



Research

New Antitrust Thinking Isn't a Return to the Good Old Days

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Amazon, Apple, Facebook, Google, Microsoft. These are America's five most valuable tech companies, and they have a public policy challenge in common: antitrust. When antitrust makes headlines, it's often because one of these five companies is looking to buy a smaller firm or facing some sort of investigation from the Federal Trade Commission or Department of Justice. Although antitrust usually comes up in the context of a specific transaction or probe, a growing movement of activists and commentators is urging policymakers to rethink the framework by which antitrust regulators scrutinize how big businesses behave and when they can enter into mergers or acquisitions. This movement, deemed "[neo-Brandeisian](#)" for its adherence to Supreme Court Justice Louis Brandeis's fear of the "curse of bigness," seeks to restore the antitrust approach that prevailed in the mid-20th century of condemning market concentration and large businesses as illegal and harmful. America's top tech companies are squarely in the crosshairs of this proposed policy shift.

This effort doesn't seem particularly close to overtaking the long-prevailing view among policymakers that competition law should chiefly serve consumers, but it has won over some influential allies. When leading congressional Democrats unveiled their legislative agenda called "A Better Deal" in July 2017, [a section](#) that drew considerable attention called for reforming U.S. antitrust laws to crack down on "corporate monopolies." Several bills were [soon introduced](#) — unsuccessfully — to implement this proposal. Even some prominent right-leaning pundits, such as Fox News commentator Tucker Carlson, have [emerged](#) in favor of stricter antitrust intervention — though this stance might be driven less by a newfound affection for antitrust enforcement and more by ideological disagreement with the left-wing political views often espoused by senior leadership at big American tech firms.

The neo-Brandeisians reject the idea that the antitrust laws exist primarily to serve consumer well-being by empowering the government to block mergers, acquisitions, and business practices that tend to push up prices, reduce output, and undermine competition itself. Instead, these commentators want judges and antitrust regulators to dust off antitrust principles long ago abandoned by the courts, such as [condemning bigness](#) in American business as presumptively unhealthy and restricting economic concentration for the sake of "[social and political goals](#)." This approach rejects the approach prevalent since the 1970s among scholars and judges that a market's concentration doesn't tell us how the market will perform, and that big firms can sometimes deliver efficiencies that smaller firms cannot.

A REALITY CHECK

Outside the world of punditry and policymaking, the American public appears relatively unconcerned about the scale of the country's leading tech companies. A summer 2018 [survey](#) conducted by Georgetown and NYU researchers found that among 20 top public and private U.S. institutions, Google and Amazon "universally inspire a great deal of confidence." One notable outlier: Facebook, which placed near the bottom of the list among Democrats and Republicans alike. But this skepticism about Facebook likely has more to do with the social media platform's highly publicized recent snafus involving user privacy and foreign election interference

than the firm's competitive practices or acquisition history. (Ironically, Facebook's efforts to address privacy fears by [greatly restricting](#) third-party applications' access to its application programming interface (API) have made it harder for users to seamlessly share content across social media platforms.)

America's leading technology firms enjoy impressive market valuations, with the nation's five most valuable tech firms worth a combined \$3.6 trillion — or roughly 17 percent of the 500 companies listed on the S&P 500 index. This market signal indicates that investors are, by and large, confident that Alphabet (Google's parent company), Amazon, and Microsoft will grow more profitable in coming years, while Facebook and Apple will maintain their enviable profits. But U.S. tech firms' record-breaking performance in the stock market should not obscure the immense size and scope of the rest of the nation's economy, which includes numerous companies with well-established brands, deep pockets, and a thirst for success in the digital world.

For the time being, American consumers and businesses still spend far more offline than online, even when it comes to retail purchases and ad buys. In the United States, for instance, Amazon's direct retail sales plus its third-party sellers' revenue amounted to [about \\$200 billion](#) in 2017 — an impressive figure, but still far behind Walmart's [\\$308 billion](#) in U.S. sales last year. Similarly, although Google and Facebook are [expected to sell](#) about \$62 billion combined in U.S. digital ads this year, that still adds up to under one-third of the [overall domestic advertising market](#).

These tech firms haven't stopped growing, to be sure: Amazon and its affiliates may outsell Walmart domestically in 2019. And Google and Facebook may end up raking in most U.S. advertising dollars within the next few years. But portraying companies like Amazon or Google as behemoths swallowing up the competition at every turn, monopolizing market after market, is a gross exaggeration.

Jet.com, an e-commerce site launched in 2015 with aspirations to take on Amazon by ditching annual fees, was acquired by Walmart for \$3.3 billion in late 2016. Microsoft's Bing may not be taken too seriously among power users or industry analysts, but Microsoft has the incentive and ability to capitalize on any shortcomings at Google if it doesn't keep improving its search product. And despite Uber's new leadership and revamped marketing strategy, Lyft remains a popular — and innovative — alternative.

For critics of U.S. tech firms who want greater antitrust intervention, the rationale for such regulation seems to transcend the question of what's best for consumers. Instead, subsumed in the case for an antitrust crackdown is a laundry list of complaints about tech companies that spans a broad array of policy areas. From accusations of overrepresentation of Asian employees to insufficient responsiveness to sexual harassment complaints to too much (or too little) moderation of user-generated content, the clear takeaway is that America's tech firms are engaged in lots of bad behavior.

Policymakers could address each of these issues in context, critically examining the evidence and the legal frameworks that underlie each area. Or, officials could avoid this complexity and instead take up antitrust intervention as a powerful cudgel to save the day for the many constituencies supposedly harmed by tech giants — and perhaps mete out some well-deserved punishment at the same time. To the populist progressives pining for a pound of flesh from big tech, the appeal of the latter approach is obvious. For consumers, however, the benefits of antitrust interventionism are dubious — while the downside is real.

Undoing decades of bipartisan, rigorous, empirically grounded efforts to rationalize U.S. antitrust laws and rekindling the "big is bad" approach to antitrust will undoubtedly alter how big tech firms behave. Indeed, this is the point of antitrust regulation. But this behavioral change could come at a steep price for consumers. To

understand why, it's worth revisiting the tumultuous decade and a half in the smartphone marketplace.

GOOGLE AND THE SMARTPHONE

Just 15 years ago, the smartphone was a niche product popular among busy executives, but its transformation into a must-have consumer device was imminent. Against this backdrop, Apple's decision to develop the iPhone wasn't all that surprising of a business decision, given the success of the iPod. More surprising, however, was Google's decision to purchase Android for a reported \$50 million in 2005. Given that Nokia, BlackBerry, Microsoft, and Apple, among others, were investing heavily in the mobile marketplace, Google's foray into consumer devices was hardly a foregone conclusion. Following its Android acquisition, nearly five years would elapse before the platform even made a dent in the smartphone market. Fast forward to 2019, and over 80 percent of the world's smartphones are running Android.

Google's extraordinary success with Android is just one example of how consumers benefit when tech firms make risky bets entering adjacent markets. Even when these vertical gambits don't topple incumbent firms, they can make a difference. Consider Google Fiber, announced in 2010 as an effort to jumpstart the U.S. broadband sector by building fiber-to-the-home networks in cities across the nation. Nine years later, Google Fiber is available in over a dozen cities, but Google has paused network buildout in new cities. Still, although only a tiny fraction of Americans are served by Google Fiber, the initiative likely contributed to the vast improvement of broadband in America. Over [80 percent](#) of U.S. households are served by at least one provider offering service with downstream speeds of a gigabit or more. Just a few years ago, only a lucky few Americans could get gigabit broadband service at home.

Google continues to invest in emerging markets, including, perhaps most notably, automated vehicles (also known as self-driving cars). Alphabet has poured well over [a billion dollars](#) into its Waymo division, which is widely viewed as a global leader in automated vehicle technology. If the technology is ultimately successful, it could revolutionize the safety, efficiency, and affordability of surface transportation to an extent greater than perhaps any innovation since the automobile itself. But it will almost certainly take decades for automated vehicles to proliferate across the country, even once the technology itself has been perfected.

Private sector investment in potentially game-changing innovations can have positive, far-reaching societal implications. Whatever one thinks about the proper role of government in fueling research and development, market-driven efforts to develop revolutionary technologies in hopes of achieving commensurate rewards are an essential ingredient in human progress. But we shouldn't take for granted the willingness of brilliant and creative minds to sweat it out despite the high risk of failure that comes with trying to change the world. Just as governments can help establish the conditions in which these creative efforts thrive, governments can also stymie such efforts.

Had Google known from the start that Android's extraordinary success would mean regulatory headaches down the road, would it have still entered the mobile ecosystem? Quite possibly. But imagine if those headaches were more like throbbing migraines. Even if Google were to still have pursued Android, it might have followed Apple's path, targeting the world's most affluent users to generate solid profits while keeping a lower profile in terms of market share.

How will the government react if Waymo ends up first to market with a safe, affordable, automated vehicle? If such success is met with exacting bureaucratic oversight of every decision Waymo makes when it comes to pricing, strategy, and acquisitions, at what point do the diminished rewards of success make the risk-taking no

longer worth it? Like any company, Google will throw in the towel if the prospect of success is sufficiently slim relative to the benefits. Government should foster an economic environment in which efficient risk-taking can thrive. Scrutiny will scale with success, but antitrust intervention should never amount to a hefty marginal tax on innovation.

Rewriting U.S. antitrust laws won't just affect existing firms; it will also influence the evolution of markets that have yet to exist. Although Google's earliest days were financed by personal credit cards, like most of America's tech leaders, the company's formative years were financed by angel investors and venture capital funding. Even the 42-year old Apple got off the ground in the 1970s thanks to wealthy funders willing to bet on a long shot.

But it's astronomically rare for a startup to enjoy the success of Apple or Google. Indeed, investors have poured countless sums into seemingly promising firms that ended up failing spectacularly. Pets.com spent \$300 million in under two years before shutting down in 2000. Groupon [raised](#) \$1.4 billion in its first four years, then another \$700 million in its initial public offering — yet it's now worth under \$2 billion. Juicero [raised](#) almost \$120 million in three years before shutting down in 2017. Even MoviePass, whose business model boils down to losing money on every customer in hopes of making up the difference with volume, garnered nearly \$70 million in seed funding. These are just a few examples of how, each year, investors pour billions of dollars into startups that never even come close to breaking even, let alone justifying their seed funding.

Why do investors make such risky bets? Because of the potentially huge upside they might enjoy if just one of their investments turns into a multi-billion dollar unicorn. Even a few moderately successful startups that end up being acquired by larger players is often enough to make a venture capital fund worth its risk premium. But as antitrust regulation makes it harder for the rare success story to develop into a large, sustainably profitable operation — or for leading firms to acquire promising startups — it shifts the risk-reward proposition of angel investment and venture capital funding. The upshot? Fewer bold ideas make it to market, fewer creative thinkers quit their day jobs to become entrepreneurs, and more investable assets end up in the pockets of the very incumbents that advocates of antitrust regulation aspire to weaken.

TO UNDERSTAND ANTITRUST, FIRST UNDERSTAND MARKETS

Markets occupied by two or three major players are often demonized as overly concentrated, but the actual number of firms needed to make a market competitive is just *one*. One reason for this is that markets are inherently contestable; even where entry costs may seem formidable, no incumbent can ever be sure that some innovation will eliminate its apparent dominance. Even in markets where entry barriers and other factors render multiple competitors infeasible, artificially introducing competition by forcing incumbents to break up into smaller, less efficient firms may increase higher prices for consumers. No matter how vigorous the price competition, it cannot overcome the economic reality that firms must charge enough to cover their costs in the long run.

It turns out that so-called “natural monopolies”—i.e., markets that the government has deemed incapable of sustaining multiple competitors — rarely, if ever, [exist in nature](#). Instead, they tend to emerge due to government regulation that protects incumbents, thwarting entry. Assume for the sake of argument, however, that Google's dominance in search — or Amazon's in online retail — will continue to grow and endure. Even then, the case for antitrust intervention is hardly a slam dunk. For well over a century, government agencies have regulated monopolies in sectors including telecommunications, electricity, rail, trucking, and aviation. Despite immense efforts by regulators tasked with advancing the public interest to make these markets function

well, the results have been abysmal. Failures have been frequent, and merely maintaining a market's mediocrity is considered a regulatory success.

The neo-Brandeisian movement is right about one thing: lawmakers should revisit America's antitrust laws. Their vague wording and susceptibility to wildly different judicial interpretations is problematic by itself. More fundamentally, though, lawmakers should rethink the notion that the government can make consumers better off by banning entire categories of voluntary transactions among market participants. The only obvious beneficiaries of the merger review process are lawyers, economists, and lobbyists. But even price coordination among rival firms, often considered the most obviously problematic form of supposedly anti-competitive conduct — and a criminal offense in many situations — can [generate real efficiencies](#).

Even those who don't share this skepticism of antitrust should recognize the harms of giving regulators and judges far greater powers to shape the evolution of the digital marketplace. Especially with America's tech sector continuing its trajectory of remarkable progress, intervening in this marketplace is a recipe for denying consumers the unknowable rewards of innovations that no one creates. Antitrust may be far from perfect in its current state, but it could be far worse.