Antitrust Is Not a Conservative Position

Controversy over treatment by "Big Tech," a shorthand reference to companies like Facebook, Google, Twitter, and Amazon, of those expressing conservative, libertarian or just unapproved views on controversial political and social issues[1] has led some conservatives to call for government use of antitrust law to rein in, or even break up, these companies unless they change their practices. Some are even supporting new laws giving government more power to use antirust against these companies.[2] This paper will examine the arguments by conservatives pushing for use of antitrust against Big Tech and expose the flaws and dangers in this approach. *Before examining these arguments*, it would be useful to examine the history of antitrust laws.

History of Antitrust

The major federal Antitrust law is the Sherman Anti-Trust Act of 1890 (15 U.S.C. §§ 1-38).[3] This legislation gives the federal government authority to prevent monopolies by prosecuting firms engaging in "anti-competitive behavior."[4]

From its inception until the 1980s, the guiding principle behind enforcement of antitrust laws was that government bureaucrats and federal judges were perfectly capable of determining when a company must be considered "too big" because allowing it to grow even further would threaten competition. And, as described by the Antitrust Education Project, thanks to efforts of bureaucrats and judges to restrain certain companies, antitrust laws were the epitome of government overreach:

> …antitrust law had become a mélange of conflicting decisions that tended to raise prices and support inefficient firms to the detriment of consumers. In much of the 20th century, the U.S. Supreme Court's antitrust jurisprudence focused on exotic goals that often proved irrelevant or even harmful to the well-being of consumers.
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> …. antitrust law had fallen under the sway of subjective biases. Justice Louis Brandeis denounced the "curse of bigness" against "small dealers and worthy men" – the idea

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[1] Douglas Golden, "How Did Big Tech Censor Conservative Outlets in 2021? Let Us Count the Ways?", Western Journal, February 22, 2002

[2] Conservatives support for increased antitrust enforcement is a part of the growth of the "antimarket" or "post-liberal right" that has emerged in recent years. These thinkers reject the "fusionist" consensus that the best way to project traditional values is through free markets. Instead, this new right advocacy of aggressive government action to "protect" American workers and families from the degradation of "woke" capitalism. For more see "The Post Liberal Right, the Good, the Bad and the Perplexing," Samuel Gregg, Public Discourse, March 2, 2020

[3] "Sherman Antitrust Act," Corporate Financial Institute https://corporatefinanceinstitute.com/resources/knowledge/finance/sherman-antitrust-act/

[4] Ibid

> being that it was the job of the law to protect small, often artisanal firms against the predations of larger, more efficient companies. Judge William O. Douglas took up this cudgel in the 1960s and 70s, hitting businesses for being too big for his taste.
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> Such decisions were not based on any real economic analysis.[5]

Far from prompting real competition and benefiting consumers, the "bigness" doctrines:

> .... discouraged scale economies that promoted lower costs and prices, penalized successful market entrepreneurship, and rewarded the political entrepreneurship of less-efficient business rivals.[6]

Starting in the 1950s, the received wisdom of antitrust laws, along with other government interventions in the economy, received a serious intellectual challenge from the growing number of conservative and libertarian intellectuals questioning the economic basis of the welfare-regulatory state.[7]

The free-market opponents of antitrust can be grouped into two camps. Camp one, is the "Austrian" followers of economist Ludwig Von Misses, Murray Rothbard and Nobel Laurent F.A. Hayek. These Austrians call for complete abolition of federal antitrust laws.[8]

Camp two is associated with the Law and Economic movement that grew out of the Chicago school.[9] The leading critic of antitrust to emerge from the Law and Economics movement was future Judge Robert Bork, most famous for his failed 1987 Supreme Court nomination. Bork advocated replacing the "too big to succeed" standard with a "consumer welfare" standard.[10] As

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[5] Robert E Cradley, "On the Origins of the Sherman Antitrust Act," CATO Journal, Vol. 9, number 3, Winter 1990
[6] Ibid
[7] For a good history of the rise, fall, and revival of the movement for free-markets, and a free society in general, see Ralph Raico's "The Rise, Fall, and Renaissance of Classical Liberalism" https://www.libertarianism.org/publications/essays/rise-fall-renaissance-classical-liberalism
[8] The best expansion of the "Austrian" view of Antirust is Dominick Armento's "Antirust: The Case for Repeal" (25 anniversary edition publicized by Ludwig Von Misses Institute 518 West Magnolia Avenue, Auburn, Ala. 36832; _ The book is available for sale and download at mises.org
[9] https://www.law.uchicago.edu/news/chicago-and-law-and-economics-history
[10] Bork's major work on antitrust is "The Antitrust Paradox" (originally published in 1978, republished by Simon and Schuster 2021)

the name suggests, the consumer welfare standard limits government use of antitrust laws to cases where a business's actions negatively impacted consumers, as opposed to simply considering the business as "too big."

Bork was motivated to examine antirust policy because "Antitrust law cannot be made rational until we are able to give a firm answer to one question: what is the point of the law—what are its goals?"[11]

To answer his question, Bork examined the legislative history of federal antitrust laws to understand congressional intent, and the judicial history to see how courts had interpreted the laws. He also applied economic insights derived (as stated above) from the law and economics school, which taught that judges should, to the extent possible, try to interpret law in the way that best promoted economic efficiency.

Bork determined that Congress intended antitrust laws to promote economic efficiency by protecting competition in order to protect consumers. Therefore, the end goal of antitrust laws was to ensure markets serve consumers—not to ensure a "competitive market" by limiting the size of a company to ensure that company's competitors had a "fair" market share.

Bork's analysis of the legislative intent behind making naked price-fixing agreements "per se illegal" applies to all antitrust laws: "The only value that the per se rule implements is consumer welfare, since it necessarily implies a legislative decision that business units should prosper or decline, live or die according to their ability to meet the desires of their consumers."[12]

The consumer welfare standard reflects how most people expect a free market to operate. Successful businesses base their decisions on what will enable them to more efficiently serve their customers with the goal of taking market share away from their competitors. People would find it odd if Wal-Mart refused to make changes that would make their stores more appealing to customers, thus increasing consumer welfare, because the change might take "too much" market share away from Target.

The consumer welfare standard began to displace the "bigness" standard during the Carter Administration and become the dominant approach to antitrust enforcement during the Reagan years.[13] Even the liberal Clinton and Obama administrations—which favored more vigorous enforcement of antirust than the Reagan administration—maintained the consumer welfare standard.[14] As Carl Shapiro, who served as Deputy Director for Antitrust in the Clinton Justice Department and was a member of President Obama's Council of Economic Advisors, said in a 2017 Senate hearing on "The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a

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[11] Bork, 1978, p. 50

[12] Bork, 1978 p. 67

[13] https://springboardccia.com/2020/05/28/a-brief-history-of-the-consumer-welfare-standard/

[14] Except, ironically, when the Obama administration allowed Facebook to acquire Instagram and WhatsApp in 2012 and 2014.

Sea of Doubt?" "…. "I don't know any serious antitrust scholars who want to move away from the consumer welfare standard."[15]

Consumer welfare attacked by authoritarians of the left and right

While the consumer welfare standard remained the guiding principle of antitrust law, it was not universally accepted or unchallenged. Progressives continued to attack it. For example, David Dayen, executive editor of the American Prospect, wrote in the publication that the consumer welfare standard replaced the idea that "bright-line rules limiting market shares in a particular sector could nullify mergers or even break up companies' into a technocratic debate among economists."[16]

The growing influence of far-left progressives, reflected in the strong showing of "democratic socialist" Senator Bernie Sanders in the Democratic Party primaries of 2016 and 2020, has led to a new push to not just receive antitrust law but go back to something like the old "big is bad" standard.

The most prominent member of the Biden administration pushing a revival of "old school" antitrust is Federal Trade Commission Chair Lina Khan. In a memo to FTC staff, she called for taking a "holistic approach to identifying harms" that recognizes "that workers and independent businesses, in addition to consumers, can be harmed by antitrust and consumer protection violations."[17]

This broad approach would throw out the current case law, and introduce an more unpredictability to antitrust law—slowing down mergers and harming the economy.

As mentioned in the introduction, it is not just the left calling for increased antitrust enforcement. Using antitrust to harm Big Tech has become a leading call to action of the anti-market or right. These forces secured a powerful ally in Daniel Oliver, who chaired the Federal Trade Commission under President Reagan, where he played a major role in cementing the consumer welfare standard as the guiding principle of antitrust enforcement.

Mr. Oliver has abandoned the consumer welfare standard because he has been convinced that there is no other way to limit the growing power of Big Tech.[18] Like most supporters of using antitrust to crack down on Big Tech, Mr. Oliver makes the mistake of assuming that today's market conditions will last in perpetuity. But history provides many examples of companies that were once considered untouchable losing their position as consumer tastes change and new businesses arise that better suit consumers needs and preferences. IBM was once the world's untouchable leader in computers, in fact, IBM was so powerful the Justice Department fought a year-long court battle with them over their alleged violation antitrust laws. When the government

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[15] David Dayen, "The Rehabilitation of Antitrust," The American Prospect, December 22, 2017)
[16] Ibid
[17] Lauren Feiner, "FTC Chair Lina Khan Outlines New Vison for Antitrust, Consumer Protection," CNBC, September 23, 2021
[18] Daniel Oliver, "Updating Antitrust for a Free People" American Spectator, June 28, 2021

withdrew its case in 1982, IBM was starting to lose its dominant market position to Apple and Microsoft, companies started by college dropouts in garages.[19]

In the early to mid-2000s, MySpace was the dominant social media platform. No one could have imagined that "The Facebook," a site started a joke in a Harvard dorm room, would not just displace MySpace within a decade but become the most popular social media site in the world.[20]

But starting in 2021, Facebook had to face serious challenges from social media companies like TikTok, and less serious challenges—but challenges—from social media companies such as Parlor and Truth Social. This change has contributed to the company's early 2022 loss of 25% of its market value, and the loss of 1 million of its users. This is not just because young people are fleeing Facebook—which they see as a site for "old people"—but those with right of center views fleeing Facebook for other sites that adhere to the idea of an open platform for all political views,[21] and possibly users simply spending less time on social media platforms than they did a few years ago.

Surprisingly for a veteran of the Reagan administration, which had to battle attempts by the federal bureaucracy to undermine its agenda,[22] Mr. Oliver never considers whether federal bureaucrats will use their new powers to punish tech companies that fail to silence conservatives or otherwise fail to push a "progressive" or "woke" agenda. This is especially strange since one of the major complaint's conservatives have with Big Tech is they are too close to, and thus willing to do the bidding of, left-leaning politicians. So, Mr. Oliver's position appears to be that the only way to stop Big Tech from serving the interests of leftist politicians and bureaucrats is to give those same politicians and bureaucrats greater ability and in fact the directive to "influence" Big Tech.

Abandoning the consumer welfare standard will hurt not just consumers but small businesses and could even prevent the growth of what could be the next Facebook, Amazon, or Google.

However, Mr. Oliver is not the only pro-antitrust conservative with this blind spot. For example, Republican Senators Josh Hawley, Ted Cruz; Lindsey Graham, and Charles Grassley have come out in favor of Senator Amy Klobuchar's "Innovations and Protection Online" Act (S. 2992).[23] This bill places numerous regulations on Big Tech companies to curb their "anti-competitive" behavior.

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[19] The Rise and Fall of INM, https://digmedia.lucdh.nl/2020/11/02/the-rise-and-fall-of-ibm/#:~:text=The%20beginning%20of%20the%201990s%20marks%20the%20fall,internet%20era.%20The%20IBM%20empire%20was%20over.%20Sources

[20] The History of Facebook: A Timeline, https://www.cnn.com/interactive/2019/02/business/facebook-history-timeline/index.html

[21] Norm Singleton, "It's Probably not Tik Tok, Why Facebook's Problems Are Local," Real Clear Markets, February 16, 2022

[22] Godfrey Sperling Jr., "Reagan Versus the Bureaucrats," Christian Science Monitor, July 19, 1982. For more recent examples of how bureaucrats can use their power to undermine a President see John McGuiness Trump versus the Bureaucracy, Law and Liberty, September 5, 2016

[23] Adam Kovacevich "TITLE?" Chamber of Progress, November 2, 2021

But, instead of hurting Big Tech many of these new regulations are just anti-consumer and anti-small business.

One particularly problematic part of the bill limits the ability of a "dominant" firm from conditioning use of their platform by a smaller firm on the smaller firm's agreement to use certain of the dominant firms' products and/or services. This would forbid Amazon from conditioning third-party vendors' Prime eligibility on the vendors use of Amazon's shipping and fulfillment services. Amazon would then either have to finance the shipping costs, which could require them to raise prices that Prime members would pay to buy from a third-party vendor, or not allow third parties to be Prime eligible. [24] Either way, the losers here are small businesses that will lose the ability to reach new customers through Prime and consumers who will lose the ability to discover new sources of affordable goods.

S. 2992 only applies to businesses - excluding banks, credit card companies, and telecoms - with a current market capital above $550 billion. Meaning that if a company like Target—headquartered in the home state of Senator Klobuchar, hits the threshold at a later date the provisions would not affect them. Assuming that this egregious provision would be removed before passage, this new wall of regulations would make it hard to impossible to enter the Big Tech realm—and if it is left in place would be the most crony-inspired provision in the history of the US.

Not to be outdone by Sen. Klobuchar, Sen. Hawley has also introduced the "Break Up Big Tech Act (S. 1204). This legislation would prohibit large tech companies that offer "search engines, marketplaces, or exchanges from selling, advertising, or otherwise promoting their own goods and services on their websites." Forbidding a business from using their property to sell their own products if they provide space for other business to sell their products is the type of proposal one would only expect from Senator Bernie Sanders.

Senator Hawley's bill would incentivize—by force—Amazon to stop allowing third-party vendors to sell their goods on Amazon.com. This will hurt those small businesses that have reached new consumers and customers who are able to discover new businesses through Amazon more than it will hurt Amazon.

[24] Ibid - Although this could also violate S. 2992's prohibition of a dominant platform favoring its own products.

Hawley has also introduced the "Trust Busting for the Twenty-First Century Act (S. 1074). This bill would ban all mergers and acquisitions by companies with market capitalization over $100 billion. It would also allow prosecutions where a preponderance of the evidence suggests a company is engaging "anti-competitive conduct," regardless of the size of the relevant market or the percentage of the market controlled by the company—in other words—whether or not the companies conduct actually harmed their competitors or consumers,

Hawley's proposals would replace the consumer welfare standard with a new "bigness is bad" standard. Hawley's proposal to allow antirust cases to proceed without showing the firm controls more than a certain percentage of the market is interesting since other conservative antirust supporters have called for federal agencies to pay more attention to percentages of the market control by one firm and less to economic analysis of the firm's effect on consumers.

These conservatives want those charged with enforcing antitrust laws to more closely adhere to Supreme Court precedent's such as United States v. National Bank 374 U.S. 321 (1963), where the court "… laid out the framework for challenging mergers in concentrated markets—specifically by establishing a presumption that mergers which cover at least 30 percent of the relevant market were presumptively unlawful."[25]

Perhaps Hawley and his pro-antirust allies want to give government officials multiple justifications for bringing antitrust suits, then they can then pick and choose which companies they go after and which justification they use. Senator Hawley and his allies do not care what the justification is used they just want government empowered to bring more antitrust suits—just like the left.

Mr. Oliver and Senator Hawley aren't alone, other prominent conservatives who seem to support ignoring the consumer welfare standard include policy experts at the Heritage Foundation and former Senator Jim DeMint, current head of the Conservative Partnership Institute.

The Conservative Partnership Institute's Senior Direct of Policy Rachel Bovard, writing in The American Conservative, has called for conservatives to join her boss in "rediscovering" their historical support of antitrust.[26]

Like other conservatives who have embraced antirust, she criticized the consumer welfare standard for making the economic effects of mergers and other actions by big companies the sole criteria over which federal bureaucrats decide if their actions warrant government involvement. Bovard says as a result "…antitrust enforcement has been steered away from its broad congressional mandate to police concentrated power in the market and toward the exclusive terrain of complicated, theoretical economic models, and the esoteric ruminations of economists."[27]

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[25] Rachel Bovard, "Why Republicans Must Rethink Antitrust", The American Conservative, May 26, 2021

[26] Ibid

[27] Ibid

Bovard's' casual disregard of economic models is symptomatic of the larger logical failures she and other critics of the consumer welfare standard from both the left and the right, make. They are correct in stating that technical economic measures cannot tell us when a firm reaches sufficient market power to justify calling in the federal antirust police. But, where they are wrong is that this issue calls for more enforcement of antitrust laws, instead, it justifies further actions to limit the power of federal bureaucrats and judges to interfere in market transactions that could benefit consumers and workers.

Antitrust enforcement—even the least bad consumer welfare standard—suffers from what Nobel laurate F.A. Hayek called the "the knowledge problem, which is that government bureaucrats and politicians simply cannot know what constitutes an efficient market." Anger with private Big Tech companies does not make the knowledge problem disappear. So, far from providing the argument that government should revise the consumer welfare standard to allow a revised "big is bad" standard her analysis makes the case for reduced use of antitrust to punish big businesses.

Bovard also calls on conservative critics of pro-antirust conservatives to "…stop taking at face value the notion that well-meaning attempts to ensure our antitrust laws are properly enforced, in line with congressional intent, is somehow a politicized attack on innovators" instead she wants conservatives to recognize that "Antitrust enforcement has already become politicized, in the direction of corporations rich enough to spin complex econometric tales that undermine evidence of anti-competitive conduct."

Bovard has a point, but it is not the one she thinks she is making. Increasing antirust enforcement would lead to an even more politicized process, as corporations would have great incentive to spend money on lobbying agencies and Congress. Corporations using their resources to influence bureaucrats, Congressional staffers, and members of Congress who and have power over them is a feature of our heavily regulated "mixed" economy. In fact, as shown in the work of socialist historian Gabriel Kolko,[28] antitrust laws themselves were actually supported by big businesses who saw it as a way to harm their competitors and stop small business from gaining market share.

Antitrust laws have been used as political weapons. For example, President Lyndon Johnson held up antitrust review of a bank merger until a newspaper publisher, who also helped run one of the merging banks, agreed to stop criticizing him, while President Richard Nixon threatened to use antitrust laws against the Big Three TV networks unless they gave him better coverage.29 These conservatives who want to use antitrust as a weapon to punish Big Tech for its treatment are following in the corrupt footsteps of LBJ and Nixon.

Conclusion

The application of the consumer welfare standard in antitrust laws was one of the great policies victories of the conservative intellectual movement. While the consumer welfare standard is not

[28] Gabriel Kolko, "The Triumph of Conservatism," Simon and Schuster, 1977

perfect, it does force federal agencies to consider whether they will do more harm than good by using antitrust against business they merely think or just personally consider are "too big."

Additionally, the consumer welfare standard forces bureaucrats and judges to analyze business behavior from the way a business operating in free-market should—which is whether or not a business decision enhances consumer welfare, not whether it serves some abstract ideal of "competition."

If conservatives wish to modify, or abandon, the consumer welfare standard, it should be in favor of one that provide even more limitations on the use (and abuse) of a trust law. It certainly should not be because conservatives are so angry at Big Tech that are willing to support legislation like S. 2992 that will hurt consumers and small business. S. 2992 and its ilk will increase the incitive so Big Tech to please government officials—which is unlikely to benefit conservatives. It also could be used to stop the growth of social media companies designed to counter Big Tech's silencing of their conservative customers by offering free speech platforms. The most effective way to deal with Big Tech is to let the market work free of government interference.