

# Antitrust & Enforcement

LETTING MARKETS WORK WITHOUT  
EMPOWERING GOVERNMENT



**Ted Bolema, Ph.D., J.D.**

*Antitrust and Competition Fellow, Innovators Network Foundation*

**Vance Ginn, Ph.D.**

*Chief Economist, Pelican Institute*

# Executive Summary

Antitrust enforcement in the U.S. has been around for more than a century. For the last 50 years or so, scholars and courts have operated with a consensus about the goal of antitrust enforcement: the consumer welfare standard, which asks, “does the conduct in question make consumers better or worse off?” Antitrust enforcement based on the consumer welfare standard protects the most important outcomes of the competitive market process and is worth preserving. History shows that this standard should continue to be the guiding light for antitrust enforcement.

Recent calls to create new antitrust tools to address conduct by what has been referred to by some as “big tech” companies like Apple, Amazon, Meta (Facebook), and Alphabet (Google) are misguided and will do far more to empower politicians and government bureaucrats than to prevent abusive conduct by technology companies. Expanding the enforcement powers of antitrust agencies—as many on the left and some on the right now wish to do—harkens back to an older “big is bad” approach.

In the past era of politicized antitrust enforcement, government bureaucrats used antitrust laws to reach almost any result they desired. Rather than promoting competition, such a retrograde approach undercuts the competitive market process which provides more innovation, cheaper prices, and better-quality goods and services necessary for continued human flourishing.

# Brief History of Antitrust Laws and Enforcement

The term trust refers to big corporate arrangements, such as John D. Rockefeller's Standard Oil Trust, that appeared in the 1870s. Under this type of arrangement, competing businesses agreed to cede control of their stock to trustees, who then operated the companies. The Standard Oil Trust allowed Rockefeller, who owned only a small share of U.S. oil refining capacity, to control over 80 percent of U.S. refining capacity. This led to Standard Oil being accused of monopolizing the oil refining business.<sup>1</sup>

The first antitrust statute, the Sherman Act, was passed in 1890. Section 1 of the Sherman Act prohibited contracts in restraint of trade, regardless of the size of the firms participating.<sup>2</sup> Section 2 prohibited monopolization, or the abuse of monopoly power by firms with very large market shares.<sup>3</sup> Later, in 1914, Section 7 of the Clayton Act prohibited mergers that may substantially lessen competition or tend to create a monopoly.<sup>4</sup> Today, these are still the primary federal antitrust statutes in the U.S.

Most states also have their own antitrust statutes, some of which were enacted before the Sherman Act. State statutes are very similar to the federal statutes, although some deviate. States' antitrust authority is independent of the federal government, so states may bring their

own antitrust cases even if the federal antitrust agencies choose not to pursue antitrust claims. States, however, have limited antitrust resources compared to federal agencies, so the most substantial state enforcement actions are almost always brought in coalition with other states, and often with federal agencies.<sup>5</sup>

## ANTITRUST ENFORCEMENT BEFORE THE CONSUMER WELFARE STANDARD

The texts of the antitrust statutes are short and rather vague. For example, what does it mean for a contract to restrain trade in violation of Section 1 of the Sherman Act? As Judge (later President) William Howard Taft of the Sixth Circuit noted in one of the first antitrust decisions, an overly broad interpretation of "restraint of trade" creates problems that Congress cannot have intended when drafting the Sherman Act.<sup>6</sup>

For example, when eBay acquired PayPal in 2002, eBay would have insisted on contract language prohibiting Elon Musk and Peter Thiel from launching a rival online payment service.

This type of non-compete agreement certainly restrains trade by prohibiting Musk and Thiel from immediately starting an online payment service to compete with the one they just sold.

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1 Thomas J. DiLorenzo, "The Ghost of John D. Rockefeller," The Independent Institute, June 1, 1998, available at: <https://www.independent.org/publications/article.asp?id=164>.

2 15 U.S.C. § 1.

3 15 U.S.C. § 2.

4 15 U.S.C. § 18.

5 For more on the role of state antitrust enforcement, see Eric Peterson and Ted Bolema, "The Proper Role for State Antitrust Enforcement," Pelican Institute, November 19, 2021, available at: <https://files.pelicanpolicy.org/wp-content/uploads/2021/11/Proper-Role-for-States-in-Antitrust-Lawsuits-paper-11-19-21.pdf>.

6 *U.S. v. Addyston Pipe Steel Co.*, 85 F. 271 (6th Cir. 1898). Judge Taft described the competitive effect of a non-compete clause in the contract for a sale of a business as follows: "This was not reducing competition, but was only securing the seller against an increase of competition of his own creating. Such an exception was necessary to promote the free purchase and sale of property." *Id.* at 280-81.

But if courts chose to interpret non-compete agreements as restraint of trade, entrepreneurs would struggle to attract investment to build their business. Such a ruling would jeopardize the ability to profit by selling the business later. In the PayPal example, Musk and Thiel reinvested their payouts in SpaceX, Tesla, Meta (Facebook), and other ventures that improved consumer welfare.

Even though Judge Taft identified the difficulty of interpreting the vague language of the antitrust laws early in the antitrust era, courts struggled to find a consistent principle to apply in antitrust analysis. In an antitrust case, the Second Circuit said that the purpose of the antitrust laws is to protect “small dealers and worthy men.”<sup>7</sup> Later, in a major monopolization case, the same court held that the purpose is to “put an end to great aggregations of capital,” evidently without concern about whether the capital investment was necessary for companies to benefit customers.<sup>8</sup>

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## ACTIVIST ENFORCERS FILL THE VOID

The inconsistencies in early antitrust case decisions, made in the absence of a clear guiding principle, led to uncertainty for business owners and innovators trying to plan their conduct to avoid antitrust liability. If business owners and innovators are uncertain about the line between legal and illegal behavior, they will be overly cautious to avoid violating the law. Such risk aversion is particularly pernicious in antitrust, because fierce competition often harms competitors while benefiting consumers. If businesses must worry that harming competitors could lead to legal liability, they will compete less aggressively, leading to higher prices, lower quantities sold, and less innovation in the marketplace.<sup>9</sup>

Not having a clear guiding principle for antitrust enforcement also created a void, which was filled by activist antitrust enforcers substituting their subjective judgment for the emergent judgment of the market. By the middle of the 20th Century, courts allowed antitrust agencies to break up companies the enforcers considered to be too big. Courts and enforcers had little regard for whether a company’s size was the result of superior performance and led to improved products or lower prices to the benefit of consumers. The Supreme Court went as far as to allow enforcers to block the merger of two shoe manufacturers which, if combined, would have accounted for about five percent of national shoe sales. The Supreme Court claimed that whether the merger benefited consumers was not worth considering.<sup>10</sup>

7 *U.S. v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897). As late as the 1960s, the Supreme Court expressed a similar standard when it said the purpose is to protect “small, locally owned businesses.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

8 *United States v. Aluminum Co. of America*, 148 F.2d 416, 428-29 (2d Cir. 1945).

9 This point was made recently by FTC Commissioner Christine Wilson in her dissent to a proposed new policy by the FTC. “Dissenting Statement of Commissioner Christine S. Wilson,” November 10, 2022, p. 9, available at: [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyWilsonDissentStmnt.pdf). (“The consumer welfare standard protects consumers, resulting in lower prices, higher quality, and more innovation. Efforts to protect other groups, including inefficient rivals and labor, necessarily will require tradeoffs that will harm consumers.”)

10 *Brown Shoe v. United States*, 370 U.S. 294, 344 (1962) (“Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.”)

The Supreme Court also allowed Utah Pie to prevent three of its local competitors from charging less for pies than Utah Pie wanted to charge. Utah Pie alleged that the other three pie manufacturers were trying to drive it out of business, but in fact Utah Pie continued to grow. Thus, Utah Pie’s complaint, which was backed by the Supreme Court, was simply that it was not able to extort the prices and profits it wanted from pie consumers because competitors were willing to charge less.<sup>11</sup>

In 1966, Supreme Court Justice Potter Stewart showed his frustration with the lack of consistent standards in antitrust enforcement when he famously dissented in a merger case involving two local supermarket chains, writing: “The sole consistency that I can find is that in litigation under Section 7, the government always wins.”<sup>12</sup>

Justice Stewart’s point, made shortly before the consumer welfare standard was adopted, is that without a clear and principled standard, antitrust violations may be whatever the government enforcers want them to be. Antitrust enforcers could use antitrust laws to favor some businesses over others, pursue agendas never seen in antitrust enforcement, and even punish political opponents. Indeed, today many seek to hijack antitrust laws to pursue their own activist political agendas. Some of those currently looking to exploit antitrust laws to serve other agendas call for repurposing them to reduce market concentration across the economy,<sup>13</sup> impose climate change policies,<sup>14</sup> favor the interest of labor over management,<sup>15</sup> and combat racial discrimination.<sup>16</sup>

## THE CONSUMER WELFARE STANDARD PREVAILS

As the inconsistent and unprincipled antitrust enforcement of the 1960s was becoming unsustainable, legal scholars associated with the University of Chicago put forth a solution. Aaron Director, Robert Bork, and other scholars examined and provided an interpretation of the Sherman Act’s legislative history which concluded that Congress intended mainly to protect consumers from the harm done by cartels without undermining economic efficiency.<sup>17</sup> The Chicago School scholars were not alone—there was a similar push for basing antitrust enforcement on sound economic analysis from Harvard professors Phillip Arreda and Donald Turner, as well as from future Supreme Court Justice Stephen Breyer.<sup>18</sup>

The U.S. Supreme Court recognized the consumer welfare standard in a series of cases in the late 1970s, about a decade after Justice Stewart’s famous dissent. In 1977, the Court held that business conduct raising antitrust concerns must be evaluated based upon

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11 *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

12 *United States v. Von’s Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart & Harlan, JJ, dissenting).

13 See, e.g., Tim Wu, “After Consumer Welfare, Now What? The ‘Protection of Competition’ Standard in Practice,” *Competition Policy International*, April, 2018, p. 2, Columbia Public Law Research Paper No. 14-608 (2018), available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/2291](https://scholarship.law.columbia.edu/faculty_scholarship/2291).

14 See, e.g., Ben Steinberg and Adam Mendel, “US Antitrust Regulators Should Foster Climate Collaboration,” *Robins Kaplan Newsletter*, April 13, 2021, available at: <https://www.robinskaplan.com/-/media/pdfs/publications/us-antitrust-regulators-should-foster-climate-collaboration.pdf?la=en>.

15 See, e.g., Eric Posner, “The Rise of the Labor-Antitrust Movement,” *Competition Policy International*, November 29, 2021, available at: <https://www.competitionpolicyinternational.com/the-rise-of-the-labor-antitrust-movement/>.

16 See, e.g., Joshua P. Davis, Eric L. Cramer, Reginald L. Streater, and Mark R. Suter, “Antitrust as Antiracism: Antitrust as a Partial Cure for Systemic Racism (and Other Systemic ‘Isms’),” *Antitrust Bulletin*, Vol. 66(3), May 6, 2021, pp. 359–383, available at: <https://journals.sagepub.com/doi/pdf/10.1177/0003603X211023620>.

17 For a more complete history of the work of University of Chicago scholars in providing the intellectual foundation for the consumer welfare standard, see Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout and Joshua D. Wright, “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement,” *Pepperdine Law Review*, Vol. 47, No. 4, June, 2020, 681, at 874-77, available at: <https://digitalcommons.pepperdine.edu/plr/vol47/iss4/1/>.

18 See, e.g., Timothy J. Muris and Jonathan E. Nuechterlein, “Chicago and Its Discontents,” *University of Chicago Law Review*, Vol. 87: No. 2, Article 8, at 521, available at: <https://chicagounbound.uchicago.edu/uclev/vol87/iss2/8> (“The true divide in antitrust thought today is not between ‘liberals’ and ‘conservatives,’ and not between Chicago and post-Chicago theory. It is instead between those who favor and those who disfavor a rational, economics-based approach to competition policy in America.”)

demonstrable economic effects.<sup>19</sup> Two years later, the Court explicitly described the Sherman Act as a “consumer welfare prescription.”<sup>20</sup> The consumer welfare standard quickly became relatively uncontroversial in antitrust law, at least until recently.<sup>21</sup>

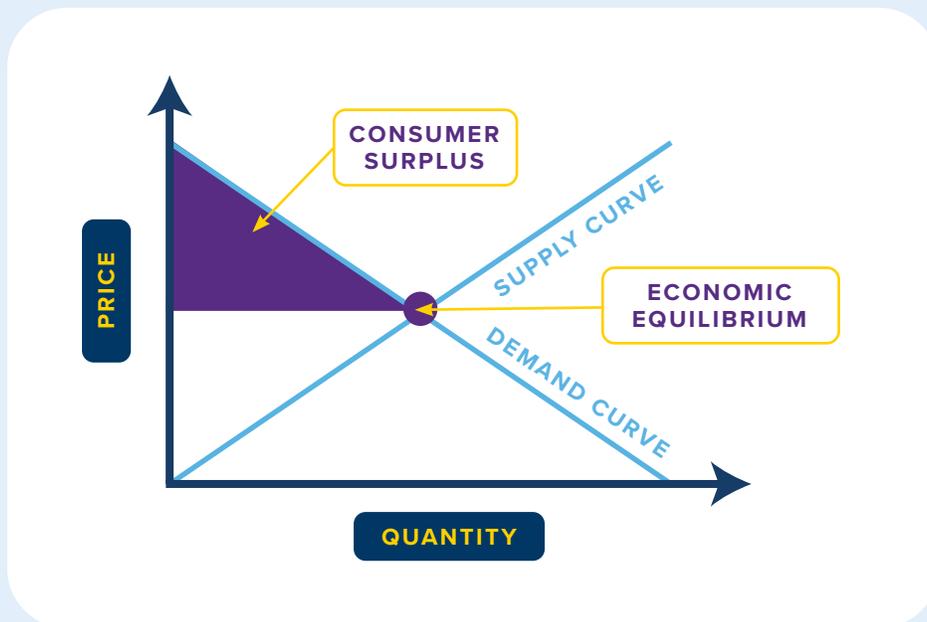
The consumer welfare standard limits enforcers’ ability to pick winners and losers and override market forces. It focuses on a simple question: does the conduct make consumers better or worse off? Thus, in 1977 the Supreme Court stated firmly that antitrust laws “were enacted for ‘the protection of competition, not competitors.’”<sup>22</sup>

## ECONOMICS AND THE CONSUMER WELFARE STANDARD

In economics, consumer welfare is a well-defined concept. The market process can be illustrated by the supply and demand chart below. The demand curve represents what consumers are willing and able to purchase at

each price level. The supply curve represents what producers are willing and able to supply at each price level. The market drives consumers and producers toward an economic equilibrium where the quantity demanded equals the quantity supplied. Consumer welfare, also known as consumer surplus, is the shaded area under the demand curve and above the price, which reflects the value added to the consumer compared with the price paid and the quality gained from the purchase.

Therefore, consumer welfare is the value consumers get from the product less the price they paid. If a consumer values a new smartphone at \$1,500 and pays the producer \$1,000 for it, that consumer will have a consumer surplus of \$500. This concept, properly defined, captures the role of quality, innovation, and price on the welfare of the consumer. In other words, consumers have sovereignty over their decision to purchase a good or service, which supports the competitive market process.



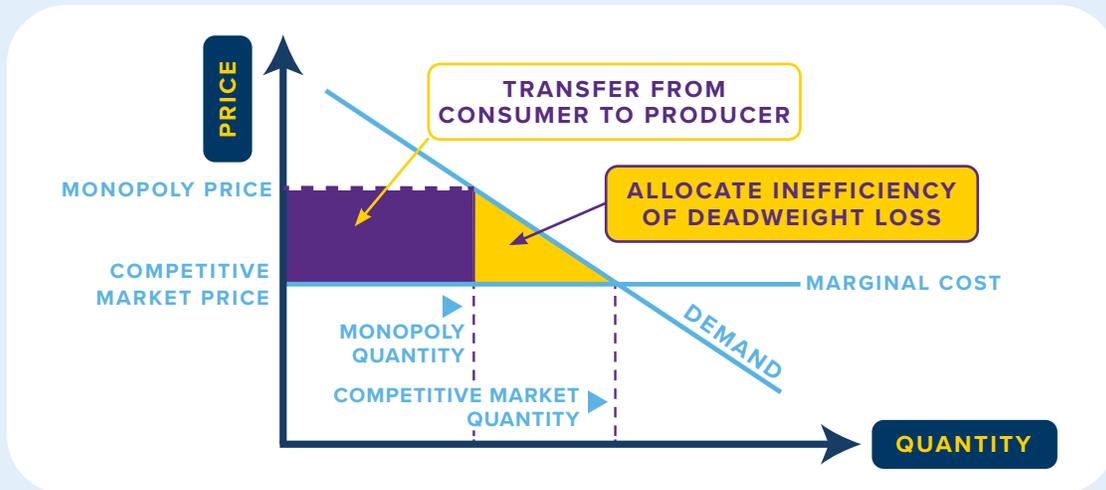
<sup>19</sup> In *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Supreme Court held that territorial restraints on franchisees should be evaluated under the rule of reason (rejecting the per se rule in this situation). After recognizing that such restrictions can enable manufacturers to compete more effectively against other manufacturers, the Court declared that the rule of reason standard must be based upon demonstrable economic effects. 433 U.S. 36, 1977.

<sup>20</sup> *Reiter v. Sonotone Corp.*, 442 U.S. 330, 1979.

<sup>21</sup> See, e.g., Justice Elena Kagan’s majority opinion in *Kimble v. Marvel Entertainment, LLC* (135 S. Ct. 2401, at 2413, 2015) (“[B]ecause the question in those cases was whether the challenged activity restrained trade, the Court’s rulings necessarily turned on its understanding of economics.”).

<sup>22</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (429 U.S. 477, 1977).

An antitrust violation then requires showing a movement away from a competitive market outcome, or toward a monopoly outcome, which reduces consumer welfare. Theoretically, this happens when a business controls enough of a market that it can restrict the supply, raise prices due to lack of competition, and thus reduce consumer welfare. Imagine that a smartphone maker raises the price to \$1,200 and a consumer still values the phone at \$1,500. This would reduce consumer welfare to \$300. This lost consumer welfare can be turned into a transfer to producers (the purple shaded area) or turned into a “deadweight loss” that no one receives (the yellow shaded area).



Professor Donald J. Boudreaux recently defended the continued use of the consumer welfare standard as follows:

Production is a means; consumption is the end. The consumer-welfare standard is nothing more, or less, than an understanding and acceptance of this fundamental economic reality. . . . This relationship between production and consumption isn’t a matter of choice or ideology. Nor is it a relationship unique to capitalism. It is, instead, a relationship that inheres in the nature of all economic activity. . . .

To judge whether any particular output is worth the inputs and effort spent to create it, some reliable method of assessing each output’s value is required. In an economy, that assessment is done by consumers spending their incomes as they choose. Producers who earn profits have actually produced value; producers who suffer losses have not. Activities that are “proven” profitable are continued and perhaps expanded, while activities that generate losses are halted. . . . Each of us. . . judges the outcome of our own individual economic efforts according to the consumer-welfare standard. Antitrust and other government economic policies should be guided by the same standard.<sup>23</sup>

The consumer welfare standard uses this relatively simple but powerful economic analysis to show the harm to consumers from a company, or group of companies working together, anticompetitively restricting output and raising prices. By establishing a clear and singular objective, “the consumer welfare standard abandons the use of vague tests that incorporate multiple, and often contradictory, social and political goals that fail to meaningfully cabin discretion and thus ultimately permit decision makers to reach almost any result they desire.”<sup>24</sup>

<sup>23</sup> Donald J. Boudreaux, “On the Primacy of the Consumer-Welfare Standard,” American Institute for Economic Research, January 21, 2023, available at: <https://www.aier.org/article/on-the-primacy-of-the-consumer-welfare-standard/>.

<sup>24</sup> Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout and Joshua D. Wright, “Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement,” *Pepperdine Law Review*, Vol. 47, No. 4, June, 2020, 681, at 879, available at: <https://digitalcommons.pepperdine.edu/plr/vol47/iss4/1/> (citations omitted).

# Current Initiatives to Expand Antitrust Enforcement

Until recently, the main antitrust debates have been between antitrust traditionalists, who favor antitrust policy focused on economic efficiency evidence, and expansionists, who are more willing to adopt absolute prohibitions and err on the side of more aggressive enforcement. The traditionalists and expansionists both subscribe to the consumer welfare standard as the guiding principle for antitrust law and economics, even as they may argue vigorously about many aspects of how antitrust enforcement should implement that principle.

## RADICALS COME OUT OF THE SHADOWS

In the last few years, a much more activist group of antitrust scholars and practitioners have emerged as advocates for a radical transformation of antitrust enforcement. They largely reject the consumer welfare standard and make sweeping claims about how failing to enforce antitrust laws has led to market concentration and wealth disparities. These new radicals have been gaining in popularity and hold many influential positions in federal antitrust enforcement.<sup>25</sup>

Supporters and critics have referred to these antitrust radicals by various names, including antitrust “hipsters,”<sup>26</sup> antitrust “populists,”<sup>27</sup> “transformationalists,”<sup>28</sup> and “New Brandeisians.”<sup>29</sup> The term New Brandeisians, used by the current chair of the Federal Trade Commission (FTC), Lina Khan, refers to former

Supreme Court Justice Louis Brandeis, who tended to focus on structural factors in antitrust analysis.

Antitrust radicals do not focus on promoting consumer welfare or protecting the competitive process. The fundamental assertion at the heart of their view of antitrust is that under the consumer welfare standard, concentration has been allowed to persist, and firms have been able to withhold output in order to charge higher prices.<sup>30</sup> Furthermore, they argue that consumers are merely one of the “stakeholder” groups antitrust laws should protect, making the consumer welfare standard insufficient. But there is very little support for this view, and most of the evidence indicates the opposite. As former FTC Commissioner Joshua Wright found in a 2018 study, “there is no empirical foundation on which to conclude that monopoly power is rising. To the extent that markups are increasing, other studies show that output has increased

25 William Kovacic, a former Chair of the FTC, provides a more complete survey of the differing viewpoints in current antitrust legal and economics circles. William E. Kovacic, “Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy,” *Antitrust*, Vol. 35, No. 3 (Summer 2021), available at: [https://www.americanbar.org/groups/antitrust\\_law/resources/magazine/2021-summer/root-and-branch/](https://www.americanbar.org/groups/antitrust_law/resources/magazine/2021-summer/root-and-branch/).

26 See, e.g., Joshua D. Wright et al., “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” 51 *Arizona State Law Journal* 293 (2019), available at: <https://arizonastatelawjournal.org/wp-content/uploads/2019/05/Wright-et-al.-Final.pdf>.

27 Carl Shapiro, “Antitrust: What Went Wrong and How to Fix It,” *Antitrust*, Vol. 35, No. 3 (Summer 2021), at 33, available at: <https://faculty.haas.berkeley.edu/shapiro/fixingantitrust.pdf>.

28 William E. Kovacic, “Root and Branch Reconstruction: The Modern Transformation of U.S. Antitrust Law and Policy,” *Antitrust*, Vol. 35, No. 3 (Summer 2021), at 46, available at: [https://www.americanbar.org/groups/antitrust\\_law/resources/magazine/2021-summer/root-and-branch/](https://www.americanbar.org/groups/antitrust_law/resources/magazine/2021-summer/root-and-branch/).

29 See, e.g., Lina M. Khan, “The New Brandeis Movement: America’s Antimonopoly Debate,” 9 *Journal of European Competition Law and Practice* 131 (2018), available at: <https://academic.oup.com/jecp/article/9/3/131/4915966>.

30 See, e.g., Jan De Loecker, Jan Eeckhout, and Gabriel Unger “The Rise of Market Power and the Macroeconomic Implications,” *The Quarterly Journal of Economics*, Vol. 135, No. 2 (May 2020), pp. 561–644, available at: <https://doi.org/10.1093/qje/qjz041>.

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and that quality-adjusted prices have remained stable.”<sup>31</sup>

The radicals at the FTC are indeed pursuing the agenda they promised. They recently announced plans to use Section 5 of the FTC Act,<sup>32</sup> a provision seldom used as a stand-

alone antitrust law, to challenge business practices that fit the current agendas of the commissioners in areas outside the historical scope of antitrust laws.<sup>33</sup> Indeed, the first major initiative by the FTC under Section 5, seeking to outlaw a common type of non-compete agreement between employers and employees, indicates that the FTC intends to use its newly claimed authority under Section 5 to tip the scales in favor of labor over management.<sup>34</sup> FTC Chair Lina Kahn has also publicly proclaimed that current FTC leadership intends to expand their enforcement powers and actions into uncharted areas.<sup>35</sup>

Federal antitrust enforcers have technology companies in their crosshairs. The FTC filed an antitrust action against Meta (Facebook), arguing that Meta is monopolizing the market for “personal social networking services.” The FTC argued that Meta, when it was still known as Facebook, purchased Instagram and WhatsApp to protect against potential

competitors and that these acquisitions gave Facebook a monopoly with 60 percent of the personal social networking market for at least the last decade. The lawsuit sought to unwind Meta’s acquisitions of Instagram and WhatsApp almost a decade after those mergers had been consummated, based on a “nascent competition” theory that Instagram and WhatsApp, had they not been purchased by Facebook, eventually would have grown to become horizontal competitors to Meta. Of course, Instagram and WhatsApp were relatively new, but growing, applications producing relatively little revenue at the time, and almost all their revenue growth has occurred after they were acquired by Facebook, making any claims about their future success as independent companies highly speculative. In the first round, the federal court was unimpressed with the FTC’s claims and dismissed the lawsuit.<sup>36</sup> The FTC responded by taking another run at Meta, filing an amended complaint alleging new facts in response to the weaknesses the court identified in the original complaint.<sup>37</sup>

The FTC’s sister antitrust enforcement agency, the Antitrust Division of the Department of Justice, is pursuing its own high-profile cases against Alphabet, the parent company of Google. The first case, which is scheduled to go to trial in September of 2023, alleges that Google is monopolizing the search engine market. The suit contends that Alphabet’s

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<sup>31</sup> Joshua D Wright, “Toward a Better Understanding of Concentration: Measuring Merger Policy Effectiveness,” 129th Meeting of the Competition Committee, Organization for Economic Co-Operation and Development, at 14 (June, 2018), available at: [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf).

<sup>32</sup> 15 USC §§ 41-58, with the relevant language on unfair methods of competition in § 45.

<sup>33</sup> Federal Trade Commission, “Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act” (“2022 Policy Statement”), November 10, 2022, p. 1, available at: [https://www.ftc.gov/system/files/ftc\\_gov/pdf/P221202Section5PolicyStatement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf).

<sup>34</sup> Federal Trade Commission, Press Release, “FTC Cracks Down on Companies that Impose Harmful Noncompete Restrictions on Thousands of Workers,” January 4, 2023, available at: <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-cracks-down-companies-impose-harmful-noncompete-restrictions-thousands-workers>.

<sup>35</sup> See, e.g., Chair Lina M. Khan, Federal Trade Commission, “Memorandum to Commission Staff and Commissioners regarding Vision and Priorities for the FTC,” September 22, 2021, at 1-2, available at: [https://www.ftc.gov/system/files/documents/public\\_statements/1596664/agency\\_priorities\\_memo\\_from\\_chair\\_lina\\_m\\_khan\\_9-22-21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf) (“First, we need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. Focusing on power asymmetries and the unlawful practices those imbalances enable will help to ensure our efforts are geared towards tackling the most significant harms across markets, including those directed at marginalized communities.”).

<sup>36</sup> *FTC v. Facebook, Inc.*, Memorandum Opinion, U.S. District Court for the District of Columbia, June 28, 2021, Civil Action No. 20-3590 (JEB), available at: [https://www.ftc.gov/system/files/documents/cases/073\\_2021.06.28\\_mtd\\_order\\_memo.pdf](https://www.ftc.gov/system/files/documents/cases/073_2021.06.28_mtd_order_memo.pdf).

<sup>37</sup> *Federal Trade Commission v. Facebook, Inc.*, First Amended Complaint, No. 20-3590 (JEB) (D.D.C. June 28, 2021), available at: [https://www.ftc.gov/system/files/documents/cases/ecf\\_75-1\\_ftc\\_v\\_facebook\\_public\\_redacted\\_fac.pdf](https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf).

exclusionary agreements, where the company pays manufacturers to install Google as the default search engine on their phones, computers, or other devices, improperly creates monopoly power in ways that violate Section 2 of the Sherman Act.<sup>38</sup>

In the second case, filed at the beginning of 2023, the Antitrust Division alleges that Alphabet is illegally monopolizing the online ad market through a pattern of self-dealing, anticompetitive acquisitions, and forcing businesses to use multiple products and services that it offers.<sup>39</sup>

The cases against Meta and Alphabet are based on unconventional legal theories that are going to be difficult for the government to prove. But winning may not be the point. Even if the enforcers lose all their cases against technology companies, getting past the government challenges takes years. This hostility toward technology company mergers will undoubtedly discourage other such acquisitions,

depriving consumers of the benefits of many pro-competitive mergers. For example, many small technology companies attract capital investment based on their potential to create value later when they merge with a larger

company. FTC and Antitrust Division threats to block future mergers could dry up capital investment in technology startups.

The likely next major action by the FTC will be a lawsuit against Amazon, which Lina Kahn criticized before she joined the FTC.<sup>40</sup> It will probably be similar to the current case by the California Attorney General against Amazon, alleging that Amazon is favoring its own products over those of competitors that are sold on Amazon's platform. The problem with the California case is that the practices being challenged

are unpopular with competitors of Amazon, but likely have neutral or even beneficial effects on consumers.<sup>41</sup>

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38 Complaint, *U.S., et al., v. Google LLC*, No. 1:20-cv-03010 (D.D.C., October 20, 2020), available at: <https://www.justice.gov/atr/case-document/file/1329131/download>.

39 U.S. Department of Justice, “Justice Department Sues Google for Monopolizing Digital Advertising Technology,” January 24, 2023, available at: <https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies>.

40 See, e.g., Adi Robertson, “Amazon Reportedly Facing FTC Antitrust Investigation,” *The Verge*, February 3, 2023, available at: <https://www.theverge.com/2023/2/3/23584630/amazon-ftc-antitrust-probe-investigation>.

41 See, e.g., Ted Bolema, “California May Be Trying to Evade the Consumer Welfare Standard in Its Antitrust Lawsuit against Amazon,” Policy Brief, The Mercatus Center, January 23, 2023, at 11, available at: <https://www.mercatus.org/research/policy-briefs/california-antitrust-lawsuit-evading-consumer-welfare-standard> (“A victory by the California attorney general that is not based on the consumer welfare standard will undermine the principle that antitrust decisions should be based on economic analysis rather than political considerations. If California wins in court, more weaponizing of antitrust to target companies for their size is likely to follow. This will only encourage costly litigation slowing economic growth and further weaken the American economy.”)

## CURRENT BILLS BEFORE CONGRESS AIMED AT TECHNOLOGY COMPANIES

Those who advocate for market-oriented policies have generally been highly skeptical of substituting the judgment of regulators and bureaucrats for those of customers, entrepreneurs, and innovators. However, that has been changing recently as many who usually advocate for free markets have become increasingly frustrated by content moderation policies and alleged political bias of certain tech companies with current market power. That frustration has tempted some of them to join the calls for greatly expanding the scope of antitrust enforcement.

**Several bills were introduced in the 2021–22 Congress proposing aggressive reforms to the antitrust laws, and are likely to be reintroduced in 2023. Two in particular appear to have at least some bipartisan support. The American Innovation and Choice Online Act (AICOA) targets certain unilateral conduct by large online platforms, including restricting “self-preferencing,” or treating one’s own products more favorably than those of competitors.<sup>42</sup> The Open App Markets Act (OAMA) focuses on mobile app stores and operating systems.<sup>43</sup> It also restricts self-preferencing, but goes further and prohibits the “walled garden” business model that requires all app transactions to run through a single app store.<sup>44</sup>**

The fundamental problem with the new antitrust legislation and plans to target technology industries is that they reject the competitive market process as a primary source of innovation. Whatever one thinks about the largest technology companies, they got where they are largely by being more creative and making better investments in research and development. Technological advances give us more efficient production and distribution of more and better goods and services. This remarkable progress has occurred in an antitrust environment that has rarely pursued enforcement actions against technology companies. The drive for technological innovation is powerful and relentless, but it still can be blocked or directed in less productive directions by bad government policies.

A rush to do something about tech companies could lead to unintended consequences. For example, the American Innovation and Choice Online Act and the Open App Markets Act target specific tech companies, but incorporate a heavy-handed mandate to provide access to their platforms that likely will make it harder for small firms to introduce and market their products. Access and data portability mandates also would exacerbate cybersecurity concerns and undermine the process that platforms take to curate a usable and competitive space for developers. The inevitable result will be worsening services and fewer choices for the developers and other entrepreneurs the bills are supposed to protect.

<sup>42</sup> American Innovation and Choice Online Act, Senate Bill 2992, 117th Congress (2021–2022), available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2992>.

<sup>43</sup> Open App Markets Act, Senate Bill 2710, 117th Congress (2021–2022), available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2710>.

<sup>44</sup> For a more detailed discussion of the antitrust bills before the 2021–2022 Congress, see Erik Hovenkamp, “Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?” CPI Antitrust Chronicle (2022 Forthcoming), available at: <file:///C:/Users/a285m324/Downloads/SSRN-id4127334.pdf>.

# Next Steps

As with any market, competition in the technology sector has been a key element in prompting firms to innovate and provide consumers with products they want for prices they are willing to pay. Wherever that competition is stifled, whether by collusion or (more likely) government mandate, there is tremendous risk that consumer welfare will be reduced. If anticompetitive conduct is occurring in the technology sector, existing antitrust laws and the consumer welfare standard are still the best tools for protecting competition and consumers.

While the current frustrations with the size of large tech companies and censorship practices may be warranted, giving government enforcers and bureaucrats more power and more discretion is not the answer. The consumer welfare standard is about improving people's lives. That is not necessarily the goal or outcome of politicized antitrust enforcement. If technology companies fail to keep innovating, they will soon fall behind the next wave of emerging competition. There are numerous examples of tech companies that dominated markets in the past but failed to sustain their leading positions, including Myspace, Yahoo, and Palm Pilot. Nor is there a lack of smaller competition when it comes to search engines, new AI tools, e-commerce, smartphones, or social media.

Creating new antitrust laws and enforcement powers for governments is always disruptive for the economy. As enforcers bring new types of cases, at first the legal standards will be uncertain. Companies realize that even if a court may ultimately find that their conduct does not violate the new standards, antitrust investigations and litigation are always costly and divert resources from productive and innovative activities. This will give firms the incentive to settle such challenges, even when their conduct benefits consumers and the economy as a whole. When that happens, the antitrust agency bringing the lawsuit will likely declare victory, but often it will be unclear whether consumers and the economy are better off.

The current proposals before Congress, and variations on them being considered by some states, are unlikely to do much to address the current concerns about censorship and bias at tech companies. What we are more likely to get from expanding the power and discretion of government enforcers is investigations and cases aimed at punishing the perceived enemies of big government and economic winners and losers chosen based on the interests of antitrust enforcers and their political allies. This politicized enforcement may or may not affect the current antitrust targets of the day, but it will create uncertainty, stifling entrepreneurs, free speech, job creation, investment, prices, and overall economic prosperity.

# Conclusion

The technology sector is not immune from anticompetitive conduct. But when it arises, the existing antitrust laws and the consumer welfare standard are well-suited to protect the competitive market process. Antitrust has limits in what it can accomplish, which are well demonstrated by experience from past eras of expansive antitrust enforcement. Expanded antitrust enforcement will have little impact on bad conduct by tech companies and will leave us with antitrust radicals empowered to increase the size of government and remake the economy.

The better approach is to reinforce the commitment to the consumer welfare standard and letting the free market work. That requires enforcers to focus on whether the conduct they are investigating makes consumers better or worse off, without straying into agendas like fighting climate change, protecting labor unions, protecting favored companies, protecting stakeholders, or punishing political enemies. Where such endeavors are worthy, they should be pursued directly through targeted legislative and regulatory action, not through changing antitrust laws.

The consumer welfare standard has been one of the greatest victories for principled limited government policies. Advocates for market-oriented economics and the benefits of entrepreneurship and competition should be reluctant to create new government powers inconsistent with the consumer welfare standard for short-term political gains. Ultimately, the power should be in the hands of consumers and producers to do what is in their best interests. This will result in the betterment of others in the process. As history has proven, empowering people in the marketplace rather than bureaucrats in government results in more efficient and effective outcomes and better supports liberty and prosperity.



504-500-0506  
[info@pelicaninstitute.org](mailto:info@pelicaninstitute.org)  
[pelicaninstitute.org](http://pelicaninstitute.org)

 /PelicanInstitute

 @PelicanInst

 PelicanInstitute