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ANTITRUST 2022: PAST IS PROLOGUE

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INTRODUCTION

America's tech companies continue to push the boundaries of innovation and remain global leaders in providing new services and products. Yet that success has drawn the attention of politicians and regulators and the hostility of potential rivals. Both the Biden administration and the 117th Congress have been marked by a resurgence of populist antitrust and its aversion to bigness. The current interest in dismantling large corporations is not new; such sentiments have been cyclical recurrences throughout American history and fueled the creation of the Sherman Act and the nation's antitrust laws.[1]

The year 2021 was marked by the ascendancy of the neo-Brandeisian movement, more colloquially known as "hipster antitrust," as seen in Congress and the first year of the Biden administration. Both Congress and the administration demonstrated an interest not only in rigorous antitrust enforcement, but in a fundamental rewrite of the antitrust laws to take on large technology companies that critics allege operate beyond the scope of current antitrust laws. In 2022 it is likely that Congress will turn in earnest to moving its antitrust legislation forward, paving the way for expanded oversight and greater government interventions in the marketplace.

At the federal level, President Joe Biden has issued an Executive Order on competition policy, which, among other things, calls for more vigorous antitrust enforcement.[2] Biden's appointed antitrust enforcers—Lina Khan at the Federal Trade Commission (FTC) and Jonathan Kanter at the Department of Justice (DOJ)—reaffirm the administration's more aggressive stance on antitrust enforcement. Both have been outspoken critics of Big Tech, and both agencies are actively pursuing antitrust cases against major tech companies while also re-examining the foundations of the nation's competition policy.[3]

Legislation introduced in both the House and Senate would reformulate the antitrust laws into a new competition policy with a greater interest in market structure and the state of competition rather than consumer welfare. State attorneys general have also taken legal action against the major technology platforms while state legislators continue to introduce bills to reshape markets in the tech sector. In Europe and elsewhere around the globe, billion-dollar fines against America's pioneering technology companies are common

1. See, e.g., William E. Kovacic, "Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration," *Iowa Law Review* 74:1105 (1989), pp. 1106-1150. https://www.antitrustinstitute.org/wp-content/uploads/2018/12/WilliamEKovacicFailedExpe.pdf.

2. The White House, "Executive Order on Promoting Competition in the American Economy," press release, July 9, 2021. https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy.

3. See, e.g., "Justice Department Sues Monopolist Google for Violating Antitrust Laws," Department of Justice, Oct. 20, 2020. https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws; "FTC Sues Facebook for Illegal Monopolization," Federal Trade Commission, Dec. 9, 2020. https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

place, along with structural remedies aimed at helping local rivals to the large American tech companies.[4]

It is unmistakable that there is a renewed zeal for antitrust enforcement, but whether the proposed neo-Brandeisian reforms would yield outcomes superior to the status quo remains an open question. Present day reformers appear to be calling for a return to past practices targeting market structure rather than economic outcomes. Yet a brief examination of the history of antitrust in the United States suggests that this shift in emphasis may do little to improve upon market outcomes while significantly expanding government oversight and regulation in a critical sector of the economy. In fact, today's reformers appear intent on a return to antitrust practices that proved to be far more arbitrary and prone to political influence at the expense of consumer welfare.[5]

Permissionless innovation has been a driving force in the tech sector, allowing firms the flexibility to adapt to the rapid pace of change that defines the technology sector. This permits firms to evolve and attract the capital necessary for continued innovation. For consumers, permissionless innovation has resulted in a market characterized by falling (or even zero) prices, expanding output and increasing quality. These outcomes were feasible within the existing framework for antitrust enforcement, with its focus on consumer welfare and economic outcomes, but may not be so within a framework that attempts to define and enforce a designated optimal market structure or level of competition.

Many of the reforms advanced by neo-Brandeisians are a direct challenge to the model of permissionless innovation. The proposed changes to antitrust law establish a much more prominent role for government oversight by placing regulators in the path of progress with the power to proscribe certain activities or behaviors by firms that fit into arbitrarily defined categories designed by law or regulation. Additionally, reformers aim to raise the bar for companies seeking to expand, requiring them to demonstrate that their actions are not anticompetitive. This is a major departure from a simple call for increased enforcement of existing antitrust laws to address anticompetitive behavior. In many ways, proposed reforms resurrect earlier antitrust practices that tended to be inconsistent and economically fallacious.[6] The consumer welfare standard was adopted to address the economic shortcomings of earlier antitrust law; abandoning its use creates opportunities for more arbitrary and political enforcement of antitrust.

In fact, the changes that populist reformers are seeking more closely emulate European competition policy, which is an industrial policy that places more emphasis on regulating the competitive process than on promoting consumer welfare. This is inherently a more political approach to antitrust and the brunt of these policies have fallen upon U.S. technology companies to the benefit of less efficient European rivals. Implementing similar policies in the United States may likewise penalize digital platforms, which can have a significant impact on innovation and consumer welfare. This change can be seen in the recent statement from the EU-U.S. Joint Technology Competition Policy Dialogue: "Both through the Joint Dialogue and other cooperation efforts, we intend to collaborate to ensure and promote fair competition, as we firmly believe that vigorous and effective competition enforcement benefits consumers, businesses, and workers on both sides of the Atlantic."[7]

THE ORIGINS AND ROLE OF ANTITRUST

When considering current attacks on the technology sector, it is worth examining the origins of our antitrust laws, which date back to the age of the robber barons around the turn of the last century. Just as today, there was a rising tide of populist sentiment against Big Business, and like current populist mistrust of large tech companies, there was public outcry over the growing power of large companies in the oil, steel and rail industries, among others. Like today, much of the outcry was driven by news stories and editorials fanning the flames of trustbusting. Indeed, contemporary attacks on Big Tech, both online and in print, echo the writings of Ida Tarbell, one of the first muckrakers, who came to fame through her assault on Standard Oil.

But a closer look at Ida Tarbell's crusade against Standard Oil may provide some insight into the true roots of antitrust.[8] Tarbell was partly driven by the fact that her father's small independent oil refinery succumbed to the far more efficient practices of its much larger rival, Standard Oil. This difference in efficiency was due to disruptive innovation—the introduction of the tank car, which was far superior to barrels for transporting oil.

As with many of today's criticisms of the tech sector, this disruptive innovation and the plight of small independent refin-

4. "Antitrust: Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices," European Commission, press release, Nov. 10, 2020. https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2077.

5. Alan Reynolds, "The Return of Antitrust?" *Regulation*, The Cato Institute, 2018. https://www.cato.org/sites/cato.org/files/serials/files/regulation/2018/3/regulation-v41n1-8-updated.pdf.

6. See, e.g., Douglas H. Ginsburg and Joshua D. Wright, "Philadelphia National Bank: Bad Economics, Bad Law, Good Riddance," *Antitrust Law Journal* 80:2 (2015), pp. 377-96. https://www.jstor.org/stable/26411541.

7. "Inaugural Joint Statement between the European Commission, the United States Department of Justice Antitrust Division and the United States Federal Trade Commission," EU-U.S. Joint Technology Competition Policy Dialogue, Dec. 7, 2021, https://www.ftc.gov/system/files/documents/public_statements/1598739/eu-us_joint_dialogue_statement_12721.pdf.

8. Ida Tarbell, *The History of the Standard Oil Company*, (Halcyon Classics Edition, 1909).

ers found its way into the politics of the time. When examining the letters of Sen. John Sherman—author of the 1890 Sherman Antitrust Act—economic historian Werner Troesken found little evidence to suggest the Senator was responding to practices that harmed consumers. Rather, Troesken says his findings "suggest that Senator Sherman intended to protect small and inefficient firms from their larger competitors, regardless of the effect on consumer welfare."[9]

Sherman's antitrust legislation made "monopolization or attempts at monopolizing any aspect of interstate trade or commerce," illegal.[10] However, it should be noted that at the time of its passage, most economists were wary of the new law and saw an argument for economies of scale that suggested larger firms might be more efficient.[11] But this was not the view of the early trustbusters, nor is it the view of today's hipster antitrust movement, which is more attuned to the theories of Supreme Court Justice Louis D. Brandeis, an ardent trustbuster prior to joining the Supreme Court in 1916.[12] In fact, his earlier efforts were critical to the creation of the Federal Trade Commission (FTC) in 1914 and the passage of the Clayton Act.[13]

CRISIS AND COLLAPSE OF ANTITRUST POLICY

Yet the Brandeisian push for greater oversight and for the deconcentration of big business has a checkered history at best. Historically, antitrust action against businesses often seems arbitrary and even contradictory. Looking at the ranks of companies that have fallen under the gaze of antitrust enforcers, it can be hard to see the harm that they allegedly resolved. Many of these companies no longer exist, and this is due more to what an economist called the "perennial gale of creative destruction," rather than the wisdom of courts or regulators.[14] Another economist at the Cato Institute recently examined several companies that historically faced antitrust scrutiny— including the Great Atlantic and Pacific Tea Company (A&P), Kodak, IBM, Internet Explorer and others. He found that "predictions of unassailable market dominance that we hear in relation to today's tech giants," which are frequently explained by "appeals to economic phenomena such as network effects, economies of scale, tying of products, or other cost barriers to entry," are familiar arguments that "have been heard many times before in similar industries," but that have always proven to be "ill-founded."[15]

Markets are dynamic and constantly change; new firms enter and old firms leave, which leads Bourne to conclude that "the predictions of sustained dominance by Amazon, Google, Facebook, Apple, and others should therefore be taken with extreme skepticism."[16] Competition and disruptive innovation, which constantly push resources to their most highly valued uses, are far more important drivers of efficiency than economic regulation. While this can be challenging for companies, it is a boon for consumers.

Then, as now, a look at the economic data suggests that the interests of consumers were not the driving concern for those seeking to expand antitrust enforcement. In the decades leading up to the Sherman Act, the price of refined oil declined by 80 percent. Likewise, economists have found that prices were falling and output was expanding in most of the initial industries targeted by the early trustbusters.[17] Just as importantly, calls for more active trustbusting and government oversight were driven not by consumers but by less successful rival firms who were threatened by disruptive innovation.[18]

When assessing antitrust competition policy, courts and regulators traditionally held a more static view of markets, leading to a long history of regulatory decisions and actions with questionable benefits for consumers. In one infamous case, the Supreme Court blocked a merger of grocery stores where the merged company had a market share of less than 8 percent. Antitrust enforcement was so muddied and confused by the 1960s that Supreme Court Justice Potter Stewart famously quipped in his dissent of the grocery store decision, "[t]he sole consistency that I can find is that, in litigation [concerning mergers], the Government always wins."[19]

Indeed, in a survey of antitrust activity, economists found it difficult to demonstrate that antitrust enforcement was beneficial to consumers. In a historical review of cases involving monopoly, collusion and mergers, the authors

9. Werner Troesken, "The Letters of John Sherman and the Origins of Antitrust," *The Review of Austrian Economics* 15:4 (2002), pp.275–295. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.590.1989&rep=rep1&type=pdf.

10. Sherman Antitrust Act, 15 U.S.C. §§ 1-38.

11. Kovacic, p.1105. https://www.antitrustinstitute.org/wp-content/uploads/2018/12/WilliamEKovacicFailedExpe.pdf.

12. "Louis Brandeis, 1916-1939," Supreme Court Historical Society, last accessed Jan. 14, 2022. https://supremecourthistory.org/history-of-the-court-timeline-of-the-justices-louis-d-brandeis-1916-1939.

13. Jonathan Sallet, "Louis Brandeis: A Man for This Season," *Colorado Technology Law Journal* 16:2 (March 1, 2018). https://ssrn.com/abstract=3132482.

14. Joseph A. Schumpeter, *Capitalism, Socialism, and Democracy*, 3rd ed. 1942, (Harper and Brothers, 1950).

15. Ryan Bourne, "Is It Different This Time? Schumpeter, the Tech Giants, and Monopoly Fatalism," Policy Analysis 872, The Cato Institute, June 17, 2019. https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism.

16. Ibid.

17. Thomas J. DiLorenzo, "The Origins of Antitrust: An Interest-Group Perspective," *International Review of Law and Economics* 5 (June 1985), pp. 73-90. http://mason.gmu.edu/-trustici/LAW108/The%20Origins%20of%20Antitrust-%20An%20Interest%20Group%20Perspective.pdf.

18. D. J. Boudreaux et al., "Antitrust before the Sherman Act," in *Causes and Consequences of Antitrust: The Public-Choice Perspective*, eds. Fred S. McChesney and William F. Shughart II, (University of Chicago Press, 1995), pp. 255-270.

19. Justice Potter Stewart dissenting, *United States v. Von's Grocery Co.* 384 U.S. 270 (1966).

conclude: “we find little empirical evidence that past interventions have provided much direct benefit to consumers or significantly deterred anticompetitive behavior.”[20] They further caution policymakers that without strong empirical evidence the DOJ and FTC should focus exclusively on flagrant antitrust violations while adopting a standard of “benign neglect” for all others.[21]

THE POLITICS OF ANTITRUST

The fact that it was hard to equate antitrust enforcement actions with improved consumer welfare led some economists to explore alternative explanations for antitrust activity. Much of the existing research, including the Chicago School, viewed antitrust policy purely as public interest theory, something at odds with a fundamental premise of much of Chicago School thinking on other topics. Specifically, the public interest theory of antitrust ignores the role of private interests and political economy in the evolution of these laws.[22] Doing so has skewed the analysis of antitrust policy, assuming benevolent enforcers intervene to correct clearly identified market failures.

Incorporating private interests tells another story that raises questions relevant to recent efforts to expand antitrust enforcement powers. Early research by economists William F. Long, Richard Schramm and Robert D. Tollison utilized a public choice framework to analyze antitrust enforcement activity. Public choice incorporates and examines the many private and political interests that drive policymaking. In this broader assessment of antitrust enforcement in the era before the adoption of the consumer welfare standard, the authors found that there was no correlation between antitrust enforcement and efforts to mitigate the welfare costs of monopoly.[23] In fact, later work by Tollison, with co-authors Roger L. Faith and Donald R. Leavens, found congressional influence to be a better predictor of enforcement activity.[24]

Others have expanded on this research, highlighting the sensitivity of the FTC (and federal agencies in general) to changes in the composition of oversight committees.[25] Public choice analysis highlights the political nature of regulation, which suggests that antitrust policy can be driven by less than benevolent interests, including political pressure from disgruntled rivals who seize the opportunity to apply political pressure to reshape markets more to their preference. The legislation introduced in the current Congress demonstrates a clear preference for antitrust enforcement with greater government intervention and control, jettisoning the consumer welfare standard and the rule of reason for the political power to protect specific competitors and shape markets as Congress deems fit.

In many ways, the modern trustbusters’ assault on Big Tech mirrors the early populists’ assault on Big Business. As in the early days of trustbusting, the tech sector is currently defined by falling prices, increasing output and fast-paced innovation. In fact, with respect to digital platforms, consumers often see a market price of zero. From email, to search, to social media, consumers can select from a host of products and services at no pecuniary cost. At the same time, the push for new regulation and tougher antitrust enforcement of the major tech platforms often comes from online rivals, as in the case of Epic Games and Spotify pressing for important changes to app stores created by Apple and Google.[26] Or in Yelp’s political calls for antitrust action against Google.[27]

Legislation recently introduced in Congress and current work produced by the FTC and DOJ offers no new empirical evidence demonstrating consumer harms requiring redress. Despite the lack of empirical findings, proposed legislation calls for a return to activist antitrust enforcement based on legislatively created bright lines enforced by the DOJ and FTC. This approach reflects antitrust enforcement of the 1950s and 1960s and is prone to the same economically questionable outcomes.

RETHINKING ANTITRUST

By the 1970s, economists and antitrust scholars began to raise concerns about the efficacy of antitrust litigation and the actions of both the DOJ and FTC. The grocery store decision mocked by Supreme Court Justice Potter Stewart was not unique; it was difficult to find an economic justification for many of the enforcement cases. Economists began to search for new tools and methods for evaluating antitrust policy. This led to a fundamental shift and the rise of the consumer welfare standard, most prominently led by Robert

20. Robert W. Crandall and Clifford Winston, “Does Antitrust Policy Improve Consumer Welfare? Assessing the Evidence,” *Journal of Economic Perspectives* 17:4 (Fall 2003), pp. 3-26. https://pubs.aeaweb.org/doi/pdfplus/10.1257/089533003772034871.

21. Ibid.

22. Fred S. McChesney, “Antitrust and Regulation: Chicago’s Contradictory Views,” *Cato Journal* 10:3 (Winter 1991), pp. 775-798. https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1991/1/cj10n3-10.pdf.

23. William F. Long et al., “The Economic Determinants of Antitrust Activity,” *Journal of Law and Economics* 16:2 (October 1973). https://www.journals.uchicago.edu/doi/10.1086/466770.

24. Roger L. Faith et al., “Antitrust Pork Barrel,” *Journal of Law and Economics* 25:2 (October 1982). https://www.journals.uchicago.edu/doi/abs/10.1086/467019.

25. Barry R. Weingast and Mark J. Moran, “Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission,” *Journal of Political Economy* 91:5 (October 1983). https://www.jstor.org/stable/1837369.

26. Chaim Gartenberg, “Spotify, Epic, Tile, Match, and More Are Rallying Developers Against Apple’s App Store Policies,” The Verge, Sept. 24, 2020. https://www.theverge.com/2020/9/24/21453745/spotify-epic-tile-match-coalition-for-app-fairness-apple-app-store-policies-protest.

27. Avery Hartmans, “Yelp Is Cheering the DOJ’s Decision to File an Antitrust Lawsuit Against Google: ‘Google Is Directly Harming Consumers,” Insider, Oct. 20, 2020. https://www.businessinsider.com/yelp-cheers-google-antitrust-lawsuit-2020-10.

Bork at Yale University and then championed by the Chicago School of Economics.[28]

This new approach was an attempt to rationalize antitrust law and regulation that was premised on maximizing consumer welfare. Under this theory, no government intervention was needed in the marketplace if there were no identifiable consumer harm. Practically speaking, if prices were falling, output was expanding and quality was improving, there was little that the government could do to improve upon the welfare outcomes of the marketplace. Antitrust enforcement was reserved for bad actors engaging in activities that resulted in demonstrable consumer harm.

Consumer welfare became the new standard bearer for antitrust enforcement. While today it is widely understood that the consumer welfare standard transformed antitrust enforcement and litigation, the changes in the economics of antitrust are less emphasized but just as significant. Specifically, the transition to consumer welfare was facilitated by a departure from earlier antitrust analysis that focused on firm size and market structure.

ECONOMICS, INDUSTRIAL ORGANIZATION AND ANTITRUST

In the 1930s, a Harvard economist began developing an institutionalist approach for investigating market structure and applying the antitrust laws.[29] Considered an early pioneer of industrial studies, Edward S. Mason advocated studying market structure to develop a better understanding of pricing policies and market outcomes. His student, economist Joseph Bain, is considered a pioneer in developing the field of industrial organization, which examines market structure and competition policy. His work in the 1950s launched the Structure-Conduct-Performance (S-C-P) model, which became the standard framework for analyzing market behavior and assessing alleged antitrust violations.[30]

Using the S-C-P model, economists first measure the structure of an industry, typically using some measure of concentration, such as the Hirfindahl-Hirschman Index or a concentration ratio (e.g., the combined market share of the top four firms in an industry). According to the model, structure necessarily drives conduct and performance. Conduct addresses the behavior adopted by firms operating in a given market structure. This can include strategic behaviors such as pricing policy, non-price competition and other tactics that determine price and output. These behaviors help drive the performance of the industry, as measured by such variables as prices, output levels, product quality and profitability. Performance is assumed to follow directly from market structure and the behavior or conduct it generates.

In practice, economists focused on concentration to evaluate market structure. Collusion and other adverse strategies were assumed to be more feasible in more highly concentrated industries, which in turn, could affect market conduct, and ultimately, performance. With its emphasis on firm size and market concentration as indicators of anticompetitive behavior, this approach to industrial organization policy fitted well with populist sentiments that were wary of big companies.

In addition to market structure, performance was also measured through observations of firm production, output and prices. What was not readily observable, however, was conduct. This often referred to strategic behavior by and among firms that was empirically difficult to measure. As a result, conduct was often inferred, and in instances where concentrated industries were associated with performance outcomes such as high profitability, it was assumed that this was the result of anticompetitive behaviors by firms within the industry. That is, concentrated firms engaged in conduct that was anticompetitive in order to achieve better market outcomes.

Through the 1950s and 1960s, the S-C-P model shaped the analysis of antitrust enforcers at the FTC and DOJ, and ultimately the judiciary. Economic analysis was incorporated at the agencies, in litigation and in the thinking of judges in antitrust cases. Firm concentration became the critical determinant of market power and anticompetitive behavior. Economics became more integral to antitrust litigation and questions of monopolization and anticompetitive behavior. Economists became more closely involved in litigating these issues, providing technical evidence with respect to such issues as determining the proper definition of product markets and geographic markets in order to assess anticompetitive behavior.

The growing field of industrial organization saw economics become an integral component of antitrust enforcement. Economists assessed the impact of single firm anticompetitive behavior, as well as the impact of mergers and acquisitions. Both horizontal and vertical mergers were evaluated to determine their effects on competition. Yet, as economics became more important, many economists began challenging the economic theory underlying the S-C-P model. The dominant focus on concentration and firm size created an inherent bias against large firms that minimized the possibility that economic efficiency may be a contributing factor to the size of a firm.

28. Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, (Basic Books, 1978).

29. Edward S. Mason, "Price and Production Policies of Large-Scale Enterprise," *American Economic Review* 29:1 (March 1939). https://www.jstor.org/stable/1806955?refreqid=excelsior%3A94b44544c07a8e7f6ef6fbdbe6333076.

30. Joseph Bain, *Barriers to New Competition: Their Character and Consequences in Manufacturing Industries*, (Harvard University Press, 1956).

BIG MAY NOT BE BAD: THE EFFICIENT STRUCTURE HYPOTHESIS

When economists—many associated with the University of Chicago—began to develop new tools for assessing market competition, an efficient structure hypothesis began to replace earlier tools of the Structure-Conduct-Performance paradigm. Rather than simply assuming misconduct based on firm size or industry concentration, the efficient structure hypothesis asserted that dominant firms may, in fact, be dominant because they are efficient. As an early advocate of the theory noted:

> Under the pressure of competitive rivalry, and in the apparent absence of effective barriers to entry, it would seem that the concentration of an industry's output in a few firms could only derive from their superiority in producing and marketing products or in the superiority of a structure of industry in which there are only a few firms.[31]

Researchers found that technical or organizational efficiencies fueled by innovation sometimes favored large scale production over smaller firms. Additionally, economists began to demonstrate that some firm behaviors considered illegal per se may actually be efficient and generate economic benefits. Practices such as predatory pricing, tying and resale price maintenance were re-evaluated in terms of their economic efficiencies. This change in economic analysis was just as significant as the consumer welfare standard for rationalizing antitrust enforcement.

Rather than assume concentration was inherently bad, economists found that there are, in fact, efficiencies that may be attributed to being a large firm. Likewise, firms can become large because they are the most efficient companies in the market. Such findings posed a direct challenge to the traditional analysis of the S-C-P paradigm. Earlier antitrust enforcement focused on market structure and concentration, often drawing bright lines that prohibited some firms from undertaking activities such as mergers based on measures of concentration. While the efficient structure hypothesis demonstrated that this may yield problematic enforcement, current legislation in both the House and Senate contemplates a return to similar practices.

The efficient structure hypothesis was premised on a notion that markets are complex and unique, requiring careful analysis to determine whether certain structures or behaviors are efficient. There is no given level of concentration or number of firms that generates an efficient outcome. Moreover, what may be an efficient market structure in one sector or industry may be completely inapplicable in a different sector or industry. Consequently, antitrust policy is more appropriately evaluated through a rule of reason rather than per se attempts to define what a competitive market looks like ex ante. Courts received inputs from economists who evaluated the specifics of particular markets in order to make informed decisions on questions of antitrust. Consumer welfare provided an anchor for such analysis, generating a body of law that has been applied by the courts since the 1980s.

While today's neo-Brandeisans may criticize the Chicago School for this shift in antitrust policy, there was growing discontent among industrial organization economists, and many beyond the Chicago School also were questioning the efficacy of the S-C-P model. Efforts were underway to provide more rigorous theoretical and empirical underpinnings to industrial organization. In the 1980s, the theory of contestable markets emerged as an alternative to S-C-P.[32] This theory placed a greater emphasis on conditions of entry and exit rather than firm size when assessing market competition.

Elsewhere, economists began applying the tools of game theory in an attempt to develop more rigorous theoretical models, while others sought to improve empirical analysis, creating the New Empirical Industrial Organization.[33] The Chicago School may have made the greatest inroads in shaping antitrust policy, but at this point it was becoming evident that the original S-C-P model was widely discredited. Nonetheless, today's antitrust reformers advocate a return to the earlier focus on market structure, hoping to design ideal market institutions through regulatory fiat with little empirical support.

The decline of the S-C-P model and the rise of the Chicago School's efficient structure hypothesis generated a considerable amount of research into firm structure, size and efficiency. Just recently, in their book *Big Is Beautiful*, Robert Atkinson and Michael Lind examine some of the economic benefits generated by larger firms, finding that they provide larger investments in research and development (R&D), greater levels of innovation and more and higher paying jobs.[34] Larger firms also produce more goods and services for export. Indeed, another recent study of superstar firms found that they are 20 to 25 percent more productive with their labor and capital inputs than the median firm.[35] None-

31. Harold Demsetz, "Industry Structure, Market Rivalry, and Public Policy," *Journal of Law and Economics* 16:1 (1973). https://www.jstor.org/stable/724822.

32. William Baumol et al., *Contestable Markets and the Theory of Industry Structure*, (Harcourt, Brace, Jovanovich, 1982).

33. See, e.g., Jean Tirole, *The Theory of Industrial Organization*, (MIT Press, 1988); Timothy F. Bresnahan, "Empirical Studies of Industries with Market Power," in *Handbook of Industrial Organization* vol. 2, eds. Richard Schmalensee and Robert D. Willig, (North Holland, 1989).

34. Robert D. Atkinson and Michael Lind, *Big Is Beautiful*, (MIT Press, 2018).

35. Michael Birshan et al., "Superstars: The Dynamics of Firms, Sectors, and Cities Leading the Global Economy," McKinsey Global Institute, 2018. https://www.mckinsey.com/featured-insights/innovation-and-growth/superstars-the-dynamics-of-firms-sectors-and-cities-leading-the-global-economy.

theless, today's populist attacks on Big Tech tend to ignore both the evolution in economic thinking as well as demonstrable efficiencies and economic benefits generated by larger firms in favor of timeworn notions equating big with bad.

THE CONSUMER WELFARE STANDARD IN PERIL

Any demonstration of the efficiencies of a large firm poses a direct challenge to the big-is-bad model and raises legitimate questions about the antitrust reforms under consideration in Congress. The dramatic shift in antitrust enforcement in the 1980s, replacing the Brandeisian obsession with bigness with a more empirical emphasis on consumer harm, was a recognition of the potential benefits that may be associated with larger firms. While this framework has served to rationalize antitrust enforcement for more than 40 years, the rise of Big Tech has inspired a renewed interest in more aggressive antitrust enforcement based on preconceived notions of what the tech sector should look like. Yet forecasting the future of such a dynamic sector is problematic at best.

Since the internet was commercialized in the mid-1990s, the tech sector has grown substantially. In only 25 years the internet has transformed the lives of consumers across the globe, from online shopping, to social media platforms, to telemedicine and distance learning. Today there are over 5 billion internet users worldwide and in the first three quarters of 2021, e-commerce sales in the United States reached $613 billion.[36]

While technological innovation has generated significant benefits for consumers, critics have attacked the growing concentration of large digital platforms in the tech sector. Some claim that current antitrust laws and enforcement are inadequate for addressing emergent issues in the tech sector. In particular, Google, Amazon, Facebook and Apple have come under fire at home and abroad for anticompetitive practices. Network effects, the nature of digital platforms and the sheer size of these tech companies have led to calls for greater oversight, with critics asserting that existing antitrust laws are ill-equipped to address the realities of new platform industries. These concerns have been exacerbated by growing concerns over privacy, data security and content moderation. While these are real concerns that warrant a public policy response, they are issues that extend beyond the scope of antitrust.

Importantly, despite the size of the U.S.'s large tech firms, there have been few empirical demonstrations of economic harm. Indeed, with prices falling, output expanding and fast-paced innovation increasing, it would be difficult to make such a case using the consumer welfare standard. In response, neo-Brandeisians are calling for fundamental reform of antitrust laws, in a shift that abandons the consumer welfare standard and returns to the more aggressive government interventions of the past, where factors beyond economic efficiency play a more important role in enforcement.

REINVENTING ANTITRUST: WHAT'S NEW IS OLD

In 2020, the House Judiciary Committee released a majority report indicating that lawmakers were dissatisfied with current antitrust enforcement, especially in the tech sector.[37] While the report provided little new evidence to suggest market failure or widespread anticompetitive practices beyond the reach of current antitrust laws, it called for sweeping changes to competition law, including new requirements for structural separation, a presumptive prohibition on mergers based on firm size, new rules on nondiscrimination and self-preferencing, and a resurrection of the essential facilities doctrine, among others. In short, the report's recommendations are very much in the spirit of earlier trustbusters and has since served as the framework for a series of bills introduced in the House in 2021. At the same time, the Senate has moved forward with antitrust reform proposals of its own, and state legislators are advancing legislation to restructure markets in the tech sector as well.

An overview of these legislative initiatives at both the federal and state level identifies a common theme running through the various proposals. Rather than examine the details of each individual bill, this section will examine the broader theoretical framework for more rigorous antitrust enforcement that underpins the proposed legislative changes. There may be variations among the bills, but they all work toward the same end: a new antitrust law less reliant on consumer welfare. Generally, the focus is on large platforms in the tech sector, so the various proposals begin by defining which firms are subject to the proposed changes. Next, the individual bills restrict what they are allowed to do in the marketplace. The bills are a clear step away from the consumer welfare standard as they aim to expand the scope of antitrust to include a host of additional factors, all of which entail a greater degree of government regulation.

The proposed changes are also a direct challenge to the concept of permissionless innovation. Regulators and antitrust enforcers would necessarily play a more prominent role in determining how markets are structured and what business practices are considered legal. Businesses would be banned

36. See, e.g., "World Internet Usage and Population Statistics, 2021 Year-Q1 Estimates," Internet World States, last accessed Jan. 16, 2022. https://www.internetworldstats.com/stats.htm; Jessica Young, "US ecommerce sales increase 6.8% in Q3 2021," Digital Commerce 360, Nov. 18, 2021. https://www.digitalcommerce360.com/article/quarterly-online-sales.

37. Subcommittee on Antitrust, Commercial, and Administrative Law of the Committee on the Judiciary, "Investigation of Competition in Digital Markets," Staff Majority Report and Recommendations, House of Representatives, 2020. https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

or their actions restricted in certain markets, making adaptation and innovation more difficult.

While most of the proposed antitrust bills attempt to target Big Tech, it should be noted that not all tech platforms are the same. Indeed, Big Tech is not a monolith; it is a group of large, successful corporations with distinct markets and business models. Amazon is an online retailer whose relevant market includes rivals like Walmart and Target that compete both in digital space as well as in brick and mortar outlets. Google is primarily in digital advertising, where prices have been falling and significant new entrants have joined the market. Apple, whose AppStore has generated allegations of anticompetitive behavior, is at heart a hardware company that generates the bulk of its revenue from the sale of computers, smartphones and other devices. Its App Store was created to serve this market, and the ecosystem it provides for consumers and developers is distinct from other tech companies. Facebook competes with Twitter, newcomer TikTok and other social media platforms in a highly competitive market.

It is not intuitively clear that a single definition of a covered platform applies equally to the various markets involved. Additional research of the relevant markets is needed. This requires careful analysis, which economists are prepared to do under existing antitrust laws. The rule of reason is far more flexible and provides more tailored resolutions to questions of anticompetitive behavior.

YOU ARE DIFFERENT—BECAUSE WE SAY SO

As noted earlier, the initial step in all the proposed bills is an attempt to target the legislation's reach within the tech sector or, more precisely, to target specific firms. Many of the bills begin with a definition of a "covered platform," which specifies which firms would be covered by the legislation. Under the four main House bills, for example, a firm is considered a covered platform if it:

- Has at least 50,000,000 United States-based monthly active users on the online platform
- Has at least 100,000 United States-based monthly active business users on the platform
- Is owned or controlled by a person with net annual sales, or a market capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index
- Is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform.[38]

Practically speaking, this narrows the legislation to Google, Facebook, Amazon and Apple. Once designated a "covered platform," the bills propose various limitations on what a company may do, and, in some cases, they completely ban certain activities. Both the FTC and the DOJ have the authority to declare a company a covered platform, a designation that lasts for 10 years.

It should be noted that defining these covered platforms is arbitrary and politically inspired. There is little economic data or empirical analysis to demonstrate the need to establish special categories for specific firms. Nor is there any evidence that identifies current market inefficiencies requiring new market structures. Likewise, there is little consideration of the benefits to consumers that the covered platforms currently provide, nor any estimation of the costs of new restrictions that reduce the ability of covered platforms to serve their customers.

The focus on specific platforms in the proposed bills denotes a fundamental change in the relationship between tech companies and the government. In fact, they demonstrate the realities of politically prompted antitrust enforcement driven by populist sentiment. Legislation has been introduced with no economic evidence to demonstrate that annual sales or market capitalization of $500 billion is a threshold that demarcates competitive and anti-competitive behavior. Rather, the covered platform definition was crafted specifically to achieve a desired political outcome, with little regard for the underlying economics or any analysis demonstrating that such bright line cut-off points are set at an appropriate level.[39]

Moreover, the proposed bills make it much easier for plaintiffs—both private and public—to file suit. Under current law, a plaintiff must first establish that the defendant is a monopoly, and then further demonstrate that the monopolist is acting in an unlawful manner. Establishing a bright line for covered platforms may simplify the legal process, but they are a blunt instrument that can also prohibit activities that are pro-competitive and enhance consumer welfare. A rule of reason, although costlier and more time-consuming, can more effectively evaluate efficiencies and competitive behavior in the marketplace.

The proposed bills outline changes with significant real-world consequences that could reshape the tech sector. For example, when FTC brought suit against Facebook, the case was initially dismissed by the court because the FTC "failed to plead enough facts to plausibly establish a necessary element of all of its Section 2 claims—namely, that Facebook has monopoly power in the market for Personal Social Networking (PSN) Services."[40] Using the bright lines established for a

38. See, e.g., "American Choice and Innovation Online Act," H.R. 3816, § 2(g)(4), 117th Congress (2021).

39. See, e.g., "Competition and Antitrust Law Enforcement Reform Act of 2021," S. 225, 117th Congress (2021).

40. Salvador Rodrequez, "Judge Dismisses FTC and State Antitrust Complaints Against Facebook," CNBC, June 28, 2021. https://www.cnbc.com/2021/06/28/judge-dismisses-ftc-antitrust-complaint-against-facebook.html.

covered platform, it is likely that the case would have moved forward, despite the lack of evidence for monopolization.

Sen. Amy Klobuchar (D-Minn.), Chair of the Senate Judiciary's Subcommittee on Competition Policy, Antitrust, and Consumer Rights, also introduced major antitrust reform bill, the "Competition and Antitrust Law Enforcement Reform Act of 2021" (CALERA). This bill more broadly amends the antitrust laws, with a reach well beyond just the tech sector. Unlike the House bills, this Senate bill does not define a covered platform. Instead, the legislation targets any firm—in any sector of the economy—with a 50 percent market share or the more nebulous designation of having "significant market power."[41] Among other things, this bill seeks to strengthen the Clayton Act with new standards that make antitrust enforcement easier. For example, exclusionary conduct is defined as anything "that presents an appreciable risk of harming competition."[42]

REDEFINING COMPETITION

Once designated a covered platform (or some similar finding of excess market power) three main tactics are used to restrict a company's operations in the market. First is structural separation or nondiscrimination requirements that limit a platform's ability to compete with rivals on its own platform. Second is a requirement for interoperability that would require platforms to be more open and allow other businesses and competitors to connect to the platform. The legislation would also require data and products to be more easily ported between platforms and networks. The third tactic for regulating platform behavior includes prohibitions or severe limitations on mergers and acquisitions by dominant firms or covered platforms.

A. Structural Separation/Nondiscrimination

Structural separation is perhaps the starkest antitrust remedy, prohibiting a dominant firm from owning other lines of business that compete directly with other businesses in its platforms.[43] For example, Google might be prohibited from displaying Google Maps in its search results, since it may compete with MapQuest or other mapping services. Or Amazon may be banned from providing its own Amazon Basics products that compete with products that other sellers offer on the platform.

Nondiscrimination mandates attempt to achieve the same outcome as structural separation in a slightly different manner. Rather than a strict prohibition on activities or business lines offered by the covered platform, nondiscrimination would allow them to enter the market or business line, but on terms no different than any other business on the platform.[44]

While structural separation or nondiscrimination mandates may be seen as measures to level the playing field, they impede the competitive process and can ultimately lead to higher prices and less innovation for consumers. Any market is a discovery process and rival firms are in a constant struggle over consumers. This means identifying products that meet consumer demand with the highest quality at the lowest price. These are the constant gales of creative destruction that Joseph Schumpeter made famous.[45] This rivalry is the essence of the market process. Yet the new mandates on covered platforms hamper competition and this discovery process, which necessarily harms consumer welfare. If firms with more accurate information about consumer demand cannot compete in the marketplace, goods and services that more accurately satisfy consumer demand will not be produced.

In fact, many of the practices that would be banned are used throughout the economy, not just in the technology sector, and are often components of healthy rivalry in competitive markets. For instance, self preferencing or private labels are widespread in retail, with virtually all large retailers offering their own products that compete with other sold brands. Private labels make up one-third of Target's revenues.[46] This head-to-head competition among brands is a continual source of downward pressure on prices that serve consumers well. A retail strategist at Publicist Sapient states the goal of retail is "developing customers and bringing great products to those customers, and private labels give retailers the ability to reach their customers more effectively."[47] Nonetheless, many criticize Amazon's ability as a platform provider to gain access to sales and customer data that allows them to identify new product lines that will be the most lucrative. However, price discovery is what defines a market, and Amazon's relentless quest to satisfy consumer demand is the competitive pressure that keeps prices low. Other companies including online and brick and mortar retailers engage in similar practices using their access to credit card sales information and other sources of data.

41. "Ending Platform Monopolies Act," H.R. 3825, 117th Cong. (2021).

42. S. 225, 117th Cong. § 9 (2021)

43. "Ending Platform Monopolies Act," H.R. 3825, 117th Cong. (2021).

44. See, e.g., "American Choice and Innovation Online Act," H.R.3816, 117th Cong. (2021); "American Innovation and Choice Online Act," S. 2992, 117th Cong. (2021).

45. Schumpeter. https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism.

46. Dan Ochwat, "Target Own Brands Play Key Role in Record Annual Sales," Storebrands, March 2, 2021. https://storebrands.com/target-own-brands-play-key-role-record-annual-sales.

47. Maria Monteros, "Target Shaped Private Labels into Powerhouse Brands. Now Others Want to Do the Same," Retail Dive, Nov. 10, 2021. https://www.retaildive.com/news/target-shaped-private-labels-into-powerhouse-brands-now-others-want-to-do/609762.

At the same time, it is difficult to distinguish discriminatory behavior from competitive rivalry. Product differentiation is a common form of competition. Firms constantly modify their products and services in response to consumer demand or actions taken by rival firms. Often this means adding new features or updating old products in the face of technological progress and consumer demand. For instance, consider the automobile, which has improved tremendously since first introduced. Features are constantly being added to satisfy consumer demand, from safety features such as anti-lock brakes or assisted driving technologies to luxury features such as better sound systems or more advanced navigation systems. Auto manufacturers bundle all these products together for the consumer in attempt to outdo rivals and generate sales. Yet covered platforms would be prohibited from doing so, instead having to allow all businesses on the platform to provide enhancements. This reduces product choice for consumers while also raising search costs for consumers who must manage their own bundled services.

Not only does this harm consumers, but it also makes it more difficult to ensure the continued investments required for innovation and growth. Structural separation and nondiscrimination reduce the incentive for covered platforms to make new investments in the platform. The new mandates create something akin to a free-rider problem, with the benefits of platform investments accruing to rival businesses. This may lead to an overall reduction in platform investments, reducing innovation for consumers and small businesses alike.

B. Interoperability

In addition to restrictions on lines of business or products, both the House and Senate have introduced bills mandating interoperability and data portability, which would allow consumers and developers to move between platforms and networks more easily.[48] As an example, Facebook users would be able to easily port the social profiles from the Facebook platform to other platforms. More broadly, however, interoperability is a complex question, and developing a workable mandate for interoperability is a formidable task.

Interoperability issues are not new; there are many markets and products where these issues have arisen. Consider, for example, cordless tools. Many brands exist, each with its own battery system, but the batteries are not interchangeable. Yet no one has suggested that there is a lack of competition in the market for cordless drills. At the same time, many consumer electronics products are built to use universally available batteries—AA, AAA, 9 Volt, etc. Why is there more interoperability in one market rather than the other? This is a difficult question to answer and often relies on a careful assessment of a market's evolution and structure. It is necessary to identify both the costs and benefits of interoperability to determine when and to what degree interoperability makes sense. The determinants of interoperability may rely on issues such as the cost of developing an interoperability standard, the restrictions such a standard may have on product design, the reliability of one standard over another, or the costs of producing components in-house or purchasing ready-made components already available in the market. Product markets are different, and characteristics of the products or services are what determine whether interoperability makes sense.

In addition to broad interoperability mandates, the House and Senate, along with several states, have introduced legislation that addresses the specific operations of application distribution platforms (app stores) such as the App Store or Google Play.[49] App stores proved to be popular with both consumers and app developers because they create a trusted marketplace. App developers pay a commission to have their app listed in the store, which provides them a global customer base as well as a suite of services to help market and sell their apps. App stores also vet the apps for malware and security threats, providing consumers an easy and secure platform for downloading apps.

Despite the widespread popularity of app stores with consumers some large app developers are dissatisfied with the app store distribution model and are lobbying to introduce legislation in a number of states that would allow "sideloading" apps (apps purchased outside the App Store) onto iPhones and the use of alternative payment systems for app store purchases. These changes would threaten the viability of the app store model. Sideloading poses real security threats and has the potential of downgrading the customer's experience. Outside payment systems can also pose security risks as well as privacy concerns.[50]

The state legislative proposals are carefully drafted to limit their reach to the top firms in the market, Apple and Google. For instance, the legislation introduced in Arizona targets any "provider of a digital application distribution platform for which cumulative downloads of software applications from the digital application distribution platform to Arizona users exceed one million downloads in the previous or current calendar year," which quickly narrows the field to the App Store and Google Play.[51] Similar legislation has been introduced in both the House and Senate at the federal level.

48. "ACCESS Act of 2021," H.R.3849, 117th Congress (2021).

49. See, e.g., "Open App Markets Act," H.R.5017, 117th Congress (2021); "Open App Markets Act," S.2710, 117th Congress (2021).

50. Wayne T. Brough, "The Online Store App Ecosystem," R Street Institute, April 2021. https://www.rstreet.org/2021/04/06/the-online-app-store-ecosystem.

51. "Digital Application Distribution Platforms; Prohibitions," Arizona SB 1642. https://www.azleg.gov/legtext/55leg/1r/bills/sb1642p.htm

Likewise, to target the two primary app stores, the federal legislation scales up the numbers to a national level, defining a "covered company" as "any person that owns or controls an App Store for which users in the United States exceed 50,000,000."

These bills are a direct threat to current app stores that may diminish the benefits they provide. Most apps are free and pay no commissions, and smaller app developers pay only half of the 30 percent commission paid by large corporate app developers such as Spotify or Epic games. If these large companies can sidestep fees and commissions, app stores must either look elsewhere to recoup losses, which could mean higher fees for the remaining smaller developers, or diminished levels of services or developers using the app store. Either way, the changes would not benefit small developers or consumers.

Moreover, structural separation, nondiscrimination and interoperability pose potential security threats as well, as platforms are required to share information with foreign firms. As an R Street cybersecurity expert has noted, the antitrust bills "undermine the security of the networks the covered platforms control."[52] By requiring more data to be shared and imposing new interoperability requirements, sensitive data is more at risk and networks are more vulnerable to cyber-attacks. Others have also commented on the security threats posed by the antitrust bills, especially with respect to China. A letter to Congress from former national defense and security leaders concluded, "The current effort to regulate the U.S.'s largest technology companies should not be done at the expense of U.S. economic and national security. Rather than passing bills that cede U.S. tech leadership to China, we must build on America's key advantages and ensure that the United States remains a technological powerhouse for decades to come."[53]

C. Merger and Acquisition Fees

The final area of increased antitrust enforcement posited by House and Senate legislation is new restrictions on mergers and acquisitions by covered platforms.[54] In some cases, there is a pro se ban on acquisitions by large firms. Alternatively, the burden of proof is reversed, and it would be incumbent upon the platform to prove that a merger or acquisition does not diminish competition or eliminate competitors or even potential competitors.

These legislative changes aim to eliminate the possibility that a covered platform uses mergers or acquisitions to eliminate potential rivals and startups before they can grow into a significant threat (so-called "killer acquisitions"). Yet this ignores a common business model in Silicon Valley and elsewhere, where the goal of many startups is to be acquired. An acquisition is a way to cash out an innovative idea without needing to develop a long-term business plan or marketing strategy; it allows innovators to do what they do best without investing in the overhead and costs of running a business.

Without the possibility of a buyout, the cost of innovation rises as startups are required to build out more comprehensive business models. This, in turn, may reduce access to capital for innovation as many venture capitalists view acquisition as an important strategy for generating a return on investment. At the same time, large corporations invest significantly more in R&D than small firms. Banning or restricting acquisitions would keep more resources in house at covered platforms, which, paradoxically, may lead to greater concentration as avenues for startups to generate revenue dissipate.

Raising the Costs of Mergers

There is one additional bill that would increase the fees for mergers and acquisitions.[55] The higher price would deter some mergers and acquisitions (M&A) activity at the margin, but the higher fees are also a measure to provide additional funding to the enforcement agencies. There have been ongoing concerns that both the FTC and DOJ have been underfunded with respect to antitrust enforcement and lack the resources to pursue important cases. Efforts to increase funding levels have garnered support from both Democrats and Republicans in the past, and the bill on funding increases enjoys bipartisan support.

In fact, many Republicans have viewed increased funding as a reasonable compromise for improving antitrust enforcement. However, when considering such proposals, it is important to have a clear understanding of the broader mission of antitrust enforcement. There is a stark contrast between additional funding for greater antitrust enforcement under the current consumer welfare framework, and greater funding under more expansive antitrust regulation as proposed in the bills currently before Congress. Many who support additional funding do so to increase the number of staff attorneys and economists to ensure the capacity to enforce existing laws. However, if Congress redefines the scope of antitrust in ways that hamper economically

52. Tatyana Bolton, "Security in Antitrust: Implications of Two House Bills," R Street Explainer, Nov. 13, 2021. https://www.rstreet.org/2021/11/13/security-in-antitrust-implications-of-two-house-bills.

53. Letter to Rep. Nancy Pelosi and Kevin McCarthy, Sept. 15, 2021. https://s3.documentcloud.org/documents/21062393/national-security-letter-on-antitrust.pdf.

54. See, e.g., "Platform Competition and Opportunity Act of 2021," H.R.3826, 117th Cong. (2021); "Platform Competition and Opportunity Act of 2021," S.3197, 117th Cong. (2021).

55. See, e.g., "The Merger Filing Fee Modernization Act of 2021," H.R. 3843, 117th Cong. (2021); "Merger Filing Fee Modernization Act of 2021," S.228, 117th Cong. (2021).

beneficial activity, additional funding will only exacerbate the adverse impacts of the new laws.

CONCLUSION

The internet has proved to be a substantial engine of growth. Since it was commercialized in the 1990s, it has fostered a new digital economy that has become critical to the growth of the overall economy. Today, four out of the top five U.S. companies based on market capitalization are in the tech sector.[56] However, the "winner take all" nature of platform economics struck a chord with the long-standing populist antagonism towards big business in the United States. Big Tech became the new target for modern-day trustbusters, urged on by disgruntled rivals and popular opinion.

Lawmakers are now calling for new antitrust laws for the 21st century, claiming that the consumer welfare standard is no longer applicable to the modern digital economy. Yet little evidence has been put forth to support this claim. The consumer welfare standard has been the guiding principle behind antitrust law for the past 40 years and a substantial corpus of law has been built within this framework. The rule of reason, informed by economic analysis, offers a way to assess monopolistic or anticompetitive behavior.

Yet when evaluating the platforms tagged with the label Big Tech, consumer harm is difficult to find. Prices remain low, consumer choice is expanding, and innovation is thriving. Economic analysis suggests these markets are competitive and efficient. However, critics of Big Tech accused the most popular platforms of conduct that raises serious concerns about privacy, data breaches and censorship in content moderation. While these issues are orthogonal to questions of competition and antitrust, they did stoke public sentiment against Big Tech. In Congress, both Democrats and Republicans became outspoken critics of Big Tech, culminating in a series of congressional hearings to publicly interrogate the CEOs of the large tech companies.

This hostility spilled over into the antitrust debate, and both the Biden administration and the 117th Congress began to focus on questions of firm size and antitrust behavior. Antitrust enforcers began to focus on Big Tech, and Congress introduced legislation to rewrite the antitrust laws. The new bills would topple the consumer welfare standard, making it far easier to bring successful cases against large tech companies. Yet the proposed legislation reflects a step backward, embracing earlier antitrust practices that did not withstand the test of time.

56. "Largest American Companies by Market Capitalization," Companiesmarketcap.com, last accessed Jan. 16, 2022. https://companiesmarketcap.com/usa/largest-companies-in-the-usa-by-market-cap.

The bright lines and prohibitions included in the new legislation are very much in the spirit of the old S-C-P approach to antitrust regulation. Yet, there is ample history of the billions of dollars in welfare losses associated with regulated markets in the past, from airlines to telecommunications, to interstate shipping.[57] Additionally, there is little evidence that enforcement activity in the 1950s and 1960s effectively reduced the costs of monopoly. There is, however, considerable evidence of costly litigation, sometimes lasting years, that yielded little or no economic benefits.

Those wishing to return to the more discretionary attitudes of past antitrust enforcement should think carefully about changing the current antitrust framework. Trading consumer welfare for other policy goals necessarily imposes costs on consumers, as the FTC Chair has noted: "It is possible that limiting a network monopolist's ability to compete on its own network, would sacrifice certain cost savings, resulting in higher prices."[58]

Additionally, there is little economic analysis demonstrating superior outcomes for the proposed changes in antitrust law or identifying demonstrable consumer harms they will resolve. Nor are there any studies assessing the impact of antitrust law on small businesses and consumers. The proposed changes will prohibit many popular products and services and these costs should be recognized.

At the same time, it is important to evaluate the impact these bills would have on innovation and global competition. The United States is home to the most successful global tech companies, but new restrictions or prohibitions can threaten the global leadership. This is especially concerning with respect to China, whose tech companies are vying for global leadership, often with government subsidies.

Without empirical evidence and no analysis of the cost on consumers and businesses, overhauling antitrust laws may do more harm than good. Efficient regulation is difficult and will always face the challenge of imperfect information and political influence. Congress and the Biden administration would be prudent to avoid efforts to create a new framework for antitrust that aims to revive previous policies. Economic theory suggests that the existing consumer welfare standard is a useful tool for antitrust enforcement and the courts have developed a valuable body of case law to address concerns of monopolistic or anticompetitive behavior. Abandoning this framework for laws that reflect more problematic policies of the past—especially without an economic assessment of

57. Clifford Winston, "Economic Deregulation: Days of Reckoning for Microeconomists," *Journal of Economic Literature* 31:3 (September 1993), pp. 1263-1289. https://www.jstor.org/stable/2728241.

58. Lina M. Khan, "The Separation of Platforms and Commerce," *Columbia Law Review* 119:4 (2019). https://columbialawreview.org/content/the-separation-of-platforms-and-commerce.

costs and benefits associated with the change—can have a significant impact on innovation and economic growth.

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