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Antitrust and the Winner-Take-All Economy

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Abstract

The premise that antitrust needs to be applied far more aggressively—and perhaps amended—to discipline "new economy" giants is misplaced. Instead, existing U.S. antitrust doctrine, which emphasizes consumer welfare, is perfectly capable of rooting out any anticompetitive abuses without imposing unwarranted harm on companies. The latter point is important, because, as we will see, the new economy giants bestow truly "huge" economic benefits on American society, so excessive and misguided antitrust intervention threatens serious harm to the public good.

Recently, substantial public attention has focused on the supposed need to apply antitrust law more vigorously to address problems caused by today's "winner-take-all" economy.[1] This appears to assume that there is a new "disease" affecting the American economy—winner-take-all markets—and that a reinvigorated antitrust may be the "cure" for this malady.[2]

The renewed interest in big firm trust-busting perhaps should not be surprising. The relatively recent rise of extraordinarily successful firms that currently operate dominant Internet platforms—Google, Facebook, Twitter, Amazon, Apple, and Microsoft, as well as other highly successful companies that have transformed their industry sectors and booked record profits and share value—is undeniable.[3] The press is rife with accounts that antitrust needs to do a better job of "reining in" these firms, because they pose a unique challenge to the structure of the American economy—and perhaps to American society as well.[4]

Key Points

- Illegal monopolization requires actions by the dominant firm that undermine the process of competing, not merely market dominance. The mere fact that individual competitors are harmed is irrelevant.
- The goal of antitrust is to maximize consumer welfare. Antitrust does not condemn efficient business practices that benefit consumers, even though they may hurt less-efficient rivals.
- Two-sided or multi-sided online platforms (e.g., Google and Amazon) confer huge economic benefits on the consumers and producers who interact through them. Existing antitrust law is adequate to deal with any competitive issues they may raise.
- Using antitrust law to attack companies based on non-economic, ill-defined concerns about size, fairness, or political clout is not only unwarranted but would be a recipe for reduced innovation and economic stagnation.

This paper, in its entirety, can be found at **http://report.heritage.org/lm224**

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Nevertheless, the premise that antitrust needs to be applied far more aggressively—and perhaps amended—to discipline "new economy" giants is misplaced. Instead, existing U.S. antitrust doctrine, which emphasizes consumer welfare, is perfectly capable of rooting out any anticompetitive abuses by these firms without imposing unwarranted harm on them. The latter point is important, because, as we will see, the new economy giants bestow truly "huge" economic benefits on American society, so excessive and misguided antitrust intervention threatens serious harm to the public good.

A Bit of History

Let's set the stage with a bit of antitrust history. This is not the first time that American industry and society were supposedly threatened by private-sector behemoths. The great "trusts" (such as Standard Oil) and industry-dominating companies (such as U.S. Steel and certain railroads) of the late 19th and early 20th centuries were deemed by the popular press—and by populist and progressive politicians—as threats to American small businesses, American workers, and, indeed, the American social fabric.[5] Those giant enterprises had dramatically transformed the American economy in a highly disruptive fashion. Somehow American society survived that vicious onslaught, despite the fact that the early period of American antitrust enforcement, in hindsight, appears far from radical. Most successful early government enforcement actions were against hardcore cartels and mergers to monopoly—cases that would not raise an eyebrow today. Indeed, the two major cases involving structural break-ups of dominant enterprises—*Standard Oil* and *American Tobacco*—involved predatory practices and mergers to monopoly that clearly would be attacked by current antitrust enforcers.[6]

Standard Oil, *American Tobacco*, and other classic American antitrust suits brought against dominant firms throughout history focused on alleged bad acts—i.e., bad behavior—not whether defendants were "too big" or "too powerful" in some abstract sense. That is because the status of being a monopolist is not illegal under American antitrust law. Rather, "exclusionary conduct" is required to support claims of "monopolization" or "attempted monopolization" in violation of Section 2 of the Sherman Antitrust Act, American antitrust law's core provision dealing with anticompetitive monopoly abuses.[7]

American Antitrust Principles, Focusing on Monopolization

"Bad acts"—called exclusionary conduct in the case law—remain a key prerequisite (along with monopoly power) for illegal monopolization under U.S. antitrust.[8] But what makes bad acts illegal for antitrust purposes? The U.S. Court of Appeals for the DC Circuit, in the seminal 2001 *Microsoft*[9] case, stated the consensus American view: "[T]o be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice."[10]

In other words, illegal monopolization requires actions by the dominant firm that undermine the process of competing. The mere fact that individual competitors are harmed is irrelevant. Nevertheless, harm imposed on competitors due to conduct that has no conceivable procompetitive business justification is highly problematic. As the leading American antitrust treatise writer, Professor Herbert Hovenkamp, has explained, "[E]xclusionary conduct consists of acts that are reasonably capable of creating, enlarging, or prolonging monopoly power by impairing the opportunities of rivals" and that impose harm disproportionate to any benefits.[11] Some commentators would eschew a disproportionality requirement, striking down conduct if its anticompetitive effects even very slightly outweigh its procompetitive effects. With that qualification in mind, Hovenkamp's statement—and in particular, his description of exclusionary conduct—well represents the mainstream American antitrust position. Furthermore, and significantly, the International Competition Network, the global informal cooperative network of antitrust agencies and supporting experts, also views exclusionary behavior as involving harm to the competitive process that impairs rivals' legitimate competitive opportunities.[12]

What does this mean in practice? Antitrust is a highly fact-specific and case-specific enterprise, but two stylized examples involving a "dominant firm"[13] illustrate the concept. First, if a dominant firm's factory improvements raise its efficiency, lower its costs, and drive out of business rivals that are relatively less efficient, that should not be a concern for antitrust enforcers. A dominant firm's actions that harm rivals but do not involve legitimate competition on the merits, however, are fair game for antitrust enforcers.

Thus, for example, exclusionary conduct would be present if a dominant firm in effect "paid off" all key distributors, not to better promote its product or otherwise improve efficiency, but for no other reason than to deny its rivals access to the market.[14]

This approach to assessing the actions of a dominant single firm reflects the widely accepted American consensus approach to antitrust more generally, at least over the last quarter century. Under that approach, antitrust should seek to promote consumer welfare and economic efficiency, not the protection of particular producers or other social goals.[15] Those other goals are best pursued through different government policy instruments, such as labor policy, environmental protection, tax law, and so forth. Narrowing the focus of antitrust clarifies its enforcement mission. It also avoids unnecessary enforcement error and uncertainty that can creep in when it is unclear precisely what enforcers seek to do in individual cases. Minimizing such uncertainty facilitates business planning and encourages investment by letting firms know what is likely to pass legal muster.

Let's return now to single-firm conduct. Some additional light on the boundaries of illegal Sherman Act monopolization was shed by the Supreme Court's landmark 2004 decision in *Verizon v. Trinko*.[16] This case involved allegations that Verizon had illegally maintained its monopoly over local telephone service by violating Federal Communications Commission rules that made it give rival local telecommunications service providers effective "interconnection" access to its network. Writing for a unanimous Supreme Court, Justice Antonin Scalia strongly reaffirmed that U.S. antitrust law does not seek to deny a dominant firm monopoly profits, as long as it does not engage in wrongful behavior:

> The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.
>
> Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[17]

Trinko and other modern Supreme Court cases make it clear that a monopolist is not required to engage in business conduct that does not make good business sense, even if that conduct causes the monopolist to run afoul of regulations designed to help competitors enter the market. The one possible exception to this general rule involves granting competitors access to a monopolist-owned "essential facility" needed to be able to compete in the market. That exception was narrowed so significantly by the *Trinko* Court that it seldom, if ever, will come into play, unless and until there is a significant change in antitrust case law.[18]

This does not, however, mean that a monopolist's conduct affecting rivals is free from careful scrutiny and possible invalidation. That was made plain by the DC Circuit's *en banc U.S. v. Microsoft* decision, holding that Microsoft had engaged in illegal monopolization.[19] *Microsoft*, the most cited and discussed American monopolization opinion of the 21st century, sets out a general framework that can be applied in any case involving alleged monopolization.

Microsoft was an appeal of a federal district court decision holding that the company had illegally maintained its Windows operating system monopoly over the market for Intel-compatible personal computer (PC) operating systems, through a variety of stratagems. The Microsoft matter had been litigated for years in federal court and was the subject of substantial public scrutiny.[20] Attention centered not just on the continuing dominance of Windows in workplace and home computing, but on fears that Microsoft would use its Internet Explorer browser to extend that dominance to the rapidly growing Internet.

The DC Circuit Court, after acknowledging Microsoft Windows' monopoly power, engaged in a systematic examination of individual Microsoft business practices to determine in each case whether the practice at issue was exclusionary or not. The court examined the claimed anticompetitive effects of each practice, followed by an assessment of Microsoft's efficiency justifications, and then quickly determined on an individual basis whether or not the particular practice passed legal muster. Although certain aspects of some practices (and an unfocused complaint of general anticompetitive conduct) were held not to be exclusionary, the court found enough practices to be clearly anticompetitive—and lacking in colorable efficiency justifications—to affirm a holding that Microsoft had engaged in illegal monopolization.

The DC Circuit's *Microsoft* decision was not entirely free from controversy, with some critics deeming it an unsatisfying compromise resolution of a politicized case largely "ginned up" by Microsoft's rivals.[21] Nevertheless, although one may quibble with some aspects of the DC Circuit's opinion, the decision overall has stood the test of time. It demonstrates that monopolization analysis can be applied quickly and effectively by judges, even in highly complex cases involving a wide variety of challenged conduct. The trick is to examine and break down the likely effects of individual aspects of firm conduct. As the court made clear, one need not resort to problematic and unfocused "monopoly broth" theories of "generally anticompetitive" conduct. While finding that several highly specific Microsoft practices were exclusionary, the court rejected the lower court's broad holding that "apart from Microsoft's specific [bad] acts, Microsoft was liable…[due to] its general 'course of conduct'… [based on] only broad, summarizing conclusions."[22] The DC Circuit's rejection of unfocused "bad conduct" theories underscored its deeper message that monopolization allegations must be tested solely through the evaluation of specific facts, not mere "bad publicity"—a principle that appropriately discourages monopolization lawsuits that lack solid empirical and economic foundations.

Multi-Sided Markets and Platforms

The *Microsoft* template for monopolization analysis can be readily applied to the conduct of the giant Internet economy platforms that increasingly have been characterized as monopolies that need to be reined in by antitrust. Let's turn to those platforms now, which are often characterized as "two-sided markets" or "multi-sided markets" by economists:

> A two-sided [or multi-sided] market or platform is one in which two or more sets of actors interact through an intermediary or platform, which, in turn, facilitates the transactions, often enabling transactions to take place that otherwise would be too expensive absent the platform. For instance, a shopping mall is a two-sided market where shoppers can find their preferred stores. Stores would operate without the platform, but perhaps not as many, and not as efficiently. Newspapers, search engines, and other online platforms are two-sided markets that bring together advertisers and eyeballs that might not otherwise find each other absent the platform.[23]

Today's big, high-profile platforms have two-sided market characteristics. Microsoft and Apple bring together consumers and software developers; Google, Facebook, and Twitter attract Web surfers and advertisers; Amazon draws to its site consumers and makers of goods and services. (Advertisers and other third parties may participate in a platform, making it multi-sided.)

Multi-sided platforms act as "middlemen" that efficiently match two or more sets of individuals (or companies) that want to (or may want to) deal with each other. For example, take the case of consumers that are seeking a certain type of product and sellers of that product. A platform such as Amazon allows consumers to be matched with different competing sellers of the product they desire with a few quick keystrokes. This avoids duplicative consumer visits to different sellers' stores (or to their websites) and makes it far easier for sellers to reach a wide variety of buyers around the country, thereby avoiding duplication and vastly reducing transactions costs for parties on both sides of the market. Just as—if not more—important, the intermediary platform creates new value by facilitating exchanges that would not otherwise occur. Furthermore, other sellers and advertisers with access to the platform may inform consumers of complementary goods and services that could enhance the benefits of the items being sought, thereby creating additional opportunities for mutually beneficial exchanges.

A key feature of multi-sided markets is the novel pricing strategies and business models they employ. In order to attract one group of users, the network sponsor may subsidize the other group of users. Historically, for example, Adobe's portable document format (PDF) did not succeed until Adobe priced the PDF reader at zero, substantially increasing sales of PDF writers.[24] Similarly, gaming manufacturers very often subsidize the gamers and sell their consoles at substantial losses. Thus, for example, Sony's PS3 lost $250 per unit sold in order to penetrate the market and receive royalties for software sold for their gaming console.[25]

Two-sided markets display "network effects," which means that as the number of participants in the market rises, its value to existing participants rises, incentivizing more parties to join.[26] For example, the more products that are available for sale through Amazon, the more valuable it becomes for individual consumers to search for and purchase products through Amazon. Also, the more consumers that are attracted to Amazon, the more valuable it becomes for makers of products to sell their wares through Amazon. Although "network effects" are sometimes criticized as fomenters of monopolies, do not forget that the benefits flowing from these effects are great for consumers and producers—that is, they raise economic welfare. They also may, by the way, create employment opportunities, as reflected in Amazon's January 2018 announcement that it plans to add another 100,000 full-time jobs in the U.S. by mid-2018.[27]

Because of network effects, successful platforms enjoy increasing returns to scale. Users will pay more for access to a bigger network, so margins improve as user bases grow. This sets network platforms apart from most traditional manufacturing and service businesses. In traditional businesses, growth beyond some point usually leads to diminishing returns: Acquiring new customers becomes harder as fewer people, not more, find the firm's value proposition appealing.

Fueled by the promise of increasing returns, competition in two-sided network industries can be fierce. Platform leaders can leverage their higher margins to invest more in research and development or lower their prices, driving out weaker rivals. As a result, mature two-sided network industries are often dominated by a handful of large platforms, as is the case in the credit card industry.[28]

In extreme situations, such as PC operating systems, a single company emerges as the winner, taking almost all of the market. But platform monopolies may prove transient, as new and better platforms unseat older ones. For example, Google quickly displaced Yahoo as a dominant Internet search engine, and Facebook ousted MySpace from its short-term dominance as a social network platform.[29] In short, digital platforms often compete "for the market," but monopoly positions, once earned, are still subject to vigorous competition, and may not last long. That picture is, however, incomplete. Even if the market has characteristics that could lead it to be dominated by one platform, companies can choose to cooperate rather than competing to be the winner-take-all. For instance, DVD companies pooled their technologies creating the DVD format in 1995.[30]

History demonstrates that a giant firm's dominance of one sort of online digital platform does not mean it will leverage its position to dominate other online platforms. Google's current dominance in online searches has not enabled it to achieve dominance in online social networking: Facebook remains the leading social network, despite Google's best efforts to promote Google Plus. And Amazon and Facebook, despite their successes in online purchasing and social networking, respectfully, have not leveraged their positions to achieve dominance in other cyberspace sectors. Older examples come to mind as well. Critics who 20 years ago feared that Microsoft's Windows operating system monopoly would pave its way to dominate the Internet search engine and the Internet itself were proven spectacularly wrong. The inability of a successful platform to readily transfer its dominance from one market to another reflects the vigor of the competitive process, the advantages of specialization, and the diverse nature of human expertise and talent that cannot be monopolized.

To sum up, two-sided or multi-sided platform markets—including the big platforms very much in the news, such as Google, Amazon, Facebook, and Twitter—confer huge economic benefits on the consumers and producers who interact through them. What is more, firms that produce goods and services that enhance the quality of the platforms also greatly benefit: Think of the app writers, software firms, and new companies that are incentivized to be formed and grow due to the existence of platforms. Although dominant positions may be achieved in particular markets, they come about through vigorous competition that ensures the most efficient and high quality platforms thrive.

That competitive process may also lead to the displacement of temporarily dominant platforms that no longer "cut the mustard." What's more, dominance in one platform is not readily translatable to dominance in another platform. In short, big multi-sided platforms are great economic welfare enhancers, but they are well disciplined by the competitive process. They also remain subject to antitrust scrutiny, which should and does focus on whether they are competing on the merits, or engaging in exclusionary behavior that distorts the competitive process.

Antitrust Applied to Platforms—in the U.S. and Abroad

Have American antitrust enforcers vigorously scrutinized the activities of giant two-sided platforms? Yes. The Justice Department's *Microsoft* case, previously discussed, led to a judicial finding of antitrust liability and a subsequent settlement. The Federal Trade Commission (FTC) vigorously investigated allegations that Google manipulated its search engine algorithm to favor sites with commercial ties to the company over other unaffiliated sites. In January 2013, the FTC entered into a consent decree with Google regarding the licensing terms of certain "standard essential patents."[31] The FTC, however, ended its search-engine investigation. According to the FTC's outside counsel leading the Google investigation,

> [R]egarding the specific allegations that the company biased its search results to hurt competition, the evidence collected to date did not justify legal action by the Commission. Undoubtedly, Google took aggressive actions to gain advantage over rival search providers. However, the FTC's mission is to protect competition, and not individual competitors. The evidence did not demonstrate that Google's actions in this area stifled competition in violation of U.S. law.[32]

There is every reason to believe that U.S. federal antitrust enforcers will continue to investigate practices by the dominant platforms (and, more generally, by firms engaged in Internet commerce)[33] to identify those that may inefficiently skew competition and merit challenge. Those enforcers will not, however, seek to challenge economically efficient platform conduct that disadvantages rivals but benefits consumers.

What about foreign jurisdictions' antitrust policies toward platforms? Is there anything to learn from their experience? Yes, there is—in terms of what should be avoided. The European Commission (EC), plus various European and Asian countries, have engaged in intrusive antitrust investigations of all of the major dominant platforms. The EC, in particular, has imposed huge fines on Microsoft and Google for practices that are beneficial to consumers, such as Microsoft's bundling of a "Windows Media Player" in its Windows software[34] and Google's treatment of its own comparison shopping service vis-à-vis others in displaying Google search results.[35]

As former FTC Commissioner (and leading antitrust expert) Professor Josh Wright has pointed out, the EC apparently ignored FTC findings that Google likely benefited consumers by prominently displaying its vertical content on its search results page. ("Vertical content" here refers to a specific business-oriented segment of online search, such as travel services, drugs, or other goods and services.) The FTC reached this conclusion based upon, among other things, analyses of actual consumer behavior—so-called "click through" data—which showed how consumers reacted to Google's promotion of its vertical properties.[36] Nevertheless, additional European antitrust investigations of Google and Facebook continue apace, and all of the leading American digital platforms clearly remain under the European Union antitrust microscope. Statements from the European Competition Commissioner, Margarethe Vestager, confirm this.[37] Not surprisingly, less efficient American competitors were among the leaders in complaining to the EC about the big platforms, a prime example of anticompetitive "rent-protection" efforts.[38]

As I explained in a recent article:

> [W]ho loses when zealous bureaucrats target efficient business practices by large, highly successful firms, as in the case of the European Commission's Google probes and related investigations? The general public. "Platform firms" like Google and Amazon that bring together consumers and other businesses will invest less in improving

> their search engines and other consumer-friendly features, for fear of being accused of undermining less successful competitors.
>
> As a result, the supply of beneficial innovations will slow, and consumers will be less well off. What's more, competition will weaken, as the incentive to innovate to compete effectively with market leaders will be reduced. Regulation and government favor will substitute for welfare-enhancing improvement in goods, services, and platform quality. Economic vitality will inevitably be reduced, to the public's detriment.[39]

The facts bear out this assessment. Despite multiple pronouncements by European Union officials that European policy is geared to making Europe a global leader in the digital economy, all of the major high-tech platform companies are American. The highly intrusive investigation of American platform leaders has not provided "breathing space" for successful European rivals to better innovate and thrive. The best recipe for the growth of high-tech innovative companies in Europe is not heavy-handed government intervention, reflected in antitrust and other European regulatory policies.[40] It is, instead, a reduction in government micromanagement of the economy, which increases economic liberty and market-led innovation.

A European Commission move toward deregulation is not, however, likely in the foreseeable future, given continental Europe's *dirigiste* tradition.[41] Indeed, the EC is considering proposals to regulate allegedly "unfair" platform-to-business trading practices and address imbalances in bargaining power between major platforms and their business customers.[42] Such regulation risks sacrificing the efficiencies and other benefits of platforms by imposing potentially rigid rules that lack the flexibility of existing European competition and consumer protection laws. One of the main benefits of relying on existing competition and consumer protection laws is that they proceed primarily through fact-specific, case-by-case analyses, which are more likely to maximize consumer welfare than are *ex ante* regulations. The history of U.S. regulation—and, indeed, European regulation—bears this out, but the European Commission seems oblivious to it.

Absent a showing of market failure, plus a showing that the benefits of government intervention would outweigh the costs (which is doubtful), regulation of platforms is unwarranted. Those showings have not been made by the EC. Rather, and most unfortunately, the Commission's belief in the efficacy of regulatory micromanagement reflects what the economist and legal philosopher Friedrich Hayek called "the pretense of knowledge."[43]

Do Calls for More Expansive American Antitrust Have Merit?

That is not the end of the story. Over the past couple of years there has been a rise in complaints that big platforms like Google or Amazon are simply too big. The claim is that they exercise too much political or other forms of power, without regard to their effects in spurring consumer welfare, economic efficiency, or economic growth. Critics then say that antitrust should be deployed in a more aggressive fashion to deal with this new reality. In short, they believe antitrust should be given an additional set of goals to pursue, centered on the reining in of excessive business power or influence.

That advice is bad for a variety of reasons. First, for roughly 40 years now the federal courts, including the Supreme Court, have stressed that the goal of antitrust law is to maximize consumer welfare, meaning that efficient business practices that benefit consumers should not be condemned, though they may harm less-efficient rivals. Unless and until new judges are appointed, and current antitrust precedents are thrown out, antitrust prosecutions against entities based merely on their size—without regard to consumer welfare, efficiency, and harm to the competitive process—simply will not fly.

But what about "breaking up" or regulating dominant platforms through new legislative initiatives or new antitrust theories? Such proposals proceed from the premise that the mere unfettered maintenance of market dominance, though based on efficiency, inherently harms society, because it reduces the number of viable competitors who might bring different insights and approaches to market competition. This theory is unconvincing. New market entry enabled by shackling incumbent firms' efficient business conduct is artificial and detracts from true competition on the merits. It would be a recipe for diminished innovation and second-rate competitors, as the European efforts to rein in dominant American digital platforms illustrate.

Relatedly, efforts by government to carry out protracted inquiries into dominant firm behavior without a showing of likely consumer harm yields undesirable incentives for market leaders. The mere pendency of ill-focused long-term antitrust investigations may cause firms under scrutiny to pull their punches and lose their competitive edge. For instance, informed observers believe that the U.S. Justice Department's unfocused and ultimately unsuccessful monopolization investigation of IBM, which lasted from the 1960s to the 1980s, did just that, diminishing the firm's role as a major innovative force.[44]

But would reduced innovation and economic efficiency be worth it if breaking up or regulating platforms ameliorated wealth inequality? Even assuming great income equality is a desirable social goal—a topic beyond the scope of my remarks today—the answer is no. First, the evidence does not support the proposition that antitrust advances wealth progressivity.[45] Second, direct transfer payments to the poor, including fiscal tools such as the negative income tax and wealth taxation, are far more efficient means of transferring wealth.[46]

Moreover, and very importantly, there is no reason to believe that limiting the size or constraining the business behavior of dominant platforms would reduce income inequality: The opposite might be the case. Restrictions on efficient scale or advertising practices could raise the cost of goods and services, bearing disproportionately on poorer and less wealthy consumers. Why is that the case? Reductions in economies of scale could reduce the ability of sales platforms such as Amazon to offer lower prices. Limitations on displays or advertising strategies by search engines such as Google could limit their ability to enhance the quality of their services and to offer bargains through affiliated sites whose advertising they feature. Employment opportunities for low-income and middle-income wage earners could also shrink. For example, Amazon might not be able to create as many new warehouse or service jobs or offer employment packages that are as good as they are today, due to reduced efficiency and profits.

What about helping small businesses by constraining business leaders? History demonstrates that propping up smaller and less efficient retail sellers has only served to retard innovations in distribution that helped poorer consumers. The New Deal–era Robinson–Patman Act[47] is a good illustration of this, as are small business protectionist laws in Japan and other countries.

What about reducing the political or social influence of large companies? That criterion is inherently subjective and would promote arbitrary enforcement actions by political officials, undermining the rule of law. Lobbyists for less efficient rivals would be incentivized to cite political concerns to win through government what they were unable to achieve in the marketplace. Relatedly, depriving the marketplace of serving as the arbiter of the commercial success of businesses through politics not only harms consumers in the pocketbook, it undermines the role of citizens and their elected representatives as arbiters of political questions. It is therefore at its core undemocratic, directly at odds with the claim that restraining bigness somehow promotes democratic ideals.

Finally, what about the complaints that the sheer size and wealth of the big platforms presents some kind of new, yet ill-defined threat that must be dealt with before irreversible harm is done? This reflects the "precautionary principle," a European notion that substantial costs must be borne today to fend off the very uncertain possibility of a potential catastrophe tomorrow. Applying this principle to antitrust is just a modern reformulation of populist and progressive-era themes that the great trusts, the great oil monopoly, or the great banks would ruin the country if not cut down to size.

The "bigness is badness" antitrust theme, put forth by Justice Louis Brandeis and Justice William Douglas,[48] among others, did have an effect, but not a good one. Efficient mergers were discouraged, and industry-leading firms lived under the constant threat of antitrust investigation. When intrusive government regulation substituted for antitrust—as in the case of AT&T from the early 20th century to the 1980s—innovation moved at a snail's pace and consumers and the general economy suffered. For example, regulatory constraints harmfully delayed the widespread U.S. deployment of cable television and wireless cellular telephony for decades.[49] By contrast, the commercial Internet developed rapidly in the 1990s and early 20th century in a largely "regulation free" environment.[50] The maintenance of this beneficial state of affairs regrettably has been placed in some doubt, however, by calls for new government controls on cyberspace.

These hard facts have not prevented ambitious politicians from claiming that antitrust as currently applied is lacking and needs to be changed and made more interventionist. "Better Deal" antitrust legislative and policy proposals propounded by congressional *dirigistes* characterized as new rules for "cracking down on corporate monopolies and the abuse of economic and political power"—are a case in point.[51] Those proposals would establish new presumptions against mergers and other business activities, based on the size of the transactions, not on economic analysis of their likely effects. They are based on concerns about alleged increased "market concentration" which, when closely scrutinized, do not hold water, and in any event are belied by the vibrancy of the markets that are said to be the primary source of concern. I have recently addressed the deficiencies of these counterproductive proposals.[52] In short, consistent with the points just laid out, implementation of those suggestions would harm the American economy and weaken—not enhance—competition.

Conclusion

In conclusion, the U.S. antitrust laws as currently applied, emphasizing sound economics, are fully capable of preventing truly anticompetitive behavior by major Internet platform companies and other large firms. But using antitrust to attack companies based on non-economic, ill-defined concerns about size, fairness, or political clout is unwarranted, and would be a recipe for reduced innovation and economic stagnation. Recent arguments trotted out to use antitrust in such an expansive manner are baseless, and should be rejected by enforcers and by Congress.

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Endnotes

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2. Marc Jarsulic et al., *Reviving Antitrust-Why Our Economy Needs A Progressive Competition Policy,* Center for American Progress Report, 14-21 (June 2016), https://www.americanprogress.org/issues/economy/reports/2016/06/29/140613/reviving-antitrust/.
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4. Paula Dwyer, *Should America's Tech Giants Be Broken Up?*, Bloomberg, July 20, 2017, https://www.bloomberg.com/news/articles/2017-07-20/should-america-s-tech-giants-be-broken-up.
5. President Theodore Roosevelt famously spoke to this concern when he referred to the harm caused by "malefactors of great wealth," and spoke about U.S. government efforts to rein in the trusts as a "contest as…to…who shall rule this free country—the people through their governmental agents, or a few ruthless and domineering men whose wealth makes them peculiarly formidable because they hide behind the breastworks of corporate organization." President Theodore Roosevelt, Address of President Roosevelt on the Occasion of the Laying of the Corner Stone of the Pilgrim Memorial Monument, Provincetown, Mass. (Aug. 20, 1907), https://archive.org/stream/addressofpreside00roo/addressofpreside00roo_djvu.txt.
6. Standard Oil Co. of New Jersey v. United States, 211 U.S. (1911); United States v. American Tobacco Co., 211 U.S. (1911). *See* Herbert Hovencamp, Federal Antitrust Policy 79 (6th ed. 2016). For a thumbnail sketch of American antitrust history through the 1960s by Professor Hovenkamp, the author of the leading treatise on U.S. antitrust law, *see id*. at 78–83.
7. 15 U.S.C. § 2 (2004).
8. "The law of monopolization requires a showing that the defendant has monopoly power and has engaged in impermissible 'exclusionary' practices with the design or effect of protecting or enhancing its monopoly position." Hovencamp, *supra* note 6, at 32.
9. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (per curiam), *cert. denied*, 534 U.S. 952 (2001).
10. *Microsoft*, 253 F.3d at 58 (emphasis added).
11. *See* Hovencamp, *supra* note 6, at 363. *See also* Herbert J. Hovenkamp, *The Antitrust Standard for Unlawful Exclusionary Conduct* 1 (U. Penn. Faculty Scholarship, No. 1777, 2008), http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2779&context=faculty_scholarship.
12. International Competition Network, Unilateral Conduct Workbook: The Objectives and Principles of Unilateral Laws (9–12) (Apr. 2012), http://www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf; Department of Justice Office of Public Affairs, *International Competition Network Adopts Recommended Practices on Merger Notification and Review and New Work on a Framework for Analyzing Exclusionary Unilateral Conduct*, May 12, 2017, https://www.justice.gov/opa/pr/international-competition-network-adopts-recommended-practices-merger-notification-and-review.
13. "Dominant firm" is used here as an alternative shorthand term for a firm that possesses monopoly power.
14. More generally, conduct by a firm possessing monopoly power should be viewed as exclusionary if it makes no economic sense for the defendant but for its tendency to eliminate or lessen competition. *See* Gregory J. Werden, *The "No Economic Sense" Test for Exclusionary Conduct*, 31 J. Corp. L. 398 (2006).
15. *See generally* Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405 (2013), https://www.ftc.gov/sites/default/files/documents/public_statements/goals-antitrust-welfare-trumps-choice/130320goalsofantitrustbp4.pdf.
16. Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 39 (2004).
17. *Trinko*, 540 U.S. at 407-08.
18. *See*, *e.g.*, Edward D. Cavanagh, *Trinko: A Kinder, Gentler Approach to Dominant Firms Under the Antitrust Laws?*, 59 Maine L. Rev. 112, 128–29 (2007) ("At the very least, the opinion in *Trinko* raises doubt as to whether essential facilities provides a legal basis upon which to proceed against a monopolist, independent of a more general claim of monopolistic refusal to deal.").
19. Microsoft, 253 F. 3d 34 (D.C. Cir. 2001).
20. For a detailed description of this case, *see, e.g.*, Samuel Noah Weinstein, *United States v. Microsoft Corp*., 17 Berkeley Tech. L.J. 279–285, 287 (2002), http://scholarship.law.berkeley.edu/btlj/vol17/iss1/17.
21. *See* William H. Page and John E. Lopatka, *The Microsoft Case as a Political Trial*, *in* Political Trials in Theory and History 347-368 (Jens Meierhenrich & David O. Pendas eds. 2016).
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27. Spenser Soper and Jing Cao, *Amazon to Create 100,000 New Jobs in U.S. in Next 18 Months*, Bloomberg, Jan. 12, 2017, https://www.bloomberg.com/news/articles/2017-01-12/amazon-to-create-more-than-100-000-new-jobs-in-u-s-in-18-months.
28. *See* Thomas Eisenmann, Geoffrey Parker, and Marshall W. Van Alstyne, *Strategies for Two-Sided Markets*, 84 Harv. Bus. Rev., No. 10, at 1–10 (Oct. 2006), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409276.
29. *See, e.g.*, Darren S. Tucker and Hill B. Wellford, *Big Mistakes Regarding Big Data*, 14 Antitrust Source, No. 2, at 7 (Dec. 2014) (commenting on Google's rapid displacement of Yahoo and Facebook's rapid displacement of MySpace), https://www.morganlewis.com/-/media/antitrustsource_bigmistakesregardingbigdata_december2014.ashx.
30. Andrew Pollack, *Big Makers Agree on Single Format for Multi-Use Disk*, The New York Times, Sept. 16, 1995, http://www.nytimes.com/1995/09/16/us/international-business-big-makers-agree-on-single-format-for-multi-use-disk.html.
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32. *Id.*
33. Acting FTC Chairman Maureen Ohlhausen recently testified to Congress that, in the Internet arena, the FTC has sued companies for foreclosing rival content in an exclusionary or predatory manner, challenged problematic access, discrimination, pricing, and bundling practices, and has conditioned vertical mergers that would have foreclosed competition in a downstream market. *See generally*, *Statement of FTC Acting Chairman Maureen K. Ohlhausen, Net Neutrality and the Role of Antitrust: Hearing Before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Judiciary Committee*, nn. 5–10 and accompanying text (Nov. 1, 2017), https://www.ftc.gov/public-statements/2017/11/statement-ftc-acting-chairman-maureen-k-ohlhausen-net-neutrality-role.
34. European Commission Press Release IP/04/382, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine (Mar. 24, 2004). http://europa.eu/rapid/press-release_IP-04-382_en.htm.
35. European Commission Press Release IP/17/1784, Antitrust: Commission Fines Google 2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service (June 27, 2017), http://europa.eu/rapid/press-release_IP-17-1784_en.htm.
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37. Margareth Vestager, Address at the American Enterprise Institute, Washington, D.C.: How Competition Can Build a Better Market (Sept. 18, 2017), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/how-competition-can-build-better-market_en.
38. Regrettably, the European Commission has accorded excessive weight to the complaints of less efficient rivals who would rather rely on government intervention than competition on the merits to preserve their business interests. *See* Alden Abbott, *The European Commission Just Fined Google $2.7 Billion. Such Foreign Antitrust Attacks Threaten US Innovation and Prosperity*, The Daily Signal, June 28, 2017, http://dailysignal.com/2017/06/28/european-commission-just-fined-google-2-7-billion-foreign-antitrust-attacks-threaten-us-innovation-prosperity/.
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40. *See, e.g.*, Christian Borggreen, *The Sorry State of the Digital Union*, Disruptive Competition Project (Sept. 18, 2017) ("[European Commission President] Juncker's digital Europe is drifting way off course, imposing heavy-handed, inappropriate regulations. Instead of creating a unified digital single market encompassing more than 500 million consumers, Juncker's misguided policies are fragmenting it. New European regulations threaten to be ineffectual or, worse, to throttle business and innovation."), http://www.project-disco.org/innovation/091817-the-sorry-state-of-the-digital-union/#.WiVe-canG71.
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