The Case against Antitrust Law

Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era

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Executive Summary

Politicians and pundits across the ideological spectrum often call for greater competition in the marketplace. While their favored means vary widely, the view that current antitrust law is necessary to ensure competition, and should be applied more vigorously than it has in recent history, is common across the American political landscape. As this paper demonstrates, a rethink of the existing antitrust paradigm is long overdue.

Antitrust regulation harms both consumers, competition, and innovation and therefore should be repealed. From a legislative standpoint, this would involve repealing the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914, as amended, including the Celler-Kafauver Act of 1950 and the Hart-Scott-Rodino Act of 1976. In addition, the executive branch should decline to prosecute weak or spurious antitrust cases, and courts should reverse bad precedents. A market-based approach to competition would reduce the regulatory uncertainty and chilling of innovation that results from government antitrust regulation. It would also reduce opportunities for rent-seeking.

The issue has taken on greater urgency, as populist politicians from both left and right push for more aggressive antitrust enforcement. Regulators in the United States and the European Union have expressed an interest in pursuing antitrust actions against tech giants known as the FAANG companies— Facebook, Apple, Amazon, Netflix, and Google. President Trump has specifically singled out Facebook, Google, and Amazon as antitrust targets. Entire business models, such as franchising, are at risk from potential antitrust regulation.

The mere threat of legal penalties—and the environment of over-caution it engenders—also has a chilling effect on entrepreneurs who want to try new business practices and innovate. Such opportunity costs are impossible to measure.

Few large antitrust cases have been brought in the United States recently, and overall enforcement activity has been slower than in previous eras, but there is a large pool of potential cases that populist politicians are interested in pursuing.

U.S. antitrust regulators are not the only threat to American innovation. Many U.S. companies that do business in Europe often face scrutiny from the European Union, under what it calls "competition policy." For example, the European Union fined Google $5 billion in 2018, a significant amount of lost capital that could have created consumer value instead. Google's parent company, Alphabet, spent $16.6 billion on research and development in 2017. If Google did not fear losing revenue to competitors, it would feel no need to spend such resources to improve its offerings.

This paper shows that the approach to antitrust law now prevalent in both the United States and the European Union is misguided and can lead to considerable economic harm. It starts with the big picture, describing the different sides of the antitrust debate, from the early interventionist approach that arose during the Progressive Era to the Chicago school-influenced consumer welfare standard that gained popularity in the late 20th century, up to the current populist revival. It then points out the shortcomings of both the interventionist and Chicago approaches and argues for a market-based approach. With the analytical framework and political context established, the paper

goes through a "Terrible Ten" list of specific antitrust policies in need of repeal, while explaining the common themes and arguments that appear in case after case.

1: Restraint of Trade and Monopolization. The Sherman Act of 1890 makes illegal "every contract, combination, or conspiracy in restraint of trade," and declares that, "every person who shall monopolize, or attempt to monopolize, or conspire to monopolize shall be deemed guilty of a felony." Nearly 130 years later, the phrases "restraint of trade" and "monopolize" remain key terms in antitrust regulation. Yet, monopolies cannot last without government assistance (barring some very narrow limited circumstances, such as near-total control of a natural resource). If a dominant company is making extra-normal monopoly profits, the only way for it to keep out competitors is to use government on its behalf. The solution to this problem is not antitrust enforcement, but taking away the government's power to grant favors to rent-seekers.

2: Horizontal Mergers. Horizontal mergers are between companies competing in the same market. Vertical mergers are between companies up and down the supply chain. Horizontal mergers reduce the number of competitors in a market and increase their average size. Both of these raise red flags for regulators searching for possible restraints of trade or attempts at monopolization. Antitrust law treats a company differently based on whether it reaches a certain size through growth or through merger. If size or market concentration is the offense, that is what the law should be concerned with, not how a company got its dominant position.

3: Collusion: Cartels, Price Fixing, and Market Division. There are two problems with cartels, price fixing, market division, and other forms of collusion. The first is where to draw the line. Every corporation in existence engages in some form of collusion. A classic example is a law firm. When two or more lawyers join together in a law firm, they agree in advance to charge certain rates and not to compete with each other for clients, yet no antitrust regulator would file a case against such a firm. The second problem is that cartels do not last, at least without government help. Its members have strong incentives to defect and charge lower prices or increase output. The instability of inefficient cartel arrangements serves as a built-in insurance policy for consumers.

4: Predatory Pricing. Antitrust regulators can penalize a company for predatory pricing if it charges lower prices than its competitors. The thinking goes that a company can sell goods at a loss to gain market share, causing competitors to exit the market or even go bankrupt. Then the predator can raise its prices and enjoy monopoly profits. The problem here is one of simple arithmetic. Predators nearly always have a larger market share than the prey. This means the larger company must sell more product at a loss than the smaller prey companies, and thus incur a larger loss. The only way for the predator to keep a permanent monopoly is to permanently sell at a loss.

5: Price Discrimination. Price discrimination involves selling the same good to different people at different prices. The Robinson-Patman Act is the primary statute regulating the practice. Examples of price discrimination include quantity discounts for buying in bulk, putting products temporarily on sale, membership programs, or store-specific credit cards offering discounts or benefits such as points programs or frequent flier miles. As with other items on this list, there is considerable uncertainty as to which forms of price discrimination are punishable and which are not. Regulators may draw the line wherever they choose at any time. Fortunately, policy makers have mostly realized that Robinson-Patman is unworkable, and it is mostly unenforced. Consumers and businesses would gain peace of mind from its repeal.

6. Manufacturer Price Restraints on Retailers. Resale price maintenance agreements require retailers to sell a product at or above some minimum price set by the manufacturer. They have proven to be a valuable pro-consumer tool. Retailers who are unable to compete on money prices compete instead on other factors. Manufacturers who require retailers to sell at a minimum markup may have a reason for requiring a certain minimum price. Some of that extra margin might be spent on marketing, certification programs for repair technicians, or to cover warranty costs.

7: Exclusive Dealing. Exclusive dealing involves a seller agreeing to sell products exclusively from a certain supplier. Examples include car dealerships and restaurants that serve Coca-Cola but not Pepsi. An exclusive arrangement can provide important benefits to manufacturers, retailers, and consumers. A manufacturer gains some ability to make long-term decisions regarding how much product to supply. Retailers gain specialized knowledge of the product. Consumers benefit from this added sales expertise when making purchasing decisions. Exclusive dealing has been prosecuted under Section 3 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act. Exclusive dealing still exists because regulators wisely decline to enforce the letter of the law. Repealing those provisions would remove uncertainty surrounding potentially pro-consumer business practices.

8: Tying or Bundling. Tying or bundling is selling two or more products together, but not separately. Determining which products are fit to be tied and which are not is more a matter of metaphysics than sound policy analysis. Left and right shoes are always sold as a pair. A car's tires and sound system are almost always included in the sale. Transactions like these are allowed by regulators without controversy, though technically prosecutable—another instance of discretion by regulators creating uncertainty.

9: Strategic Predatory Behavior. This is often used as a catchall term for competitive behavior that antitrust regulators dislike. Trying to undercut rivals' profitability is the very essence of business competition, but recently, the ordinary competitive market behavior of causing one's rivals to face higher costs has spawned a veritable academic industry devoted to identifying competitive strategies as means of monopolization.

10: Exploiting Technological Lock-In. Companies can use technological lock-in to keep customers from fleeing to better alternatives. The famous example of technological lock-in is the QWERTY keyboard. As it turns out, QWERTY keyboards are just as efficient as Dvorak and other alternatives. Nowadays Internet browsers are often cited as an example of technological lock-in. Life is much easier when all of your website passwords and other information are stored in your browser and entered automatically when needed. In theory, this convenience also makes consumers reluctant to switch to a competing browser, even if it offers a better user experience. This reticence can lock consumers into an inferior technology, reducing competition and the incentive to innovate, but that is a problem grounded in consumer behavior that government is ill equipped to address. Even so, the title of most popular browser has shifted at least three times over the past 20 years. Netscape gave way to Internet Explorer, then Firefox, and now Chrome, which could be eclipsed at any time.

Consumers and competition would both best be served by repealing antitrust regulations regarding restraint of trade and monopolization, horizontal and vertical mergers, collusion such as price fixing and market division, predatory pricing, price discrimination, minimum resale prices, exclusive dealing, tying and bundling, strategic predatory behavior, and technological lock-in. As the economy becomes more high-tech, specialized, and global, antitrust policies formed in the smokestack era are becoming progressively less relevant. Aggressive antitrust enforcement can create considerable economic uncertainty, which can have a chilling effect on long-term investment and innovation in both products and in business practices that benefit consumers.

A market-based approach to competition would reduce the regulatory uncertainty and chilling of innovation that results from government antitrust regulation.

Introduction

Politicians and pundits across the ideological spectrum often call for greater competition in the marketplace. While their favored means vary widely, the view that current antitrust law is necessary to ensure competition, and should be applied more vigorously than it has been in recent history, is common across the American political landscape. As this paper demonstrates, a rethink of the existing antitrust paradigm is long overdue.

Antitrust regulation harms consumers, competition, and innovation, and therefore should be repealed. From a legislative standpoint, this would involve repealing the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914, as amended, including the Celler-Kafauver Act of 1950 and the Hart-Scott-Rodino Act of 1976. In addition, the executive branch should decline to prosecute weak or spurious antitrust cases, and courts should reverse bad precedents. A market-based approach to competition would reduce the regulatory uncertainty and chilling of innovation that results from government antitrust regulation. It would also reduce opportunities for rent-seeking.

The issue has taken on greater urgency, as populist politicians from both left and right push for more aggressive antitrust enforcement. Regulators in the United States and the European Union have expressed an interest in pursuing antitrust actions against tech giants known as the FAANG companies— Facebook, Apple, Amazon, Netflix, and Google.[1] President Trump has specifically singled out Facebook, Google, and Amazon as antitrust targets.[2] The Trump administration tried to block a merger between AT&T and Time Warner, only dropping the suit after losing in court.[3] Telecoms, large food and drug companies, Ticketmaster, airlines, and hospitals are on some analysts' prosecution wish lists.[4] Uber, Airbnb, and other sharing economy companies are also under threat.[5] Entire business models, such as franchising, are at risk from potential antitrust regulation.[6]

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U.S. antitrust regulators are not the only threat to American innovation. Many U.S. companies that do business in Europe often face scrutiny from the European Union (EU), under what it calls "competition policy." For example, EU antitrust authorities fined Google $5 billion in 2018, a significant amount of lost capital that could have created consumer value instead.[7] Google's parent company, Alphabet, spent $16.6 billion on research and development in 2017.[8] If Google did not fear losing revenue to competitors, it would feel no need to spend such resources to improve its offerings.

This paper shows that the approach to antitrust law now prevalent in both the United States and the European Union is misguided and can lead to considerable economic harm. It starts with the big picture, describing the different sides of the antitrust debate, from the early interventionist approach that arose in the Progressive Era to the Chicago school-influenced consumer welfare standard that gained popularity in the late 20th century, up to the current populist revival.[9] It goes on to point out the shortcomings of both the interventionist and Chicago approaches and argue for a market-based approach.[10] With the analytical framework and political context established, the paper goes through a "Terrible Ten" list of specific antitrust policies in need of repeal, while explaining the common themes and arguments that appear in case after case.

The Current State of Debate and the Brandeis Revival

Early populism. Antitrust regulation as we know it began in the late 19th century as part of a larger populist movement against big business and concentrated power. It resulted first in the Sherman Act of 1890, which made illegal restraints of trade or attempts to monopolize an industry. It was refined and strengthened by the Clayton Act of 1914 and the Federal Trade Commission (FTC) Act of 1914, both signed into law by President Woodrow Wilson. The Clayton Act provided guidelines for merger policy, among other things, while the FTC Act created a new agency to share antitrust jurisdiction with the Justice Department. Section 5 of the FTC Act also amended the Sherman Act's vague "restraint of trade" standard by adding language on "unfair or deceptive acts or practices," though it still left it largely up to agencies and courts to define those terms.

Justice Louis Brandeis, one of the early antitrust movement's most prominent champions, viewed large business size as inherently bad. In 1911, during testimony before the Senate Committee on Interstate Commerce, Brandeis said, "I have considered and do consider, that the proposition that mere bigness can not be an offense against society is false,

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The new antitrust enforcement agencies were staffed mostly by lawyers who often did not welcome economic analysis or its conclusions.

because I believe that our society, which rests upon democracy, cannot endure under such conditions."[11] This led Brandeis to favor using government to give artificial competitive advantages to smaller firms, regardless of whether they created more consumer value than larger firms.

Brandeis's theme of size as a punishable offense persisted as antitrust case law built up over the next several decades. Many economists were skeptical of antitrust enforcement as an effective means toward those ends. The traditional view, held by most classical economists from Adam Smith onward, was that monopolies were unsustainable without state assistance.[12] Real-life examples of monopolies were limited to state-supported enterprises such as the Dutch East India Company.[13] All were legally granted privileges by their governments, and were backed at times by courts and even armed force. Even after private businesses grew large and antitrust legislation was passed to combat them, many economists remained skeptical that such regulation was necessary to combat monopolies. The list of such skeptics active at this time includes notable figures such as Joseph Schumpeter, Ronald Coase, Ludwig von Mises, and Aaron Director.[14] Even today, many economists view protection from competition as a factor in the European Union's competition policy, according to a University of Chicago Booth School poll of economic experts.[15] Perhaps in part because of this skepticism, most economists did not pursue careers in the new antitrust enforcement agencies. Instead, the agencies were staffed mostly by lawyers who often did not welcome economic analysis or its conclusions.

During the Great Depression, President Franklin D. Roosevelt rolled back antitrust enforcement. But he did not take a market-based approach to competition policy. Instead of using government to oppose cartels, his National Recovery Act used government to create and maintain cartels. The Agricultural Adjustment Act even deliberately raised food prices and restricted output—precisely the indicators of monopoly power that antitrust policy was supposed to prevent. The 1936 Robinson-Patman Act, which is now mostly unenforced, also banned numerous competitive pricing practices.

While New Deal-style managed cartels did not rejuvenate the economy, postwar antitrust policy ramped up to record levels. It was given additional strength by the 1950 Celler-Kefauver Act, which instituted stricter merger policies, and the 1976 Hart-Scott-Rodino Act, which requires companies above a certain size to gain regulatory approval before merging. This stronger legislation was accompanied by record numbers of court cases, fines, and even jail sentences, including some questionable decisions that today's antitrust revivalists disavow.[16]

The Consumer Welfare Standard. From the late 1960s to the 1980s, judges and regulators slowly shifted to a consumer welfare standard. By this time, an entire movement had taken off, especially at the University of Chicago. Under the consumer welfare standard, companies are free to grow big, so long as they act in ways that maximize consumer welfare. This remains the mainstream practice today. Figures such as Coase, Director, and Frank Knight influenced a new generation of competition scholars, including Richard Posner, George Stigler, Yale Brozen, Robert Bork, Harold Demsetz, Sam Peltzman, and others.[17]

The most famous defense of the consumer welfare standard remains Robert Bork's 1978 book *The Antitrust Paradox*, which was one of the first major law books to heavily incorporate economic analysis. This coincided with the rise of a hybrid academic discipline of law and economics—which is now a recognized discipline at many major universities.[18] The influence of law and economics has extended beyond the academy, as the Department of Justice and the Federal Trade Commission began to employ economists around this time, and still do today. This has led to a more restrained overall approach to antitrust enforcement, with progressively fewer big cases, and none since the late-1990s Microsoft case. The Justice Department attempted to block a proposed merger between AT&T and Time Warner, but dropped the case after a loss in the D.C. Circuit Court in February 2019.[19]

The Brandeis revival. Unfortunately, a new era of antitrust might now be in its infancy—basically a return to Brandeis's anti-bigness ethos with a few nods to modernity. Some analysts call this movement "hipster antitrust," usually derisively.[20] This paper will instead use terms the movement's members use, such as "Neo-Brandeisian."[21] Some populists on the right, such as President Trump and some of his political allies, including political commentators such as Steve Hilton, Tucker Carlson, and Ned Ryun, also favor an antitrust revival.[22] Neo-Brandeisians and many populists reject the consumer welfare standard, proclaiming to use antitrust regulation to promote broader values such as decreasing income inequality, opposing concentrated power, favoring democracy, the public good (however defined), and bringing elites down a notch.

Under a Neo-Brandeisian standard, a company's size could once again become a *per se* offense, even if a breakup would make consumers worse off (in legalese, this means something is automatically illegal, even if it

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has good intentions or beneficial consequences).[23] Columbia University law professor Tim Wu, in his 2018 book *The Curse of Bigness* (titled for a famous Brandeis expression), advocates returning to an anti-bigness standard. His arguments are a good summation of the general Neo-Brandeisian world-view, and are worth examining further. The first antitrust legislation, Wu writes, "was clearly understood as a reaction to the rising power of the monopoly trusts, such as the Standard Oil Company."[24] Seeing large business size as a persistent problem, Wu points to Louis Brandeis, "whose voice is needed for what we confront today."[25]

In his concluding chapter, "A Neo-Brandeisian Agenda," Wu argues that, "Some effort to revive the antitrust laws may be an inevitability in a nation founded on principles of anti-monopoly, equality, and decentralized power."[26] However, a federal government that can break up any company for a wide variety of reasons is far from decentralized.

Wu favors rejecting a consumer welfare standard in favor of a protection of competition standard, a new term for the rule of reason standard that was used in Brandeis's era. This standard relies heavily on a judge's discretion in deciding a company's guilt in an antitrust case, and therefore is less well defined than both the preponderance of evidence standard used in most civil cases and the reasonable doubt standard used in criminal cases. Wu argues that it is practically impossible to measure consumer welfare or allocative efficiency. This is a problem for the consumer welfare standard, under which "courts and enforcers rely too heavily on price effects, since they are the easiest to measure—yielding underenforcement of law."[27] Underenforced by what criteria, Wu does not say.

However, the protection of competition/rule of reason standard has even larger measurement problems, and, as Wu acknowledges, "inevitably demands some exercise in social planning, and ascertaining values that can be difficult, if not impossible, to measure."[28] In practice, returning to the old ways would give judges and regulators vast power they do not have today.

It would also violate a cardinal rule of sound policy—do not give allies powers you would not want your enemies to have. Remember President Trump's threats against Amazon in the early days of his administration. Given how heated judicial confirmations have become in recent years, Neo-Brandeisians should be especially sensitive to this argument.

Wu also commits what economist Harold Demsetz popularized as the Nirvana fallacy.[29] In the perfect competition model, consumers are assumed to have perfect information, prices instantly move so that supply and demand never depart from the exact equilibrium point where all goods sell and markets clear, and all this happens with zero transaction costs. This model is useful for isolating variables and for classroom teaching, but not so much for judging real-world market performance. Wu is correct in that markets nearly always fall short of the perfect competition model. Yet his advocacy of government action comes very close to assuming that real-world governments can create their own version of a perfect competition model. Wu compares real-word market outcomes to an idealized vision of government regulation, not the real-world kind.

Neo-Brandeisians and other progressives rightfully oppose rent-seeking, but their proposed antitrust policies would make the problem worse. Antitrust regulation creates opportunities for rent-seeking by politically connected interests. Wu consistently ignores this throughout his book. He correctly points out how numerous companies game government policies to reduce competition, but then goes on to advocate for more government power, which can also be gamed, as the solution. Even now, in a relatively restrained antitrust environment, roughly 95 percent of antitrust lawsuits are brought privately by competitors, not by the Justice Department or Federal Trade Commission.[30] Repealing antitrust regulation would not eliminate rent-seeking—there are many other avenues rent-seekers can take—but it would reduce it.

Such is the current state of the debate. The consumer welfare and Neo-Brandeisian populism standards are more similar than advocates of either side would like to admit, but there are more than two possible approaches to antitrust policy. The next section shows how a market-based approach to competition policy would yield better results than what pro-antitrust politicians on both the left and right are currently offering.

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Major Antitrust Themes and Arguments

Antitrust enforcement policies have ebbed and flowed over the last 130 years, and will no doubt continue to do so, but the major themes and arguments persist. This section lists some of those major themes, and shows why market competition outperforms both Neo-Brandeisian activism and Chicago-style moderation.

Competition is a spectrum, not an on/off switch. How much market concentration is too much? At what point does it become anti-competitive? Is it even possible to measure? If so, should it be measured by market share, how many firms are in the market, or how high are the barriers to

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entry? This is a significant knowledge problem scholars and regulators are still trying to overcome. The Herfindahl-Hirschman Index (HHI) attempts to provide an objective numerical score for market concentration.[31] But even this device has its limitations—the people plugging the numbers into the HHI formula can define the relevant market any way they choose, and thus can come up with almost any HHI score they wish. They can even change the parameters if their first attempt's results do not help the case they are trying to make.

The Justice Department and Federal Trade Commission's Horizontal Merger Guidelines state that mergers raising an HHI score by more than 200 points are "presumed to be likely to enhance market power."[32] Score changes under 100 are generally not a concern. While the scores do not decide a case by themselves, they do factor into agency decisions about whether to pursue a case and how strongly to place the burden of proof on the accused. That is an enormous amount of power for regulators to have.

Moreover, a given level of market concentration is not on its own evidence of consumer harm, but businesses face enormous uncertainty in this area. The Sherman Act is very short, and makes monopoly or attempted monopoly the crime. Moreover, courts have never settled on a consistent definition of permissible concentration. Different decisions have used different benchmarks for what levels of concentration threaten competition, for no clear reason. The Supreme Court, in its 1962 *Brown Shoe* decision, ruled against a merged company with a combined market share of 2.3 percent of the nation's shoe retail market and about 4.5 percent of its shoe production.[33] Then in the 1966 *Von's Grocery* case, the Supreme Court ruled against a merged company with a combined 7.5 percent market share in the city of Los Angeles.[34] Meanwhile, the federal government gave AT&T a legally protected monopoly for decades until reversing course and breaking it up in the 1980s.[35]

Many regulators have a binary view of competition—a market is either competitive or it is not. Most markets are somewhere in between and constantly move around along that spectrum as circumstances change. This makes regulators' task nearly impossible, given how difficult it can be for them to determine if a problem even exists, or how long it will last.

The relevant market fallacy. This is one of the easiest mistakes to make in all of antitrust analysis. It is also one of the easiest to avoid. Thinking along the different parts of a spectrum illustrates why. At one end of the spectrum, every individual product can be seen as its own relevant market. A sandwich at one restaurant is different than an identical sandwich sold at another restaurant next door, even if they are the same price. One restaurant might offer better service, better ambience, or some other non-price characteristic that differentiates it from its competitor. In that sense, there are two different products operating in different markets appealing to different sets of consumer preferences.

At the other end of the spectrum, the only relevant market is as big as the entire global economy. That sandwich also competes against other types of food in a global supply chain. Whichever point on the spectrum an analyst decides is right for a given case is an arbitrary decision. It is largely a matter of semantics, and often analytically useless in determining consumer welfare.

Uncertainty. Antitrust regulation creates an enormous amount of economic uncertainty. Nobody knows how it will be used at a given time. If antitrust statutes are interpreted literally, potentially any firm, no matter how small, can be charged with an antitrust violation—or for dominating its relevant market, however defined. If a business sells goods at a lower price than its competitors, it can be charged with predatory pricing. If it sells goods at the same price as its competitors, it can be charged with collusion. And if it sells goods at a higher price than its competitors, it can be charged with abusing market power.

A century of case law has evolved some guidelines, but judicial precedents can be overturned any time a new case is brought. There are few bright-line legislative or judicial standards for antitrust enforcement. It is mostly guided by a mix of inconsistently enforced judicial precedents, regulators' personal discretion, and political factors unrelated to market competition. Even the mere threat of antitrust enforcement can have a preemptive chilling effect on innovation, business strategies, and potential efficiency-enhancing arrangements.

There are few bright-line legislative or judicial standards for antitrust enforcement.

Rent-seeking. Neo-Brandeisians rightly want to reduce rent-seeking, but they routinely propose policies that will backfire because of a common misunderstanding of how governments work in practice. Government employees do not operate with only the public interest in mind. They are human beings, with the same incentives and flaws as other human beings. They want to increase their budgets and power and enjoy the publicity that accompanies big cases. It also makes regulators especially vulnerable to what is known as a Baptist-and-bootlegger dynamic. In Clemson University economist Bruce Yandle's classic example, a moralizing Baptist and a profit-seeking bootlegger will both favor a law requiring liquor stores to close on Sundays, though for different

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reasons. A true-believing "Baptist" in Congress or at the Justice Department or the FTC would be inclined to listen seriously to the entreaties of corporate "bootleggers" who can come up with virtuous-sounding reasons for why regulators should give their businesses special favorable treatment.[36]

Oracle, one of Microsoft's rivals, ran its own independent Microsoft investigation during that company's antitrust case, for what it alleged were Baptist-style reasons. "All we did is try to take information that was hidden and bring it to light," said Oracle CEO Larry Ellison. "I don't think that was arrogance. I think it was a public service."[37] Former Sen. Orrin Hatch (R-UT), who counted Oracle among his constituents, was one of the loudest anti-Microsoft voices in Congress. Around that time, he also received $17,500 donations from executives at Netscape, AOL, and Sun Microsystems. Perhaps heeding Hatch's admonition that, "If you want to get involved in business, you should get involved in politics," Microsoft expanded its presence in Washington from a small outpost at a Bethesda, Maryland, sales office to a large downtown Washington office with a full-time staff plus multiple outside lobbyists.[38] Microsoft quickly went from a virtual non-entity in Washington to the 10th-largest corporate soft money campaign donor by the 1997-1998 election cycle. Sen. Hatch's campaign was among the beneficiaries.[39]

The lines between Baptist and bootlegger can be blurry, and some actors play both parts. But such ethical dynamics are an integral part of antitrust regulation in practice.

Government usually stifles competition. If antitrust regulation is to be retained, it should not be a first-resort policy. If a company has an overwhelming competitive advantage, it is important to first ask what is causing it. If the advantage is due to superior performance, then consumers are not being harmed.

In most cases, dominance does not last long, as evidenced by how quickly any list of America's largest companies changes from year to year. If a company does remain dominant for a long period of time, one of two possibilities must be true. The first option is that it continues to be consumers' preferred option. The second is that it is engaging in rent-seeking behavior. In the first case, there is no need for an antitrust intervention. In the second case, the solution is not antitrust regulation, but to take away the government's power to tilt the scales in rent-seekers' favor.

Think long term. Robert Bork, though famous for his antitrust skepticism, still favors some antitrust regulation. He merely favors a more restrained usage than the Brandeis school. As he writes in *The Antitrust Paradox*, “Antitrust is valuable because in some cases it can achieve results more rapidly than can market forces. We need not suffer losses while waiting for the market to erode cartels and monopolistic mergers.”[40]

Bork’s statement is problematic for several reasons. How do regulators and judges know which cases are causing consumer harm and which are not? How do they decide which cases to pursue? Cases also often take years to resolve. Assuming regulators identify a valid case, how would they, and the judges who hear the case, know if market activity could address the problem by the time the case is decided? Do the benefits of regulatory action exceed the court and enforcement costs? Are the affected companies in a position to capture the regulators?

More to the point, does the short-term benefit come at a greater long-term cost? An enforcement action now could have a deterrent effect on future mergers, contracts, and innovations, including in unrelated industries. The consumer harm from these could well exceed the short-term benefits of a short-term improvement on market outcomes—assuming that regulators are consistently capable of such a feat.

For example, the *IBM v. United States* antitrust case filed in 1969 lasted for 13 years until the Justice Department decided to drop the case in 1982. By then, the computer market had changed so completely that IBM’s competitors had long since surpassed it. In this case, regulators eventually gave up, however belatedly, but this is not guaranteed to happen in every case. And who knows what consumer-benefiting innovations IBM could have developed with the time and resources it ended up devoting to defending itself in this case? Neo-Brandeisians could argue that it was the antitrust process itself that empowered IBM’s competitors to overtake it, but there is no way of knowing that.

With these themes in mind, here is a “Terrible Ten” list of antitrust policies that should be repealed.

1: Restraint of Trade and Monopolization

The Sherman Act of 1890 is two pages long.[41] Section 1 makes illegal “every contract, combination, or conspiracy in restraint of trade.”[42] Section 2 declares that “every person who shall monopolize, or attempt to monopolize, or conspire to monopolize shall be deemed guilty of a felony.”[43] Nearly 130 years later, the phrases “restraint of trade” and “monopolize” remain key terms in antitrust regulation.

From the earliest cases to the present, antitrust enforcers have chosen odd targets. In fact, there is substantial

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evidence that prosecutors select cases based on political considerations rather than on the merits.[44]

The working economic definition of a monopoly is a firm dominant enough to simultaneously raise prices and reduce supply.[45] By this standard the first major antitrust target, Standard Oil, did not act as a monopoly. It had overwhelming market share, but its behavior did not fit the pattern of a monopolist, as it continually increased supply and cut prices.[46] Over the period 1879-1895, Standard Oil's market share went from 88 percent to 82 percent. Over a similar period, 1880-1897, the price of refined oil per gallon in barrels declined from 9.33 cents to 5.91 cents.[47] Despite falling prices, over the period 1890-1897 Standard increased its kerosene production by 74 percent, lubricating oil by 82 percent, and wax by 84 percent. Falling prices and rising output are the opposite of monopoly behavior.

More importantly, it was not immune from competition. In the following years, the market changed. Electricity and natural gas displaced kerosene, which Standard Oil dominated. The company had to adapt to customers' preferences instead of the other way around. It did so successfully, as the growth of automobiles and increasing industrialization opened a large market for gasoline and other oil products such as lubricants. Rather than restricting supply, its crude oil production went from 39 million barrels in 1892 to 99 million barrels in 1911, the year of the Supreme Court's momentous *Standard Oil* decision (there were several antitrust cases against Standard; the 1911 *Standard Oil Co. of New Jersey v. United States* decision is the one most commonly cited).[48] Despite increasing supply, Standard's market share of all petroleum products had declined from 88 percent in 1890 to 64 percent in 1911.[49] In addition to falling prices and rising output, Standard also had to contend with declining market share.

Based on the data, it is difficult to argue that Standard was engaging in monopoly behavior or harming consumers. This may be why the 1911 *Standard Oil* decision relied on a "rule of reason" standard, which has no set criteria or thresholds for determining what is and is not a monopoly. Judges and regulators simply decide what they think is reasonable, which varies over time and from case to case.[50] From *Standard* until now, there has never been a bright-line rule for determining monopoly status.

The most recent major case was the Justice Department's case against Microsoft. It involved a personal computer market that Microsoft played a large part in popularizing in the first place.[51] The Justice Department began the first of multiple investigations Microsoft in 1992 and extracted a settlement in 1994. Under that settlement, Microsoft agreed not to tie outside programs into Windows, but remained free to add features.

This semantic distinction became the crux of a lawsuit that began in 1998 and continued into 2002. Microsoft required computer manufacturers to include Internet Explorer in their Windows 95-based machines. The Justice Department argued that this violated the 1994 settlement's tying ban, while Microsoft argued that Internet Explorer was a feature of Windows, not a separate program.

An initial 2000 decision would have broken up Microsoft into two separate companies. One would have been in charge of operating systems such as Windows, and the other firm would take up Microsoft's other software programs. This decision was overturned on appeal, leading to a settlement agreement in 2001 that was finalized in 2002.

Microsoft was allowed to continue tying Internet Explorer and other products into Windows. But by that time, a rival browser called Firefox was gaining popularity, and Microsoft's browser monopoly was dying of natural causes. Despite being tied into every Windows machine, Internet Explorer would lose market share every year and eventually be discontinued. As of 2019, it survives as a little-used program re-named Edge. Firefox would in turn be unseated by Google's Chrome browser, and even Apple's stock Safari browser for Mac and iOS has long had a larger market share than Internet Explorer.

Today, antitrust regulators in both the U.S. and Europe are focused on the FAANG companies—Facebook, Amazon, Apple, Netflix, and Google—for their dominance of their respective sectors. Some of them invented the very markets they dominate, such as Apple with the iPhone, the first widely adopted touchscreen smartphone. Others superseded prior incarnations by offering consumers a better product, as Facebook did over MySpace or Netflix over Blockbuster. Amazon competes with brick-and-mortar retailers such as Walmart and Target, which are improving their online shopping as a direct competitive response.

None of these developments have reduced supply so far. Many online offerings, from Google searches to Facebook accounts to many apps in Apple's App Store, are zero-price. This price point, common in the tech sector, encourages trade rather than restrains it. Netflix raises its prices every so often, but for families who collectively watch at least a movie a week, membership is still cheaper than competing options such as purchasing DVDs, on-demand cable TV, or going out to a movie theater. This should be their decision to make, not the Justice Department's or the FTC's. (Hulu, Amazon Prime Video, and various

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niche services also offer competing exclusive original content.)

Monopolies cannot last without government assistance (barring some very narrow limited circumstances, such as near-total control of a natural resource). Facebook is currently overwhelmingly dominant, but is worried about its aging user base. Younger users generally prefer to interact with each other out of sight of parents, teachers, or bossess, and are increasingly choosing other social networks, such as SnapChat. As Georgetown University computer scientist Cal Newport remarked in a January 2019 *Wall Street Journal* interview, Facebook, in his view, seems to have "a very weak connection to their user base. It's a much more fickle user base than they probably want to admit."[52] And on March 6, 2019, in response to growing privacy concerns among the public, Facebook CEO Mark Zuckerberg announced plans to shift the company's focus toward encrypted and ephemeral communications, acknowledging that, "frankly we don't currently have a strong reputation for building privacy protective services."[53]

Privacy concerns are also providing opportunities for competitors to provide a different balance of privacy protection and data collection for targeted advertising that consumers and advertisers might prefer over Facebook's. The only way for Facebook to keep its dominance is to offer a better product that appeals to its customers—which is why the company is continuously changing its design, features, and privacy practices. It also spent $7.8 billion on research and development in 2017, which is not a business decision a company would make if it felt safe and secure.[54]

The quality of the user experience is another issue. Remember the relevant market fallacy. Social media competes with other forms of leisure time and some people are souring on social media and doing other things with their time instead. Facebook and Twitter political discussions are often rather less than edifying, to put it politely. They are difficult to keep out of one's newsfeed. And time spent scrolling through feeds is time not spent with family, friends, hobbies, books, movies, and more.

Antitrust regulators are in no better position than anyone else to foresee the future of social media. Market dominance is not automatically a bad thing. Size in itself is neither good nor bad. What matters is maximizing consumer benefit. Given the ease of exit, which in this case is as simple as not visiting certain websites, it is easy for consumers to do what they want, rather than what Facebook wants.

Neither Microsoft nor Facebook nor Standard Oil ever held 100 percent market share. But if having a single firm in a given sector does turn out to maximize consumer welfare, antitrust regulators would hurt people by breaking it up. If a dominant company is making extra-normal monopoly profits, the only way for it to keep competitors out is to use government on its behalf. The solution to this problem is not antitrust enforcement, but taking away the government's power to grant favors to rent-seekers.

2: Horizontal Mergers

Horizontal mergers are between companies competing in the same market. Vertical mergers are between companies up and down the supply chain. General Motors and Ford merging with each other would be a horizontal merger, while one of them merging with one of its suppliers would be a vertical deal. Horizontal mergers reduce the number of competitors in a market, and increase their average size. Both of these are red flags for regulators searching for possible restraints of trade or attempts at monopolization.

Antitrust law treats a company differently based on whether it reaches a certain size through growth or through merger. If size or market concentration is the offense, that is what the law should be concerned with, not how a company got its dominant position.

As University of California, Berkeley economist Oliver Williamson has demonstrated, the real proof of a merger leading to market power has two components: 1) reduced output, which leads to societal deadweight losses; and 2) the cost savings from efficiencies that may outweigh those deadweight losses—in other words, increased profits[55]

Horizontal merger arguments are prone to the relevant market fallacy. The mergers between Coca-Cola and Dr. Pepper and between PepsiCo and Seven Up were attacked during the 1980s under the arbitrary premise that one need distinguish between "carbonated soft drinks" and "soft drinks" for the purpose of determining whether monopoly power exists.[56] Many beverage companies own multiple brands, not all of them carbonated, hence the distinction. Coca-Cola also owns Dasani bottled water, for example, and Dr. Pepper and Snapple have had the same parent company through several rounds of mergers and acquisitions. The trouble is that these are not necessarily separate markets. Many of these brands compete against each other, for example, with bottled water and iced tea marketing campaigns aimed at persuading consumers to drink those products instead of soda that in some cases might be bottled at the same plant. This is competitive behavior, regardless of who owns which brands.

In 1997 the Federal Trade Commission blocked the merger of Staples and

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Time will tell what the market's next competitive response will be.

Office Depot on the basis of a static perception that prices would rise or competitive entry might not happen overnight.[57] In 2016, U.S. District Judge Emmet G. Sullivan ruled against a second merger attempt.[58] The unintended result has been to deprive underserved localities of superstores that the merger's potential profitability might have made feasible.[59]

In 2008, Sirius and XM, two satellite radio companies, merged. The Justice Department nearly blocked the merger due to the relevant market fallacy. Yes, the merged company would have a monopoly over satellite-based radio, but that is not the relevant market. Satellite radio competes for listeners' attention with terrestrial radio, podcasts, audio books, streaming radio, streaming on-demand music services such as Spotify, and depending on the age of one's car, compact discs. Recognizing its true relevant market, SiriusXM has expanded beyond satellites and also offers subscribers its full channel lineup over the Internet, and acquired Internet radio company Pandora in 2019 in an attempt to improve its Internet offerings.[60]

A similar argument applies to the Whole Foods-Wild Oats merger between two high-end grocery store chains.[61] These compete with other grocery stores such as Trader Joe's, Wegman's, Kroger, Piggly Wiggly, and many others, including small, locally owned stores that are especially attuned to a community's tastes and preferences. The relevant market is much larger than Whole Foods' organic and health-conscious niche. After being bought out by Amazon, Whole Foods also entered the online ordering grocery delivery market, where it now competes with Peapod and other delivery services. Traditional grocery stores are responding by increasing their offerings for online ordering, curbside pickup, and delivery. Amazon is further upping the ante by announcing, in March 2019, its own brick-and-mortar stores separate from the Whole Foods brand.[62] Time will tell what the market's next competitive response will be.

3: Collusion: Cartels, Price Fixing, and Market Division

Adam Smith famously observed that, "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."[63] He was right. This is one reason why, historically, price fixing is by far the most common cause for antitrust lawsuits.[64] This is usually done by means of formal and informal cartels and agreed-upon market divisions. But this does not mean such arrangements are effective; companies that collude tend to be less profitable than companies that do not.[65]

There are two problems with cartels, price fixing, market division, and other forms of collusion.

The first—a common one with antitrust issues—is where to draw the line. Every corporation in existence engages in some form of what could be considered collusion. A classic example is a law firm. When two or more lawyers join together in a law firm, they agree in advance to charge certain rates and not to compete with each other for clients. They set market divisions, say, with one attorney specializing in contract law and another in patent law. These are all examples of collusion, yet no antitrust regulator would file a case against such a firm. If collusive behavior is acceptable inside a single firm, why is identical behavior unacceptable between separate firms? No compelling argument for this legal and logical oddity exists.

The second problem with attempting to regulate collusion is that cartels do not last, at least without government help. Its members have strong incentives to defect and charge lower prices or increase output. Even if price fixing and other collusion were the result of deliberate anti-consumer mischief, we would be better off allowing markets, rather than regulators, to take their course. The instability of inefficient cartel arrangements serves as a built-in insurance policy for consumers.

Moreover, if cartel members stop competing on money prices, they can compete on other features such as quality, shorter wait times, warranties, or other add-ons. Consumer welfare depends on more than just money prices. The tendency to undermine agreements, and seek a bit of competitive advantage, renders inefficient cartel arrangements unstable and sets in motion their destruction—unless government enforces the cartel. The more inefficient a cartel becomes—prices are too high or some territories are underserved—the stronger the incentive for new competitors to enter the market.

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A prominent example of collusion in U.S. history is the pre-deregulation airline industry.[66] Before the Carter administration and the economist Alfred E. Kahn's deregulatory efforts, airlines were unable to compete freely on interstate flights. The Civil Aeronautics Board (CAB) ran a cartel arrangement in all but name. If an airline wanted to add, say, a New York to Los Angeles flight, it first had to apply to the CAB. If the agency thought the route was already sufficiently served, it could deny the application. The CAB also set fares, so airlines were unable to compete on price. Instead, airlines competed on non-price features such as in-flight service and other perks, but air travel remained out of reach of many people's budgets. When the CAB was abolished, *The only way for the predator to keep a permanent monopoly is to permanently sell at a loss, which results in bankruptcy, not monopoly.*

prices went down and supply went up almost immediately. The cartel, just as economists predicted, was unsustainable without government regulation.

The Civil Aeronautics Board did not have jurisdiction over intrastate flights, and the vibrancy of those markets compared to the CAB-regulated interstate market was striking. Southwest Airlines began flying only inside the state of Texas. It found high demand for inexpensive, low-frills flights. Deregulation allowed Southwest to take this business model national, and it is now the fourth-largest airline in the United States.[67] Airlines such as Pan American and Braniff were unable to keep up and went out of business. Surviving airlines had to cut costs to remain competitive, and new airlines such as JetBlue and Spirit emerged with their own takes on cost-cutting and unbundling of various amenities and services.[68]

Because cartels and other forms of collusion are inherently unstable, many such cases involve rent-seeking. The remedy for such cases is not antitrust enforcement. It is making rent-seeking more difficult, such as by reforming tax and regulatory codes to inoculate them against special interest lobbying.

4: Predatory Pricing

Antitrust regulators can penalize a company for predatory pricing if it charges lower prices than its competitors. The thinking goes that a company can sell goods at a loss to gain market share, causing competitors to exit the market or even go bankrupt. Then the predator can raise its prices and enjoy monopoly profits.

The problem here is one of simple arithmetic. Predators nearly always have a larger market share than the prey. This means the larger company must sell more product at a loss than the smaller prey companies, and thus incur a larger loss. The only way for the predator to keep a permanent monopoly is to permanently sell at a loss, which results in bankruptcy, not monopoly.

Monopolies are also temporary—again, unless government assists—so the predator's monopoly would disappear as other companies saw an opportunity to undercut a high monopoly price and still make a profit.[69]

A successful example of predatory pricing has never been proven, as the Supreme Court acknowledged in the 1986 *Matsushita Electric Industrial Corp. v. Zenith Radio Corp*. decision.[70] Zenith, an American television set producer, argued that 21 of its Japanese competitors, including Matsushita, colluded to earn monopoly profits in Japan to subsidize predatory pricing in the U.S. market in order to drive American companies out of business. A skeptical Supreme Court noted that "predatory pricing schemes are rarely tried, and even more rarely successful." Though the Court declined to repeal the Robinson-Patman Act outright, it noted that a "predatory pricing conspiracy is by nature speculative."[71]

It is possible that a company with some outside revenue from another line of business could subsidize its predation enough to succeed, but monopolizing one market in this fashion comes at the cost of becoming less competitive in another market. Such a company would not benefit on net, as its profits in one market are negated by losses in another.

As Nobel Prize-winning economist George Stigler argued in a lecture five years before *Matsushita*, economists are far more knowledgeable about how competition works than they were when the Sherman Act passed in 1890:

> The content and power of competition have become much better understood after several generations of far-ranging debate about monopolistic and imperfect competition and oligopoly—a word unknown to the profession in 1890. Consider one small example: The earlier literature of predatory competition had the predator cut prices in the vicinity of the prey and raise prices elsewhere to recoup the loss. Today it would be embarrassing to encounter this argument [that predatory pricing is a monopolizing device] in professional discourse.[72]

Predatory pricing is especially difficult to achieve in the tech sector. Many apps and games, social media, and cloud storage services are available free of charge—a difficult price to undercut. They are supported instead by advertising or other revenue sources. This opens up additional competitive opportunities. If companies cannot compete on money prices, they can compete on other features, such as offering fewer or less intrusive advertisements for a small fee. This type of undercutting is pure consumer benefit.

Even operating systems, which used to cost hundreds of dollars for updates back in the days of Windows 95, are now typically updated for free. Android, the most popular mobile operating system as of this writing, is available for free to phone and tablet manufacturers, who are also free to customize it for their devices.

Not only do attempts at predatory pricing usually fail, antitrust remedies can harm consumers.

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5: Price Discrimination

Price discrimination involves selling the same good to different people at different prices. The Robinson-Patman Act is the primary statute regulating the practice. As Robert Bork put it, *Independent booksellers are enjoying something of a renaissance without any antitrust assistance.*

"One often hears of the baseball player who, although a weak hitter, was also a poor fielder. Robinson-Patman is a little like that. Although it does not prevent much price discrimination, at least it has stifled a great deal of competition."[73]

In a colorful example of price discrimination, Burger King ran a temporary promotion in December 2018 to sell Whoppers for a penny—but only to customers who used its smartphone app to order while within 600 feet of a McDonald's location.[74] Burger King's goal was to encourage customers to download its relaunched app and order online—and yes, to troll its competitor for a laugh. The penny Whopper promotion was a way for Burger King to persuade customers not just to download the app, but to associate Burger King with online ordering. Down the road, this price discriminating provision can save Burger King future labor costs and staff time in taking orders, while reducing error rates.

Other examples of price discrimination include quantity discounts for buying in bulk, putting products temporarily on sale, membership programs, or store-specific credit cards offering discounts or benefits such as points programs or frequent flier miles. Some clubs, restaurants, or theaters will charge different prices to members and non-members, or sell season tickets at a special rate.

In 1998, the American Booksellers Association and a number of other independent booksellers filed antitrust lawsuits against the superstores Borders and Barnes & Noble for receiving not just volume discounts, but other favorable terms, such as special promotional treatment from publishers—non-money price discrimination.[75] Borders is now bankrupt and Barnes & Noble is struggling to remain competitive despite such favorable treatment, so it is unlikely the antitrust case would have helped competition had it succeeded. However, it would have given special government treatment to individual competitors. This is often the result of antitrust regulation, if not its intention.

In a twist of fate no regulator predicted, independent booksellers are enjoying something of a renaissance without any antitrust assistance.[76] Many stores are even benefiting from Amazon's dominance. Amazon allows independent booksellers to use Amazon's website to list and sell books (and nearly any other product), and can even handle order fulfillment.[77] The stores benefit from gaining access to a global customer base, and Amazon benefits from both a cut of the sales and enhancing its desired reputation as a place to buy just about anything. Even individuals who do not own a physical store or do not want to go through the regulatory hurdles of establishing one can take advantage of this policy, enabling even the smallest of competitors to enter the market and benefit consumers. Many of those customers will take advantage of Amazon's Prime program, a form of price discrimination for shipping costs.

As with other items in this Terrible Ten list, there is considerable uncertainty as to which forms of price discrimination are punishable and which are not. Regulators may draw the line wherever they choose at any time. Fortunately, policy makers have mostly realized that Robinson-Patman is unworkable, and it is unenforced. Consumers and businesses would gain peace of mind from its repeal.

6. Manufacturer Price Restraints on Retailers

Resale price maintenance agreements require retailers to sell a product at or above some minimum price set by the manufacturer. They were made illegal on a *per se* basis by the Supreme Court's 1911 *Dr. Miles* decision.[78] The Supreme Court expressed squeamishness about such a severe prohibition, but upheld it for more than five decades, most famously in the 1967 *Schwinn* decision.[79] In this case, the Court ruled against Schwinn for putting territorial restrictions on where its distributors could sell its bicycles to retailers, thus limiting competition in a given area. The decision notes that Schwinn's market share had declined from 22 percent in 1951 to 12.8 percent in 1961. A decade later the Court reversed *Schwinn* in the *Sylvania* case between Sylvania, a television manufacturer, and Continental Television, a California retailer that took issue with Sylvania's sales policies. Continental, which already sold Sylvania televisions in San Francisco, wanted to expand its sales to Sacramento. Sylvania already had deals with Sacramento stores, and refused to allow Continental to sell its televisions there. The Court ruled in Sylvania's favor.[80]

Price maintenance agreements have since proven to be a valuable pro-consumer tool, and regulators have mostly left them alone since *Sylvania*. Retailers who are unable to compete on money prices compete instead on non-money price factors such as quality of service. Manufacturers who require retailers to sell at a minimum markup may have a reason for requiring a certain minimum price. Some of that extra margin might be spent on marketing or displays, certification programs for repair technicians, or to cover warranty costs. A retailer that is able to maintain an extranormal profit margin has an incentive to display the high-margin product more prominently than lower-margin competitors or otherwise give it favorable treatment. This gives those disadvantaged competitors an incentive to become

Price maintenance agreements have proven to be a valuable pro-consumer tool.

Traditional retailers are beefing up their online operations as a competitive response.

more competitive on some mix of money prices and non-money features, all to consumers' benefit.

The retailer also avoids a potential free-rider problem. With a resale price agreement, consumers could go to one store that offers non-price benefits such as knowledgeable sales staff and hands-on product demonstrations, then leave and buy the same product for less from a no-frills competitor. This type of short-term gain results in long-term consumer harm. Firms quickly wise up to what is happening, and gain an incentive to do away with non-price benefits. Consumers would then have less information available and fewer shopping choices.

Online shopping makes it easier than ever for consumers to free-ride on brick-and-mortar stores' non-price benefits while buying online instead. For products requiring online sellers to preserve some minimum resale price, they must offer similar non-price benefits as brick-and-mortar retailers. Amazon, where possible, allows customers to peek inside books the same as they would at a bookstore, without charge. It also relies on customer reviews to give credible assurances of product quality, free of charge. Google and services such as *Consumer Reports* and Yelp also offer reviews for products, stores, restaurants, hotels, and more. If this independent model becomes the dominant model for informing consumers, it may even spell a market-derived end for retail price maintenance.[81]

Traditional retailers are also beefing up their online operations as a competitive response—another consumer benefit partly attributable to resale price maintenance agreements.

Returning to a pre-*Sylvania* approach to resale price agreements could make almost all marketing advertising activities by retailers technically illegal. Advertising costs money and eats into profit margins. Even low-margin retailers, such as grocers, engage in extensive advertising, such as in weekly circulars and local television commercials. Retailers often pay for this pro-competitive behavior by charging higher prices.

The *Schwinn* decision has been roundly criticized by Bork, Richard Posner, Dominick Armentano, and other antitrust scholars, and generally enjoys a poor reputation in the legal community.[82] It is unlikely any judge would reinstate it. But the extent of regulatory restrictions of some non-price competition would be a matter of discretion. This would cause uncertainty among affected businesses and have a chilling effect on competition and innovation.

7: Exclusive Dealing

Exclusive dealing involves a seller agreeing to sell products exclusively from a certain supplier. Examples include car dealerships, restaurants that serve Coca-Cola but not Pepsi, or musicians who exclusively use a certain brand of instrument on stage. An exclusive arrangement can provide important benefits to manufacturers, retailers, and consumers. A manufacturer gains some ability to make long-term decisions regarding how much product to make. Retailers gain specialized knowledge of the product, making them more knowledgeable and effective sellers. Consumers benefit from this added sales expertise when making purchasing decisions.

Exclusive dealing has been prosecuted at various points under Section 3 of the Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act.[83] Exclusive dealing still exists in the economy because regulators wisely decline to enforce the letter of the law. Repealing those provisions would remove uncertainty surrounding potentially pro-consumer business practices.

A classic exclusive dealing case is the 1922 *Standard Fashion Co. v. Magrane-Houston Co*. decision. Standard Fashion was a clothing manufacturer that required some of its retailers to sell its designs exclusively. Magrane-Houston was one of those retailers, and Standard Fashion sued it when Magrane-Houston violated their agreement. The Court sided with Magrane-Houston, and declared the exclusive contract invalid under Section 3 of the Clayton Act.[84]

There are several issues in play here. As Bork points out, Magrane-Houston's exclusive contract was a two-year deal that left the retailer free to pursue a different option upon its expiration. That is not much of a restraint.[85]

In 2010, there was a court case over the National Football League (NFL) giving Reebok exclusive rights to sell licensed team jerseys (the league has since moved to an exclusive deal with Nike). It ended in a settlement with the NFL paying American Needle, an apparel manufacturer disadvantaged by the exclusive Reebok deal, so it remains an open legal question of whether, for antitrust purposes, a sports league is a single business entity or whether each team in the league is a separate entity.[86]

Franchising is another example of exclusive dealing promoting competition. Opening a restaurant and keeping it afloat is difficult. A small entrepreneur can benefit by being able to put a nationally known brand on the sign outside, backed by national marketing, with the menu and ingredients already taken care of and already popular. Other facets of

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Companies should be free to embrace or reject franchising as they see fit.

running a business, such as payroll and bookkeeping, are often standardized or outsourced altogether, saving further hassle and expense. Thousands of small entrepreneurs are able to make a living and thrive thanks to this franchising model. Meanwhile, the parent company benefits from the franchising fees, and from selling ingredients and supplies to its franchisees. And many of the efficiency gains from marketing to food costs mean lower prices for consumers.

At the same time, companies should be free to embrace or reject franchising as they see fit. Many American state governments all but forbid car manufacturers from selling directly to consumers, for purely political reasons. Car dealer franchisees have captured regulators, who protect incumbent dealerships by requiring carmakers to use their services.[87] Tesla, an electric car manufacturer, has decided to sell direct-to-consumer in some places anyway, and has angered incumbent car dealers.[88] In March 2019, Tesla announced it would be closing many of its self-owned dealerships, but would keep some locations open to serve as showrooms or promotional centers. Rather than embrace the traditional franchise model, it would transition to online sales.[89]

One business model is not inherently better than the other. That is for businesses and consumers to find out over time.[90] Antitrust regulators do not have their own money at stake over such decisions; they neither profit from making the right decision nor lose by making the wrong one. Therefore, they have little incentive to make a decision based on economic efficiency and are vulnerable to political pressure, including from rent-seeking parties.

8: Tying or Bundling

Tying or bundling is selling two or more products together, but not separately. Courts have frowned upon the practice since the Supreme Court's 1912 *A.B. Dick* decision, which involved a maker of shoe-buttoning machines that required its customers to also use its shoe-buttoning wire.[91] More famously, the 1917 *Motion Picture Patents* decision found against a film projector company that required that only movies authorized by the projector company be screened on its projectors.[92] A 1936 Supreme Court case involved IBM requiring customers to exclusively use its punch cards with its machines. The Court decided that while IBM could impose standard specifications for compatible punch cards, it could not prevent other companies from making the cards or prevent customers from using them.[93] Tying was also at the heart of the Microsoft case, the last major case regulators have brought.

Determining which products are fit to be tied and which are not is more a matter of metaphysics than sound policy analysis. Left and right shoes are always sold as a pair. A car's tires and sound system are almost always included in the sale. Transactions like these are allowed by regulators without controversy, though technically prosecutable—another instance of discretion by regulators creating uncertainty.

In the 1990s, the Justice Department tried to prosecute Microsoft for tying its Internet Explorer Web browser, free of charge, to its Windows operating system, while not selling a different version of Windows without the browser. The European Union's case against Google similarly involves tying its apps to the company's Android operating system—that is, including it at no additional cost (Android is available for free to developers).[94]

Another problem is ease of exit. Internet Explorer could easily be used to download its direct competitors. This is exactly what happened; Internet Explorer was overtaken in the marketplace by Firefox and Google's Chrome browser. Apple's Safari browser is also popular with Macintosh and iOS users. Microsoft tried replacing Internet Explorer with Microsoft Edge but has now conceded defeat and will use Google's free Chromium software as a basis for future Edge browsers.[95] Edge remains tied to Windows and little used, hardly the threat antitrust regulators made Internet Explorer out to be.

9: Strategic Predatory Behavior

This is often used simply a catchall term for competitive behavior that antitrust regulators dislike. Every business, big or small, tries to grow and gain or preserve market share. Naturally, this would come at competitors' expense.

Trying to undercut rivals' profitability is the very essence of business competition. But recently, the ordinary competitive market behavior of causing one's rivals to face higher costs has spawned a veritable academic industry devoted to identifying competitive strategies as means of monopolization.

For example, in her 2012 book *Captive Audience: The Telecom Industry and Monopoly Power in the New Gilded Age*, Harvard law professor Susan Crawford argues:

> The absence of any effective regulatory regime or oversight over the cable giant makes it unlikely that Netflix will ever be able to challenge Comcast. Comcast has a number of options that will make it extremely difficult for independently

Determining which products are fit to be tied and which are not is more a matter of metaphysics than sound policy analysis.

> provided, directly competitive professional online video to challenge its dominance.[96]

Employees often move from firm to firm in an industry, taking knowledge of predatory plans with them.

Yet, within a year of the publication of Crawford's book, Netflix began producing original content, an innovation she did not foresee.[97] As of 2019, Netflix is alive and well, and Comcast is the one shifting its business model to match changing consumer tastes. A June 2018 cover story in *The Economist* sums up the matter:

> This year [Netflix's] entertainment output will far exceed that of any TV network; its production of over 80 feature films is far larger than any Hollywood studio's. Netflix will spend $12bn-13bn on content this year, $3bn-4bn more than last year. That extra spending alone would be enough to pay for all of HBO's programming—or the BBC's.[98]

There is a case of strategic behavior that appears similar to predatory pricing. Rather than a firm lowering its prices, this involves a firm seeking to raise its rivals' costs. As George Mason University economist Donald Boudreaux points out:

> All methods of raising rivals' costs depend on the ability of a predator to secure contracts that exclude its rivals. Such a result requires that the predator's rivals and its suppliers remain ignorant about its intentions.[99]

This is a difficult task. Employees often move from firm to firm in an industry, whether horizontally to a rival or vertically through the supply chain, taking knowledge of predatory plans with them. A disgruntled employee might leak damaging information to the press or a competitor. Trade shows, publicity events, or even informal socializing provide regular opportunities for loose lips to accidentally sink a company's ships.

10: Exploiting Technological Lock-In

Companies can use technological lock-in to keep customers from fleeing to better alternatives. The famous example of technological lock-in is the QWERTY keyboard. As it turns out, QWERTY keyboards are just as efficient as Dvorak and other alternatives.[100] The handwringing over the VHS-Betamax wars went away when DVDs became popular, which have since been superseded by streaming video. Same with the progression of music being played on 78 RPM, then 45 RPM, and then 33 RPM records, 8-tracks, cassettes, CDs, MP3 players, and now streaming services such as Spotify. A lock-in example currently in antitrust crosshairs is the Internet browser market. This is in addition to the tying allegations brought by European Union regulators addressed earlier in this paper.

Here is where the lock-in issue comes in for browsers: Life is much easier when all of your passwords and other information are stored in your browser and entered automatically when needed. Logging into a website or buying something online can be almost seamless. But in theory, this convenience also makes consumers reluctant to switch to a competing browser, even if it offers a better user experience. This reticence can lock consumers into an inferior technology, reducing competition and the incentive to innovate, but that is a problem grounded in consumer behavior that government is ill equipped to address.

Even so, the title of most popular browser has shifted at least three times over the past 20 years. Netscape gave way to Internet Explorer, then Firefox, and now Chrome, which could be eclipsed at any time. The older browsers remain freely available for anyone who wants to use them; apparently few people do. Apple's Safari browser is also in the mix, along with numerous independent and open source browsers, such as Opera. There are also stand-alone programs such as LastPass that can store passwords, credit card numbers, and other information and work with multiple browsers and other applications. A product called a YubiKey reduces the need for passwords altogether while serving as an additional security layer.[101] Facial recognition is another option for replacing passwords. If there is a threat of lock-in, it is via regulation, not markets.

Conclusion

Antitrust regulation began as a populist reaction against big business and industrial concentration. Yet, it has proven ineffective at countering the perceive threat of bigness in business, while causing considerable harm to consumers, competition, and innovation. Moreover, many antitrust policies are based on faulty arguments that bear little relation to how real-world markets work. And throughout its history, U.S. antitrust law has created considerable uncertainty for businesses, as federal antitrust enforcers have tried different regulatory approaches over the last 130 years.

The "rule of reason" standard, which had no set criteria, became the standard for enforcing actions from fines to jail terms to firm breakups. During the New Deal, government policy turned in the opposite direction and actively encouraged cartel behavior. After a postwar change of heart, antitrust enforcement reached its peak in the

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1950s and early 1960s. Around this time, economists' arguments slowly earned mainstream acceptance in the legal profession. By the 1980s, a Chicago-style consumer welfare had become the dominant enforcement standard, and has remained so up to the present day. However, the combination of a populist presidential administration with a growing Neo-Brandeisian antitrust movement on the progressive side threaten to revert antitrust policy to something closer to an arbitrary rule of reason standard, which creates the potential for a sharp upswing in enforcement actions against large or politically disfavored firms.

While the Chicago school and the Neo-Brandeisians prefer different levels of antitrust enforcement, both believe that antitrust regulation is an effective tool for managing competitive market processes. In this, both are in error, for a number of reasons.

First, competition is a spectrum, not an on/off switch. That makes it difficult to set predictable standards that companies can work to avoid violating and plan around.

Second, regulators are prone to fall for the relevant market fallacy, in which a company appears to dominate a narrowly defined market but has little power in the larger market in which it actually competes.

Third, antitrust enforcement standards are so broad that they are useless as a guide to permissible behavior. Allowable behavior changes with the political winds. Cases, especially major ones, are sometimes prosecuted for publicity rather than merit.

Fourth, antitrust regulation creates rent-seeking opportunities for companies seeking favors from government to harm competitors. As a result, antitrust regulation, as actually practiced, has done far more to stifle competition than to protect it or promote it.

Finally, antitrust regulation takes a short-term approach to a long-term competitive process. The *IBM* case was in play for a dozen years before the government dropped the case. By that time, the technology at the heart of the case had changed and IBM's competitive position had declined. A case against one of the FAANG companies would likely have similar competitive relevance by the time a major trial would be decided.

As noted, antitrust regulation harms competition, consumers, and innovation, and therefore should be repealed. Congress should repeal the Sherman Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914, as amended, including the Celler-Kefauver Act of 1950 and the Hart-Scott-Rodino Act of 1976. A market-based approach to competition would enable more powerful market regulation to replace flawed government regulation. This would reduce regulatory uncertainty and its chilling effects on innovation, reduce rent-seeking, and do away with the need for intellectual rabbit holes such as defining relevant markets or permissible levels of firm size or market share.

Aggressive antitrust enforcement can create considerable economic uncertainty, which can have a chilling effect on long term investment and innovation in both products and in business practices that could benefit consumers. Consumers and competition would greatly benefit from the repeal of antitrust regulations regarding restraint of trade and monopolization, horizontal and vertical mergers, collusion such as price fixing and market division, predatory pricing, price discrimination, minimum resale prices, exclusive dealing, tying and bundling, strategic predatory behavior, and technological lock-in. As the economy becomes more high-tech, specialized, and global, antitrust policies formed in the smokestack era are becoming progressively less relevant.

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About the Authors

Clyde Wayne Crews, Jr. is Vice President for Policy at the Competitive Enterprise Institute (CEI). He is widely published and a contributor at Forbes.com. A frequent speaker, he has appeared at venues including the DVD Awards Showcase in Hollywood, European Commission–sponsored conferences, the National Academies, the Spanish Ministry of Justice, and the Future of Music Policy Summit. He has testified before Congress on various policy issues. Crews has been cited in dozens of law reviews and journals. His work spans regulatory reform, antitrust and competition policy, safety and environmental issues, and various information-age policy concerns.

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