6)(B) creates civil penalties for violations in the amount of no greater than 10 percent of revenue of the person during the period of the offense.[27] We're in favor of the proper disincentives as much as the proper incentives; however, such a steep penalty seems to negate the recognition that disagreements among people of good faith are possible; it may, in the course of disincentivizing objectionable behavior, reduce productive economic activity as well. A fine of 10 percent of revenue would erase nearly all the net earnings of a company.

- **Empowers the FTC with a $300 Million Raise in its Regulatory Budget:** Congress should be reducing the enormous regulatory burden on American businesses—estimated at $2 trillion a year—not giving agencies like the FTC a $300 million additional allocation of funds for the purpose of harassing our businesses. We point to the TEAM Act as a more prudent proposal for the use of scarce resources to be devoted to antitrust enforcement (see page 29 for more information).

The Platform Competition and Opportunity Act of 2021 (S.3197)

"Winners go to market; losers go to government"
- Unattributed

Sen. Klobuchar's Platform Competition and Opportunity Act (or "Opportunity Act") of 2021 is designed to protect competition by placing limits on the size of online business that would be allowed to acquire another company. In the process of protecting competition, however, the bill ultimately becomes the epitome of crony capitalism.

"Today, we're increasingly seeing companies choose to buy their rivals rather than compete," Sen. Klobuchar claims on her website.[28] She continues, "competition is critical to protecting workers and consumers and spurring innovation." These statements are not words spoken in error—they are on Sen. Klobuchar's website, after all—and they actually offer insight into her thinking process.

With regards to Sen. Klobuchar's first statement above, clarification is in order: companies seek to merge with or acquire competitors for many reasons—to integrate vertically or horizontally, or to acquire technology or labor skill sets that complement their existing assets; mitigating competition and gaining market share may also be desirable.

In a dynamic, competitive market, a company's ability to merge with or acquire a rival means it has secured the resources to do so by satisfying preexisting customer wants. That company A can merge with company B might also signal the former has successfully outcompeted the latter in the marketplace. Perhaps Sen. Klobuchar thinks mergers or acquisitions should be the result of a government mandate rather than negotiated between market participants and subject to shareholder review. If only this were mere sarcasm, but it isn't: S.2992 expands the FTC budget by $300 milllion as well as the scope of its reach into businesses immensely (see page 13).

With regards to her second statement above, Sen. Klobuchar is correct in one respect: competition is indeed often critical to producing the best possible market outcomes. But as the Antitrust Law Section of the American Bar Association noted in their critique of Sen. Klobuchar's other bill,[29] S. 2992, there is a substantial difference between protecting *the competitive process*, which is essential to healthy markets and has guided antitrust judicial philosophy for over 100 years, and protecting competitors, the latter being the outcome when regulation protects some businesses at the expense of consumers and other competitors (see pages 27-28). Unfortunately, the Opportunity Act, like Sen. Klobuchar's S. 2992, is designed to protect competitors, not the competitive process.

Analysis of the provisions of Sen. Klobuchar's Platform Competition and Opportunity Act (or "Opportunity Act") of 2021[30,31] reveal her frequent platitudes in favor of protecting workers, small businesses, and competition to be disingenuous and the work of a crafty politician. That's because the Opportunity Act was carefully crafted to offer select large businesses, like Target, which is based in Sen. Klobuchar's home state of Minnesota, substantial long-term regulatory protection *from competition* at the expense of both the constituents Sen. Klobuchar purports to protect, and more successful digital marketplace participants like Amazon and Google. As such, the Platform Competition and Opportunity Act epitomizes the worst of crony capitalism.

Below is text from the summary of the Opportunity Act on Congress.gov[32]:

> "This bill generally prohibits operators of covered platforms from acquiring the stock or other share capital or the assets of another person engaged in commerce or in any activity affecting commerce.
>
> *Covered platforms* are online platforms that (1) have at least 50 million U.S.-based monthly active users or at least 100,000 U.S.-based monthly active business users, (2) are owned or controlled by a person with net annual sales or a market capitalization greater than $600 billion, and (3) are critical trading partners for the sale or provision of any product or service offered on or directly related to the platform."

Notice that businesses with annual revenue or market capitalization less than $600 billion are exempt. Since when was a $600 billion business a "mom and pop" shop that needed government protection?

Mom and pop shops are not the ones intended to be protected here. Two companies with revenue that fall under $600 billion in revenue are Walmart and Target. Target is based out of Sen. Klobuchar's home state of Minnesota. Walmart is based in Arkansas, the home state of another cosponsor of S. 3197, Sen. Cotton. As noted by *Reason*:

> "Note, however, the bill stipulates that it only covers firms that are over the $600 billion line "as of the date of enactment." In other words, if a company has a market cap under $600 billion on the day the bill becomes law, then that company is permanently exempt—even if it later crosses the threshold."[33]

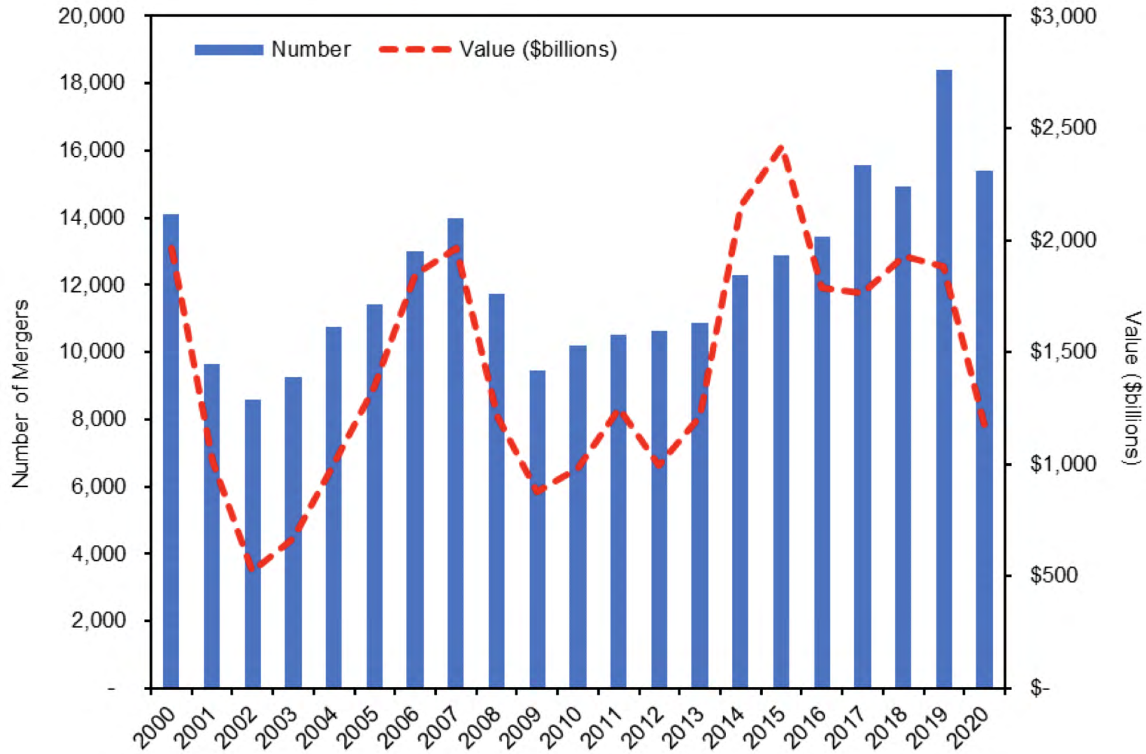
S. 3197 Currently has one Democrat cosponsor, Sen. Blumenthal, and two Republican sponsors, Sen. Cotton and Sen. Cruz.[34] They should know better.

Limiting Mergers and Acquisitions Will Impair New Business Start Ups and Reduce Economic Efficiency

Some of the legislation before Congress would bar certain types of merger and acquisition activity in the technology sector. But M&A activities have been critical to the enormous growth of the tech sector in terms of market value, consumer welfare, and lower costs to consumers. To give context to the potential disruption antitrust legislation could cause, consider the following: between the years 2000-2020, there were 257,134 mergers valued at the time at $29 trillion in the United States (see Figure 2). It is worth asking how many of those mergers would be subject to scrutiny and eventual disintegration under Sen. Warren's bill based on the retroactive review process as stated above, and what the economic toll would be on the involved companies, their employees, and the economy.

Figure 2: Number and Value of Mergers in the United States[35]

(2000-2020)



The companies that merged years ago in Figure 2 have long since shaken off their pre-merger identities to form entirely new entities; it is naïve to think that breaking-up those companies would retain pre-merger identities, ambitions, and competitive advantages. Given the amount of change since 2000, the marketplace may have already determined there is no need for their old business model. This is what Schumpeter called "Creative Destruction."

The "New" Antitrust Formulation Vastly Expands Government Regulatory Powers

> *"…the focus of [the competitive harm requirement of S. 2992] is not on enhancement of market power but instead a return to competition policy picking winners and losers by protecting certain competitors against others" (pgs. 9-10)* [36]
>
> *"If the prohibitions in Section 3(a)(1)–(3) [of S. 2992] mean to establish freestanding prohibitions on 'discriminatory' conduct without requiring proof of harm to the competitive process, then the Bill does not supplement antitrust law but is altogether different in kind" (pg. 11)*[37]
>
> *- Antitrust Law Section of the American Bar Association*[38]

On April 27th, 2022, the Antitrust Law Section ("the Section") of the American Bar Association (ABA) provided critical comments on Sen. Klobuchar's American Innovation and Choice Online Act (S. 2992). What follows is a summary of some of the criticisms of S. 2992; we have quoted the source material extensively to retain the full impact of the Section's criticisms:

1. **Omission of Market Power as Prerequisite for Harm to Competition:**

   "For over 100 years, antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, by ensuring strong incentives for businesses to operate efficiently, keep prices down, and keep quality up" (pg. 10).[39]

   "Proof of market power, like proof of all other elements of a violation, should be required to be established in case-specific factual scrutiny within the context of the adversarial process" (pg. 10).[40] In the absence of market power as a requirement for justification of intervention—by some degree—the possibility of indiscriminate, wasteful, legal intervention that may harm *all* participating businesses and consumers (pg. 10).[41]

2. **Lack of Competitive Harm Requirement and Broad Language May Contribute to Unintended Consequences [emphasis ours]:**

   "The Section urges Congress to require harm to the competitive process for each of the violations set forth in Section 3(a)(1)–(3) of the Bill. The economics of self-preferencing are complex, and the Bill raises a serious risk of unintended consequence based on the broad language of these violations. **The Section cautions against departing from the antitrust laws' commitment to protecting the competitive process as distinguished from favoring one set of competitors over another. This tenet of antitrust has served as a lodestar to antitrust enforcement and should not be omitted."**

If select prohibitions intend to restrict "discriminatory" conduct without a requirement for market power, and hence, no means for determining if harm has been done to the competitive process, then S. 2992 "does not supplement antitrust law" and in fact more closely resembles "common carrier regulations that are not currently enforced by the DOJ or the FTC" (pg. 11).[42]

3. **The Ban on Self-Preferencing May Reduce Consumer Welfare:**

"To illustrate by specific example, the economic literature on self-preferencing lays bare the risk of unintended consequences if all that determines legality is a freestanding "fairness" standard. As those concerned with self-preferencing surmise, self-preferencing can be anticompetitive and welfare reducing in certain circumstances. But this is not the only possibility. Owners of platforms that sell products on their platforms alongside those of third parties ("dual mode intermediation") may also create consumer benefits through increases in product diversity, efficiency, and competition. Indeed, while more work remains to be done, **recent research finds that self-preferencing conduct on a platform can be welfare-enhancing"** (pgs. 11 and 12).[43]

"Prohibition of self-preferencing on the basis of vague and abstract concepts like "fairness" thus risks the destruction of beneficial competition to the detriment of consumers. This risk is compounded by the fact that inherent supply-chain differences between first-party and third-party products makes it difficult to determine what constitutes self-preferencing in the first instance. Case-by-case factual analysis, focused on asking whether self-preferencing enhances or harms the competitive process, is a better path to pursuing the Bill's objectives" (pg. 12).[44]

4. **Forced Interoperability Can Reduce Competition, Innovation, Security, Profitability and Increase Prices for Consumers and Business Users (emphasis ours):**

"…forced interoperability can harm competition by reducing incentives to innovate and imposing economically inefficient requirements on firms. As a result, the Section cautions against broad-brush assumptions that compelled data sharing and interoperability requirements will promote competition" (pg. 13).[45]

"Forced interoperability can cause consumer harm by increasing costs and decreasing innovation. With respect to costs, **accommodating interoperability requirements can involve significant implementation costs, which may be passed on (in part or in whole) to business users and end consumers.** Without particularized studies of costs and benefits, it is difficult to say when the benefits of imposing an interoperability requirement outweigh the costs. Interoperability requirements can also dampen incentives to innovate. With mandated interoperability "[t]he incentive to invest in new features and improvements to existing platforms [are] diminished, because those improvements could be accessed by customers of competing platforms." In other words, by decreasing the profitability of product investments to platform owners, interoperability requirements decrease incentives to engage in product innovation and can increase product homogeneity. Moreover, the literature suggests that making all functions interoperable with all firms may not be efficient, as it deprives platforms of control over their own system and security" (pg. 14).[46]

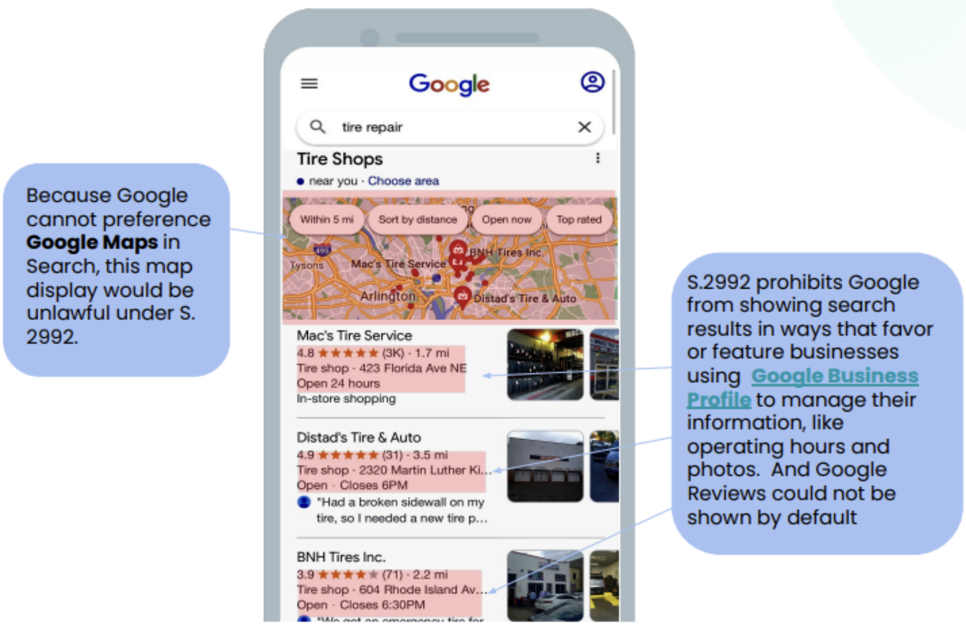
The Ban on Self-Preferencing Prohibits Innovations and Products Businesses and Consumers Depend On[47]

Unfortunately for the American consumer and digital businesses that are integrated with and depend upon Amazon and Google, antitrust legislation is no small thing. Through a fair analysis of how key provisions of S. 2992 will impact digital experiences most of us use daily, it becomes clear that the blunt provisions of S. 2992 will damage a vibrant economy that draws its strength and benefits from the complex integration of all of the ecosystem's participants.

The examples below illustrate how S. 2992 will negatively—and *immediately*—disrupt the options available to consumers.

Example #1: Google Maps

When users of Google Search are looking for a business nearby, they expect search results to include a Google map that shows locations, linked to customer ratings and reviews and to business profiles that include driving distance, photos, and operating hours.



Under S.2992, Google may not preference its own Google map and Google's customer ratings, driving distance, and information provided by the business. Google Search would be forced to integrate and share data with other map providers, like MapQuest, TomTom, Yandex, etc.

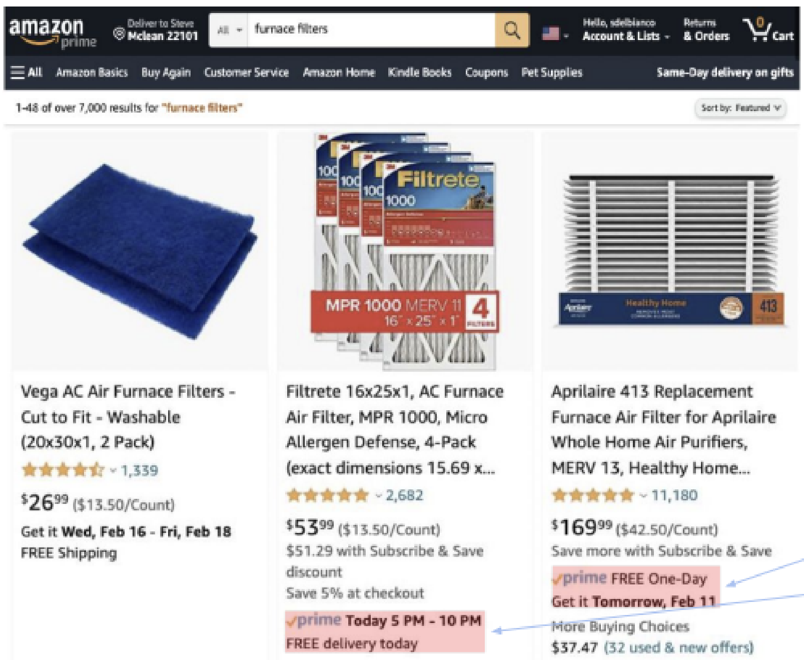
> It shall be unlawful... to preference the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition.

Moreover, Google may not arrange search results in ways that favor or feature businesses using Google Business Profile to manage their information, like operating hours, photos, and reviews.

Example #2: Amazon Prime

> *"It [Sen. Klobuchar's S. 2992] was like it was written by somebody who didn't understand e-commerce."[48]*
> *- Kristin Rae, founder of Amazon Marketplace seller Inspire Travel Luggage*

Amazon Prime subscribers expect to compare products in search results, where a **Prime** badge means that Amazon guarantees free delivery by the promised date. For a product to be eligible for Prime, a marketplace seller needs to use Amazon's fulfillment services and provide inventory to Amazon's distribution network.



S. 2992 prohibits Amazon from featuring **Prime** badges only for sellers who use Amazon's fulfillment services.

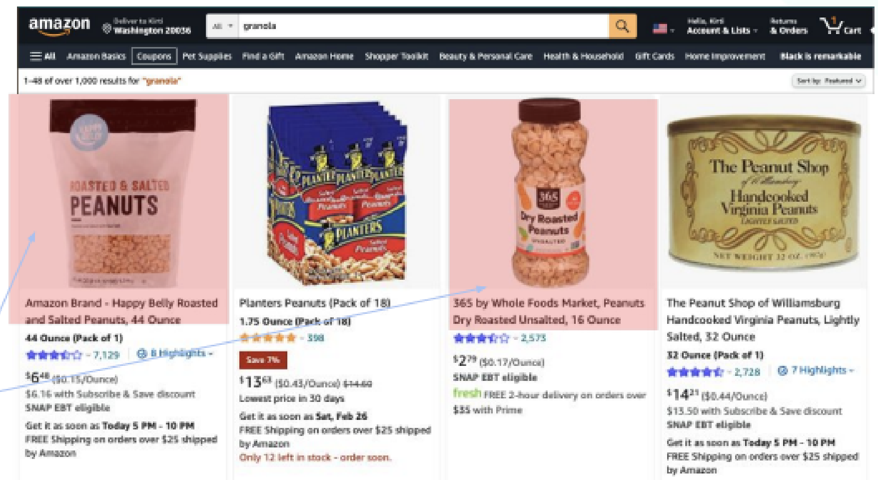
In the example above, the first seller cannot display the **Prime** badge since they are not using Amazon's fulfillment services, although that seller is promising free shipping with 1-day delivery. Prime subscribers often look for the Prime badge to ensure faster free delivery by Amazon.

But Amazon may not favor Prime offers from Amazon or from marketplace sellers, since that favors sellers who use Amazon's fulfillment services. That is unlawful conduct under S. 2992 Section 2:

> It shall be unlawful... to preference the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition.
>
> It shall be unlawful for a person operating a covered platform... in connection with any covered platform user interface including search or ranking functionality, treat the products services, or lines of business of the covered platform operator more favorably relative to those of another business user.

Example #3: Amazon's Own Affordable Brands

When Amazon consumers search for pantry staples, they expect results that include Amazon's own affordable options, like **Happy Belly** or **365 by Whole Foods,** so they can compare against name brands offered by other marketplace sellers.



S. 2992 prohibits giving **Happy Belly** or **365 by Whole Foods** more favorable placement than products from other sellers.

But under S.2992 Section 2, Amazon could not give preferential placement to its **store brands** as seen above since it would be considered unlawful conduct:

> It shall be unlawful… to preference the covered platform operator's own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition.
>
> It shall be unlawful for a person operating a covered platform… in connection with any covered platform user interface, including search or ranking functionality, treat the products services, or lines of business of the covered platform operator more favorably relative to those of another business user.

Amazon may not favor its **Happy Belly** or **365 by Whole Foods** products—both of which are SNAP EBT eligible—by giving them more favorable placement than products from Amazon marketplace sellers.

Digital Economy Lowers Prices to Consumers and Businesses

"The internet in general is no place to go in search of inflation: in America online prices have been falling fairly steadily since about 2012 and are lower than they were at the turn of the millennium."
- The Economist, 2019[49]

There is a fundamental difference in the prices of goods and services that are sold online versus those sold in the traditional economy: the prices of goods and services sold online consistently fall over time, i.e., are deflationary, whereas their counterparts in the traditional economy tend to increase, i.e., are inflationary. The evidence for this phenomenon is plentiful and warrants a thorough review; an explanation of the underlying economic theory that facilitates it will follow.

The Evidence

Evidence for the divergence in prices between goods and services in the digital and traditional economies is abundant. We find no source available that depicts a secular increase in digital prices, and certainly no sources show nominal price declines in the traditional economy.

The sources for these data include private sector participants like Adobe and the Federal Reserve, and multiple government agencies, such as the Bureau of Labor Statistics and the Bureau of Economic Analysis.

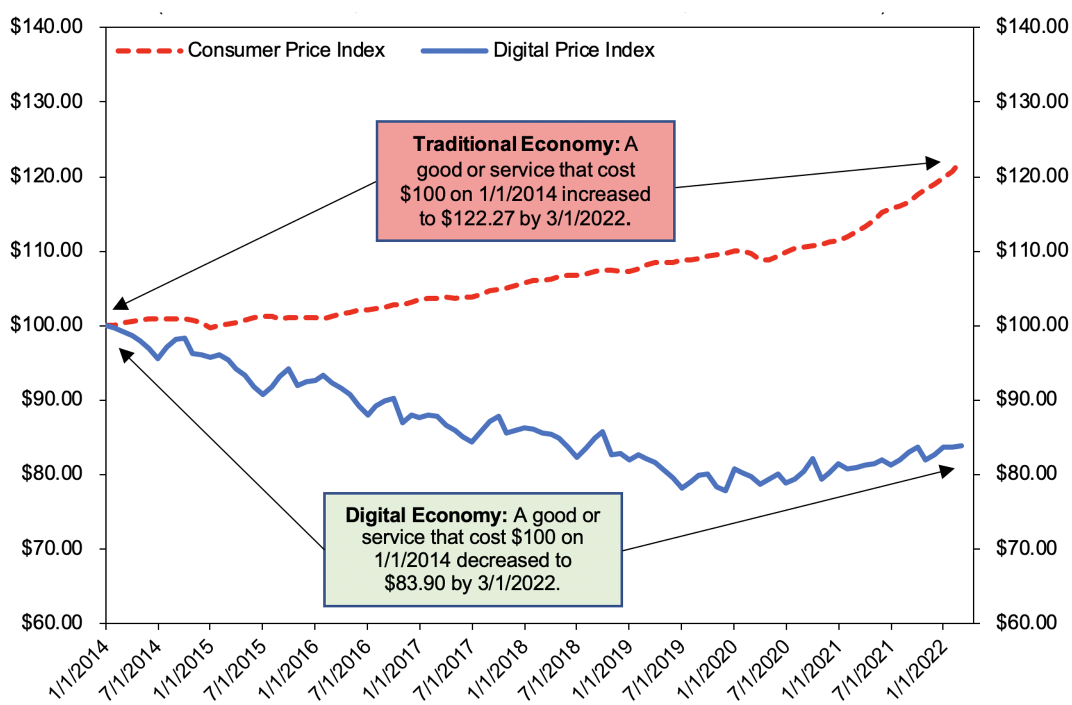
Adobe's The Digital Price Index

Economists Austan Goolsbee and Pete Klenow developed the Digital Price Index (DPI) with Adobe. Drawing upon on Adobe's AI and machine learning tools, the DPI "analyzes one trillion visits to retail sites and over 100 million SKUs across 18 product categories: electronics, apparel, appliances, books, toys, computers, groceries, furniture/bedding, tools/home improvement, home/garden, pet products, jewelry, medical equipment/supplies, sporting goods, personal care products, flowers/related gifts, non-prescription drugs, and office supplies."[50]

Figure 3 on the following page compares the DPI with the consumer price index (CPI) since the DPI was created in January 2014. The divergence in prices is considerable: **a representative item contained in the DPI that cost $1 in 2014 would now cost $0.84, while a representative item contained in the CPI would now cost $1.20.**

Figure 3: Digital Price Index vs. Consumer Price Index[51,52,53]

(Jan-2014 – Mar-2022, CPI = CPI-U for all urban customers, both indexed to 2014)



The Federal Reserve's Digital Access Services Data

The DPI vs. CPI comparison is not the only evidence for the divergence of digital vs. physical market prices. An extensive 2020 study from the Federal Reserve (The Fed) found prices of what it refers to as "digital access services" not only consistently fell over a period of decades, but that in nearly every subsequent decade over the last 30 years, the fall in prices tended to accelerate. The Fed's evidence is based on multiple data sources.

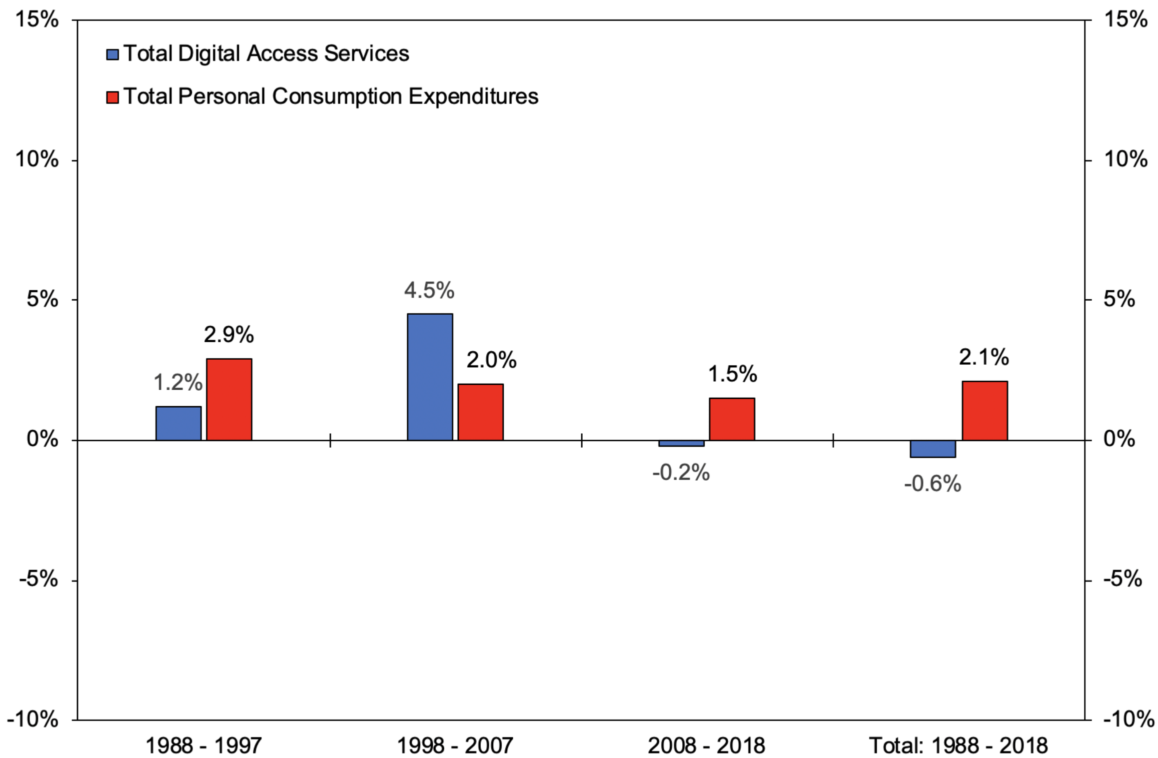
In its first analysis, the Fed compared changes in prices in "digital services" versus the traditional market with current data from the Bureau of Economic Analysis (BEA) and the Bureau of Labor Statistics (BLS). The Fed defined total digital services as being the aggregate of the following categories: Internet Access Services, Mobile Access Services, Cable Access Services, and Streaming Services.[54]

Referring to Figure 4 on the following page, according to official inflation metrics, prices of digital access services increased at an annual rate of 4.5% between 1998 and 2007, before reversing course and falling 0.2% between 2008 and 2018. In the traditional market, goods and services increased at annual average rates of 2.0% and 1.5% between 1998 and 2007 and 2008 and 2017, respectively.

Over the last 3 decades, digital goods and services fell at an average rate of 0.6% while goods in traditional markets increased at an average rate of 2.1% (see Figure 4 below).

Figure 4: Federal Reserve, Official Inflation Metrics: Digital Access Services vs. Personal Consumption Expenditures (PCE): Average Annual Percent Change[55]

(1988-2018)

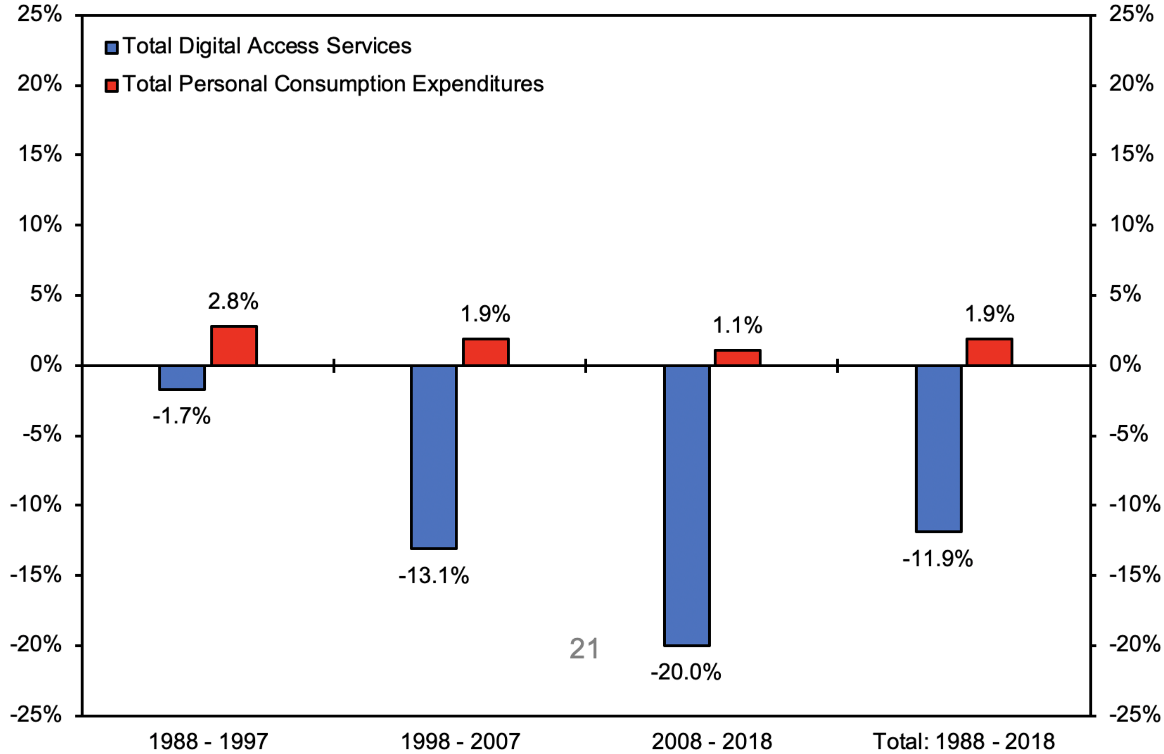


However, when the Fed adjusted its assumptions and applied its own calculations to the data in order to improve accuracy, the performance gap between digital and traditional prices increased.[56] Referring to Figure 5 below, according to official inflation metrics, prices of digital access services fell in every decade: decreasing at annual rates of 1.7% between 1988 and 1997, 13.1% between 1998 and 2007, and 20% between 2008 and 2018. Traditional goods and services prices increased in every decade over the last 30 years, though to be sure, at least the rate of increase was falling.

Over the last 30 years, in digital services, prices fell at an average annual rate of 11.9% while prices in traditional markets increased at an average annual rate of 1.9%.

Figure 5: Federal Reserve, Alternative Metrics: Digital Services vs. Personal Consumption Expenditures (PCE): Average Annual Percent Change[57]

(1988-2018)



The Producer Price Index Shows Falling Marketing Costs

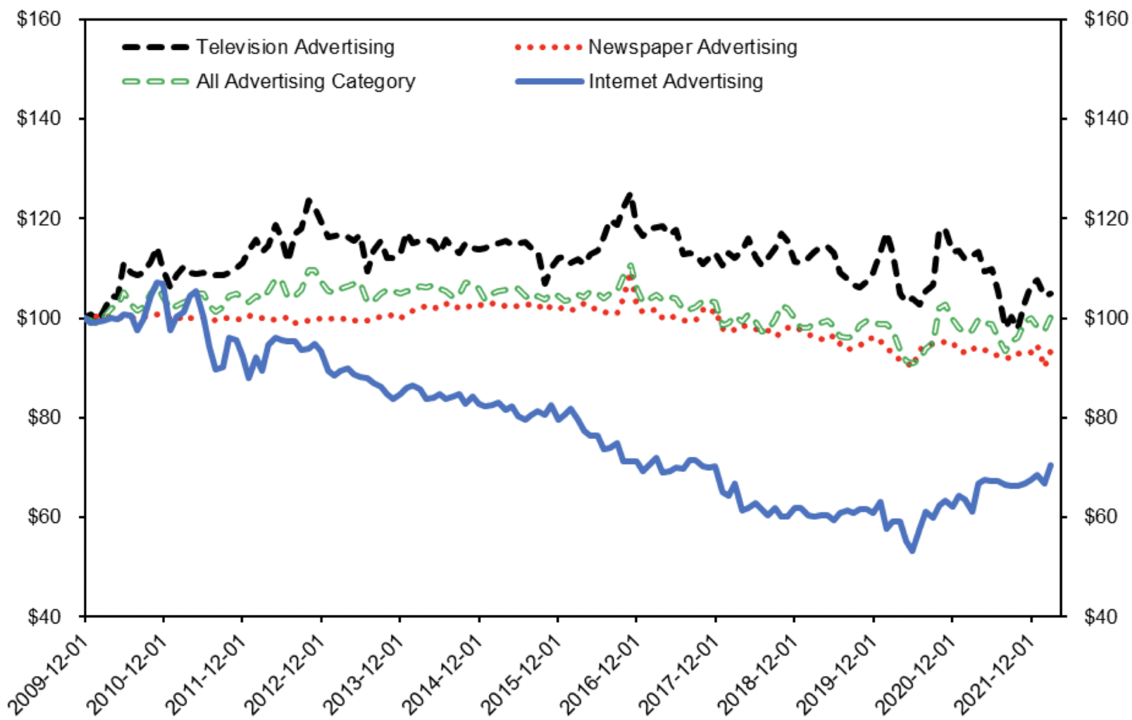
The Producer Price Index (PPI), like the CPI, measures the cost of goods and services; however, the PPI reflects the cost of goods and services as input costs for businesses, rather than the prices consumers pay. The PPI data for internet sales has been collected since 2009.

Figure 6 on the following page compares the PPI for space and time sales in several advertising categories: internet, television, newspapers, and the entire advertising category.[58] When compared with other advertising channels like television, newspapers, and all advertising, digital ads sold on the internet fell dramatically in relative terms.

In December 2009, an Internet ad that cost $100 would have fallen to $71 by March 2022 (see Figure 6). A $100 television ad in December 2009 would have risen to $105 by March 2022, and a $100 newspaper ad would have fallen to $91. Despite the dramatic shift from newspapers and other print media to the internet, the cost of digital ads fell three times faster than newspaper print ads during the same period.[59]

Figure 6: Producer Price Index: Advertising Space and Time Sales for Internet, Television, Periodicals, and All Advertising Category Sales[60]

(Monthly, Dec 2009 to Mar 2022, all data reindexed so Dec 2009 = 100, not seasonally adjusted)



The broad economic benefits of the dramatic fall in costs for online ads should not be understated, as advertising is a substantial cost for many businesses. Over the last decade, companies spent between 1-30% of their annual budgets on marketing costs.[61,62]

The Benefits of Scale are Timeless: Why the Digital Economy's Big Players May be Subject to Powerful Market Forces, and Remain Price Takers—not Price Makers

> *"In fact, the major result of general equilibrium analysis is the following: under certain conditions, a general equilibrium with two or more noncolluding firms per industry is perfectly competitive."*
> *- Noble Laureate Eugene F. Fama and Dr. Arthur B. Laffer*[63]

The paper first establishes a variation of the Cournovian model, named after Cournot, a French mathematician. In this model, "there is a positive relationship between the degree of competition and the number of firms," meaning, as there are more firms, there is greater competition. Under this view of Cournovian competition "*Firms Mind Their p's but not their q's*,"[64] meaning, they take the price consumers are willing and able to pay, and merely determine how many units to produce based on their costs.

The paper offers an alternative framework under the general equilibrium model, the assumptions of which are:[65]

- "Factors of production are infinitely divisible.
- Information about the returns earned by factors in different firms and industries is available costlessly to everybody, and factors act to maximize their returns.
- The same techniques of production are available to all firms in any given industry.
- The demand curve for the good produced by any industry is downward sloping with nonzero elasticity at all levels of output.
- At any given level of output, the curve showing the minimum marginal cost of industry output as a function of industry output has greater slope that the industry demand curve.
- Conditions of production are such that the rest of an industry can always use precisely the incremental quantities of factors or production demanded or released by a firm to offset precisely output changes by a firm."

Dr. Fama and Dr. Laffer demonstrate mathematically that under a General Equilibrium framework, one or more of the above assumptions must be violated for the state of perfect competition to be disturbed and for firms—even monopolists—to no longer be "price takers." The term "price takers' markets" describes a class of markets where every supplier (and also every demander) provides so small a portion of the supply (or demand) that his output (or demand) has no significant effect on price; hence he "takes" the market price as if it were given by outside forces."[66] This model provides additional theoretical support for the consistent downward trend of prices in the digital economy.

Misguided Antitrust Policy Will Make Inflation Worse

Antitrust is not anti-inflation—quite the opposite, according to economic theory. Proposed antitrust regulatory legislation from Sens. Klobuchar and Grassley that targets companies based on size–threatening utility-style regulation and huge financial penalties–will not reduce inflation. In fact, the inefficiencies this legislation would create could make inflation worse, and further raise the prices of basic needs for consumers.

Abandoning the consumer welfare standard will allow government agencies such as the FTC to control America's most successful firms. This is not a partisan political issue, it is economics. Below is a collection of voices from across the political spectrum warning of the potential for misguided antitrust policy to reduce supply and exacerbate inflation:

"Blaming inflation on anti-competitive behavior (or greed) is like blaming plane crashes on gravity."
- Jason Furman, Chair of Council of Economic Advisors for President Obama

"The emerging claim that antitrust can combat inflation reflects 'science denial'. There are many areas like transitory inflation where serious economists differ. Antitrust as an anti-inflation strategy is not one of them…" Though Summers supports the administration's competition agenda, he also states the agenda is at odds with combating inflation: "as described, hipster Brandesian antitrust, with which the Admin and its appointees flirt, is more likely to raise than lower prices." [67]
- Lawrence Summers, Treasury Secretary for President Clinton, Adviser to President Obama

The Path Forward: Antitrust Legislation that Protects the Competitive Process and Consumers: The TEAM Act (S. 2039)

> *"It is a foundational principle of our republic that the law deals with conduct, not status. We punish people for what they do, not who they are. "Big is bad" abandons that fundamental American principle of law. Instead, the facile insistence on being simply "anti-monopoly" belies the proponent's true priorities: it means being anti-business, even when it hurts consumers. It is the economic version of cutting off your nose to spite your face."*
> *-Sen. Mike Lee, June 14, 2021*[68]

In June 2021, Sen. Lee and Sen. Grassley introduced the Tougher Enforcement Against Monopolists (TEAM) Act (S. 2039).[69] S. 2039 is a holistic approach to addressing antitrust concerns that avoids the mistakes of other heavy-handed proposals that miss the mark entirely.

S. 2039 would codify the consumer welfare standard and improve antitrust enforcement by uniting the FTC and DOJ efforts. There has been growing tension between the two agencies in recent years regarding oversight and which agency takes the lead. This confusion has led to delays in enforcement and uncertainty for businesses.

S. 2039 would also double appropriations for enforcement, ensuring that the FTC and DOJ have the resources to adequately protect consumers. Below are other highlights from the bill:

- Codifies the Consumer Welfare Standard. (Title 5, Sec. 506).
- Applies antitrust principles across the economy instead of using federal power to target select industries or businesses.
    - By contrast, Sen. Klobuchar's S. 2992 focuses her attention on "Big Tech" even though the practices she seeks to outlaw are common across industries.
- Streamlines antitrust enforcement into a single agency instead of expanding the authority of now aggressively politicized bodies. (Title 1, Sec. 102)
    - By contrast, Sen. Klobuchar's S. 2992 keeps enforcement efforts fractured and expands discretionary powers at the FTC and DOJ at a time when those agencies are hyper-partisan and ideological.
- Allows consumers to recover damages and empowers the DOJ to pursue civil penalties and treble damages for antitrust violations.

- The TEAM Act clarifies antitrust remedies for enforcement and the court including overturning *Illinois Brick* and *Hanover Shoe* to expand the consumers that would be eligible to recover damages.

S. 2039 is a targeted, thoughtful piece of reform legislation that builds on the strength of existing antitrust law rather than increasing government intervention in the economy. Much of the benefits that the TEAM Act seeks to bring about are directly undone by the adoption of Sen. Klobuchar's American Innovation and Choice Online Act (S. 2992). The two bills are contradictory, and members of both parties who wish to protect consumers—and we believe that is the case—should continue to understand the merits of the consumer welfare standard and provide stability to the economy by codifying it in the TEAM Act.

Appendix

Analysis of Specific Provisions of S. 2992 by NetChoice

- **Section 3(a)(1)** makes it illegal to "preference" the platform's own offerings over a competitor in a way that would "materially harm competition" on the platform.
  - "Preference" and "materially harm competition" are vague, undefined phrases that empower the Khan-controlled FTC and the Kanter-controlled DOJ to regulate platforms and condemn business practices as they see fit.
  - FTC could make it illegal for a business to order results in a way most beneficial for consumers. For example, Google Maps/Reviews showing up at the top of search results, Amazon Basics' more affordable offerings being shown in a comparison box at the bottom of a page.
- **Section 3(a)(2)** makes it illegal to "limit" the ability of a platform's competitor to compete with a platform's own offerings in a way that would "materially harm competition" on the platform.
  - Raises the same vagueness concerns mentioned above that would effectively delegate substantial power to the FTC and DOJ.
  - Would greatly limit the ability of a platform to protect their customers by preemptively controlling access to the platform and quickly excluding companies that pose a meaningful security or privacy risk. While there is an affirmative defense for such actions, the platforms will err against exclusion under the threat of costly litigation.
- **Section 3(a)(3)** makes it illegal to "discriminate" in the enforcement of a platform's terms of service when it comes to similarly situated businesses.
  - Incentivizes a platform to refrain from enforcing their terms of service in specific circumstances for fear they have missed an enforcement action elsewhere. Creates an impossible scenario where businesses have to somehow identify all potential violations and bring enforcement actions against them all at once or risk litigation for "discriminating" against specific companies.
- **Section 3(a)(4)** makes it illegal to "materially restrict, impede, or unreasonably delay the capacity" of a competitor to access or interoperate with the platform in the same way the platform's own offerings do.
  - Raises even greater security and privacy concerns than those discussed above as this does not just force a platform to offer a competitor's products and services, but also to interoperate with the platform. The affirmative defense is even less useful here, as the security risks are greater and it is harder to detect them *ex-ante* when it comes to interoperability.
- **Section 3(a)(5)** makes it illegal for a platform to "condition access to the covered platform or preferred status or placement" on the purchase or use of other products or services offered by the platform.
  - Takes away the ability of a platform to provide businesses with discounts or other benefits for bundling services together, even if they would greatly benefit from such offerings. This will raise prices for some third-party businesses to benefit other third-party businesses.

- **Section 3(a)(6)** makes it illegal to use non-public data created through the platform by another party to strengthen its own offerings in the same area.
  - Erects a major barrier to product and service improvement, harming consumers through lower quality offerings.
- **Section 3(a)(7)** makes it illegal to "materially restrict or impede" a business user's ability to access data created through the platform or limit portability.
  - Forces platforms to share personal information of their customers with third parties, including foreign software and app developers.
- **Section 3(a)(8)** makes it illegal to prevent users from uninstalling pre-installed apps or changing default settings to favor their own offerings.
  - Makes it so a user could accidentally delete a pre-installed app store, essentially bricking their device.
  - Prevents platforms from nudging consumers toward products and services that function better with their offerings.
- **Section 3(a)(9)** makes it illegal to treat a platform's own services more favorably in search and ranking results.
  - Would likely make it illegal for a business to order results in a way most beneficial for consumers. E.g. Google Maps/Reviews showing up at the top of search results, Amazon Basics' more affordable offerings being shown in a comparison box at the bottom of a page.
- **Section 3(a)(10)** makes it illegal to retaliate against a business for raising concerns related to law enforcement or violations of federal or state law.
  - Allows third-party businesses to strongarm their way into certain outcomes by threatening to sue and using the lack of the outcome they want as evidence of "retaliation."
- **Section 3(b)** provides for affirmative defenses related to legality, privacy, and security, or enhancing core functionality.
  - These are not helpful as platforms have a higher standard than the government (i.e. clear and convincing evidence vs. preponderance of the evidence) for (2)(b) defenses and will still have to bear the risk of litigation and the expense of discovery. This is particularly true as Chair Khan sits as the decision maker. It also imposes incredibly burdensome requirements like having to show that their conduct was narrowly tailored, least discriminatory, non-pretextual, and necessary.
- **Section 3(c)** allows the FTC and DOJ to designate certain businesses as covered platforms.
  - Gives enormous power to the Khan-controlled FTC and Kanter-controlled DOJ to pick and choose which businesses will and will not be covered by the bill.
  - The designation lasts for 8 years regardless of whether circumstances change unless either the FTC or DOJ removes the designation.

- **Section 3(c)(6)(B)** creates civil penalties for violations in the amount of 10 percent of revenue (not profit).
    - Would essentially destroy almost any of these businesses and would certainly lead to higher prices or lower quality goods and services for consumers.
- **Section 2(a)(2)** provides a definition for "Business User": a person that "utilizes or has a reasonable probability of utilizing the covered platform for the sale or provision of products and services."
    - This is a broad definition that could pull in a variety of unintended parties such as Facebook users that have a standard page for their business. This could prevent the platforms, including Facebook and Amazon, from doing things like a Black, Veterans, or LGBTQ owned business campaign.
- **Section 2(a)(5)** provides the definition for a "covered platform": a platform that is designated by the FTC and DOJ as described above, or is owned or controlled by a person that has 50,000,000 U.S.-based AMU or 100,000 U.S.-based monthly active business users *and* has, at any point in the last 2 years, had annual sales or market cap above $550 billion
    - Also applies to any company that, in the last year, has at least 1 billion worldwide MAU and is a "critical trading partner."
    - These are completely arbitrary numbers, showing they are intended to harm a handful of politically disfavored businesses.
    - The definition of "critical trading partner" is extremely broad and gives the FTC and DOJ enormous discretion.

Endnotes

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37 *Ibid.*

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