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FEDERAL TRADE COMMISSION

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MISSION/OVERVIEW

America's antitrust laws are over a century old. In 1890, the U.S. Congress enacted the Sherman Act,[1] the first federal prohibition on trusts and restraints of trade. The Clayton Act,[2] adopted in 1914, builds upon the Sherman Act, outlawing certain practices, such as price fixing, while bringing other business combinations, such as mergers and acquisitions, under regulatory scrutiny.

The Federal Trade Commission Act (FTCA),[3] also adopted in 1914, gives the federal government legal tools to combat anticompetitive, unfair, and deceptive practices in the marketplace, empowering the Federal Trade Commission (FTC) to enforce provisions of the Sherman and Clayton Acts. The FTCA prohibits "unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce." Sections 3, 7, and 8 of the Clayton Act empower the FTC to block unlawful tying contracts, unlawful corporate mergers and acquisitions, and interlocking directorates. Under an amendment to the FTCA, the Robinson–Patman Act,[4] the FTC has authority to prohibit practices involving discriminatory pricing and product promotion. While the FTC has enforcement or administrative responsibilities under more than 70 laws, the FTCA and the Clayton Act are the focus of its regulatory energy.

FTC actions, therefore, turn on the antitrust principles and market principles it adopts. Modern approaches to antitrust stress that the objective of antitrust law is to assure a competitive economy—which in economic terms maximizes both allocative efficiency (optimal distribution of goods and services, taking into account consumer's preferences, so that prices tend toward marginal cost) and productive efficiency (using the least amount of resources for optimal output)—and thereby maximizes consumer welfare.[5]

Recently, however, many in the conservative movement have taken a broader view of antitrust. They point out that the authors of our antitrust laws did not intend this purely economic understanding of competitive markets—and the normative assumptions that undergird it—to guide their legislation. First, these principles were only imperfectly worked out at the time the antitrust laws were passed. Second, contemporaneous statements concerning the Sherman and Clayton Acts demonstrate Congress's concern about the political and economic power of the oil and railroad trusts of the first Gilded Age, and their influence on democratic institutions and civil society. Antitrust law can combat dominant firms' baleful effects on democratic institutions such as free speech, the marketplace of ideas, shareholder control, and managerial accountability as well as collusive behavior with government.

Republican Senator John Sherman explained to Congress in support of his eponymous legislation:

> If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.[6]

Similarly, identifying the institutional threats that market concentration can pose, the former Republican President and future Supreme Court Justice William Howard Taft wrote at the time,

> The federal antitrust law is one of the most important statutes ever passed in this country. It was a step taken by Congress to meet what the public had found to be a growing and intolerable evil in combinations between many who had capital employed in a branch of trade, industry, or transportation, to obtain control of it, regulate prices, and make unlimited profit.

Taft saw in this economic threat broader implications for American society since "the building of great and powerful corporations which had, many of them, intervened in politics and through use of corrupt machines and bosses threatened us with a plutocracy."[7]

Others in the conservative movement have maintained for numerous decades that an economic justification is the only coherent approach to the antitrust laws. Many view the first 90 years of U.S. antitrust policy as unprincipled in its approach, often resulting in policies that, by trying to protect smaller competitors, ended up raising prices for consumers. Judge Robert Bork in his influential book *The Antitrust Paradox* found economic justifications for previously denounced behavior including small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division agreements, tying arrangements, exclusive dealings and requirements contracts, "predatory" price cutting, and price "discrimination." Bork also defended corporate "bigness" if it came about through internal growth or acceptable mergers. He also defended agreements between competitors on prices, territories, refusals to deal, and other "suppressions of rivalry" that are "ancillary" to some economic efficiency. The practical contribution of his work was to put consumer welfare at the heart of competition law.[8]

Beyond antitrust injury, we are witnessing in today's markets the use of economic power—often market and perhaps even monopoly power—to undermine democratic institutions and civil society. Practices such as Environmental, Social, and Governance (ESG) requirements on publicly traded corporations and their inclusion in business agreements, the so-called "de-banking" of industries and individuals, and the interference of large internet firms with democratic political discourse undermine liberal democracy, a truly open society, and, indeed, rule of law. Without rule of law, markets themselves will wither.[9]

Critical of the "social responsibility" agenda, Milton Friedman in his provocatively titled essay "The Social Responsibility of Business Is to Increase Its Profits" states,

> [T]here is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays in the rules of the game, which is to say, engages in open and free competition, without deception or fraud.[10]

For Friedman, market mechanisms, not political mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses. Business managers appropriate shareholder wealth when they use corporate resources to further their personal political beliefs, even when pursuing what they consider a "socially responsible" or "moral" agenda. The business of American business is business, not ideology.

More broadly, there is less and less debate around the growth of monopoly rents throughout the U.S. economy. The current data strongly suggest that U.S. corporations are systematically earning far higher profits than they were 25 or 30 years ago. Combined with other evidence that large corporations are accounting for an increasing share of revenue and employment, it certainly appears that many large U.S. corporations are earning substantial incumbency rents, and have been doing so for at least 15 years, apart from during the depths of the Great Recession that began in 2008.

While the explanations for this shift are not clear, what is particularly disturbing is the possibility that these rents are extracted at least in part through regulatory capture—which can function as a bar to entrance for new competitors. In addition, the sheer cost of compliance with regulation favors large firms, which can more efficiently spread the cost of regulation over a larger revenue base and have the resources to invest in sophisticated government relations. The FTC must consider, therefore, the role of government itself in maintaining market concentration in areas ranging from pharmaceuticals and healthcare to avionics, banking, and real estate brokerage.

Beyond undermining small businesses and reducing their salubrious moral effect on American civil society, concentration of economic power facilitates collusion between government and private actors, undermining the rule of law. The continued emergence of evidence documenting collusion—between the Big Tech internet platforms and the Biden White House and administrative agencies—to censor criticism, scientific fact, and uncomfortable political truths demonstrates this unfortunate development.

But, there are some caveats. First, the FTC lacks the power to revisit developments in antitrust laws, which have brought an invaluable rigor to the antitrust law—matters such as analyzing vertical integration, for example. Nor should it. Second, the FTC's recent rescinding of its 2015 Policy Statement was undoubtedly ill-considered.[11] Of course, the consumer welfare standard must guide FTC action, but, in appropriate situations and with strong evidence, this standard must be expanded to include more factors than just price. Further, a similar standard of proof used to establish that a practice challenged by the Commission causes harm to competition must also apply in demonstrating the efficiencies that justify the practices.

President Harry Truman reportedly made the famous quip, "Give me a one-handed economist. All my economists say 'on the one hand…', then 'but on the other.'" When it comes to some of the more vexing issues in antitrust regulation, the conservative movement is in the same predicament. Many wish to preserve the productivity and efficiency focus of an economic-based consumer welfare standard approach to antitrust enforcements; others are more willing to look at the effects of business concentration in certain industries on innovation, the institutional resilience of our democracy, and children's development. The following discussion sets forth policy principles and initiatives on which there was agreement among the contributors to this chapter, and notes and explains where there was dissent.

NEEDED REFORMS

Should the FTC Enforce Antitrust—or Even Continue to Exist? Some conservatives think that antitrust enforcement should be invested solely in the Department of Justice (DOJ). The FTC's commissioners are not removable at will by the President, which many quite reasonably believe violates the Vesting Clause of Article II of the Constitution; it is for this reason that conservatives have long believed in either ending law enforcement activities of independent agencies or ending their independent status. The Supreme Court ruling in *Humphrey's Executor*[12] upholding agency independence seems ripe for revisiting—and perhaps sooner than later.[13]

Others think that the post–New Deal expansion of the administrative state has had baleful effects upon our society and earnestly share the hope that it can be greatly curtailed if not eliminated—or that its authority can be returned to the states and other democratically accountable political institutions. But, until there is a return to a constitutional structure that the Founding Fathers would have recognized and a massive shrinking of the administrative state, conservatives cannot unilaterally disarm and fail to use the power of government to further a conservative agenda. As experience shows, the administrative state will grow and further its own agenda, often at odds with conservative thought, even under conservative leadership. Unless conservatives take a firm hand to the bureaucracy and marshal its power to defend a freedom-promoting agenda, nothing will stop the bureaucracy's anti–free market, leftist march.

ESG Practices as a Cover for Anticompetitive Activity and Possible Unfair Trade Practices. It has long been suspected, and is now increasingly documented, that corporate social advocacy on issues ranging from "Diversity, Equity, and Inclusion" (DEI) to the "environmental, social, and governance" (ESG) movement also serves to launder corporate reputation and perhaps obtain favorable treatment from government actors. In a recent Senate Judiciary hearing, Senator Josh Hawley asked FTC Chair Lina Khan if the FTC had conditioned merger reviews on ESG or critical race theories adopted by the firms involved. Khan responded by saying that she turned down deals when firms offered social justice policies in return for approving unlawful deals. In response to a similar question from Senator Tom Cotton, Khan responded that firms try to come to the FTC to get out of antitrust liability by offering climate, diversity, or other forms of ESG-type offerings, but that there is no ESG loophole in the antitrust laws.[14]

Her comments suggest that there is a movement of firms attempting to use both ESG and DEI as a sort of reputational laundering to avoid enforcement of potentially criminal activity. The FTC should set up an ESG/DEI collusion task force to investigate firms—particularly in private equity—to see if they are using the practice as a means to meet targets, fix prices, or reduce output.

- **Congress should investigate ESG practices as a cover for anticompetitive activity and possible unfair trade practices.**

The business of American business is business, not ideology. The privileges extended to corporations in American society come with the expectation that they will pursue profits for shareholders, bringing about economic growth. Managers, particularly in publicly traded corporations, who use their power to advance sets of fashionable moral beliefs, such as ESG/DEI, introduce agency problems into the shareholder relationship and appropriate corporate wealth for their own benefit.

Milton Friedman recognized this problem decades ago when answering the question whether businesses have ethical or social obligations, as was mentioned above. Contrary to his detractors, Friedman did not defend "greed is good." Rather, according to Friedman, socially responsible activities conducted by a corporation distort economic freedom because shareholders do not decide how their money will be spent—increasing the possibility for fraud or management opportunism. This is especially the case in concentrated industries with market power.[15]

Managers who insert their own values into underwriting agreements, contracts for professional services, or other business transactions coopt shareholder value for their own personal utility. This is an unfair trade practice, particularly when it occurs in industries that enjoy market power and special privileges or relationships with the government.

Cancel Culture, Collusion, and Commerce. As a corollary, businesses that make general offers of service to the public forego profits by refusing to service a lawful activity, i.e., fossil fuel extraction or gun manufacturing, raising similar concerns. When banks or internet platforms refuse customers based on their political or social views (as distinguished from religious views), they forgo profits. While such decisions are often justified on public relations, marketing, or branding grounds—and normally such decisions, reflecting business judgment, should and would receive deference, this presumption is harder to make in a highly partisan, ideologically divided America. This type of behavior can rise to the level of an unfair trade practice when the business is (1) publicly traded; (2) highly regulated; (3) enjoys legal privileges; (4) enjoys market power; and (5) appears to engage in its own political or social agenda that is unrelated to any conceivable branding concerns. The government, as guided by democratically passed laws, already regulates activities such as fossil fuel extraction and gun manufacturing. Businesses, particularly those that enjoy certain government privileges or relationships and/or market power, should not replace democratic decision-making with their own judgment on controversial matters.

A related concern is the degree to which concentration of industries, particularly in pharmaceuticals, health care, and the internet, encourages government collusion that undermines democratic institutions. Collusion can be explicit, in the case for example of government working with social media companies to censor politically harmful news, or more implicit—for example, regulatory requirements so burdensome that they deter market entrance by smaller entities without the resources to bear them.

Protecting Children Online. The FTC has long protected children in a variety of different contexts. Internet platforms profit from obtaining information from children without parents' knowledge or consent—and social media's effect on the well-being of American children is well-documented. Around 2012, American teens experienced a dramatic decline in wellness. Depression, self-harm, suicide attempts, and suicide all increased sharply among U.S. adolescents between 2011 and 2019,[16] with similar trends worldwide.[17] The increase occurred at the same time that social media use moved from rare to ubiquitous among teens,[18] making social media a prime suspect for the sudden rise in mental health issues among teens. In addition, excessive social media use is strongly linked to mental health issues among individuals. Several studies strongly support the notion that social media use is a cause, not just a correlation, of subjective well-being and poor mental health.[19]

Social media and other large platforms form millions of contracts every year with American children. And even though a minor can void most contracts into which he or she enters, most jurisdictions have laws that hold minors accountable for the benefits received under the contract. Thus, children can make enforceable contracts for which parents could end up bearing responsibility. Targeting children to create potentially harmful contracts or making parents responsible for such contractual relationships is an unfair trade practice. The FTC, therefore, has the authority, interest, and duty to protect children online from such contractual relationships.

- **The FTC should examine platforms' advertising and contract-making with children as a deceptive or unfair trade practice, perhaps requiring written parental consent.**

Currently, the Child Online Privacy Protection Act (COPPA)[20] regulates the information internet firms can obtain from children. COPPA fails because it (1) only protects children under the age of 13, leaving older teenagers completely unprotected and (2) only prohibits platforms from collecting information from a child using "actual knowledge" rather than abiding by the "constructive knowledge" standard, which prohibits collecting information from a user reasonably assumed to be underage. The FTC has rulemaking authority under this statute but has done little with this authority, nor can it—given the statutory constraints. However,

- **The FTC can and should institute unfair trade practices proceedings against entities that enter into contracts with children without parental consent.** Personal parental responsibility is, of course, key, but the law must respect, not undermine, lawful parental authority.

Other conservatives are more skeptical concerning the effect of online experience on the young, comparing the concern about social media to concern about video games, television, and bicycle safety. They point out, as does Cato fellow Jeffrey A. Singer, that the psychiatric profession has yet to designate "internet addiction" or "social media addiction" as a mental disorder in the authoritative Diagnostic and Statistical Manual of Mental Disorders (DSM-5-TR).[21] These conservatives also maintain that calling for regulation undermines conservatives' calls for parental empowerment on education or vaccines as well as personal parenting responsibility.

In addition, some of the methods used to regulate children's internet access pose the risk of unintended harms. For instance, age verification regulations would inevitably increase the amount of data collection involved, increasing privacy concerns. Users would have to submit to platforms proof of their age, which raises the risks of data breach or illegitimate data usage by the platforms or bad actors. Limited-government conservatives would prefer the FTC play an educational role instead. That might include best practices or educational programs to empower parents online.

Antitrust Enforcement. As is evidenced by a relentless focus on bringing Big Tech lawsuits, state attorneys general (AGs) are far more responsive to their constituents than is the FTC. Such a "boots on the ground" approach would benefit the FTC enormously. Practically, this would mean establishing a distinct role in the FTC Chairman's office focused on state AG cooperation and inviting state AGs to Washington, D.C., to discuss enforcement policy in key sectors under the FTC's jurisdiction: Big Tech, hospital mergers, supermarket mergers, and so forth.

FTC regional offices are substantially more in touch with local issues. Over the past few decades, the reach and influence of regional offices has shrunk dramatically. The FTC should consider returning authority to these offices.

Some conservatives however are less supportive of this idea. Conservative enthusiasm for the idea of adding regional FTC offices to the states is a break from the majority conservative position. Endorsing the federal government as a premier job creator runs counter to decades of conservative opinion that holds that New Deal agencies and subsequent government bodies should never have been created in the first place, and that their red tape and interference is a dominant cause of economic inefficiency. Republicans used to seethe when Democrats tried to move federal offices into the states. In the early 1990s, House Minority Whip Newt Gingrich fumed about Senator Robert Byrd's campaign to transfer certain national intelligence facilities to West Virginia, calling it a "pure abuse of power."

Some contributors to this chapter would remind conservatives that the unseen mechanics of redistribution—by which taxpayer money paid to state employees is taken from taxpayers nationwide—is a drag on the economy of the entire country. Many conservatives fear that it would be impossible to uproot or even prune back a bureaucracy the seeds of which have been planted in every state. State legislators would struggle to slash funding from agencies that employ and generously pay thousands of their constituents. FTC outposts would tie middle America inextricably to big progressive government, remaking the heartland in Washington's image. It would be anything but decentralization; Americans need policy makers to discipline the arrogance that prevails inside the Beltway, not spread it. It would be "Swamp 2.0": just as deep and many times as wide.

Big Tech and Antitrust. The large internet platforms have transformed the U.S. economy, streamlining consumer purchases, networking billions of people, and altering long-established business practices. Despite their enormous size, they have avoided significant antitrust liability or prosecution. The reasons for this are not entirely clear.

It may be because these platforms have been incredibly innovative and have generated tremendous efficiencies for our society, with little to no evidence of traditional consumer harm in the form of higher prices, reduced output, or a lack of innovation. Also, Americans report a high level of satisfaction in and trust regarding these companies.

The less friendly regulatory environment in the European Union would make a good case study in expansive antitrust law. The continent boasts not one of the top 10 global tech companies, while the U.S. can claim eight.[22] Some claim that the recent drop in value of former leader and current antitrust target Meta, along with the rise of new competitors such as Zoom and Chinese-dominated TikTok, indicates that competitive forces are healthy and at work benefiting consumers in the tech space.

On the other hand, the platforms challenge traditional economic thinking because arguably the firm structure they employ is radically different, and they create different competition dynamics. First, there is some evidence that the major internet platforms have market power, resulting in increased prices for advertisers, costs that very well could be passed onto consumers. For instance, numerous government studies have found evidence of market power.[23] And while some data show declining advertising costs, they also show increasing prices in this decade.[24]

Second, while consumers may report that they like social media, hedonics tells a different story, suggesting that social media and other online activities diminish human happiness. This evidence, while mixed at first,[25] appears to have become quite solid: Social media makes Americans less happy.[26]

Third, internet platforms have not created consumer price increases, but of course they provide free services—and this creates a challenge for antitrust regulation. For decades, antitrust economics has been focused on a paradigm in which firm and consumer behavior are modeled as functions of price and output as the primary variables. It may very well be that these models do not fully capture the effect of technologies that enable increasing returns to scale based on data, such as digital platforms. This possibility cannot be lightly discounted, considering the tremendous market power of these firms and their market cap, with the top five firms of the U.S. market (Apple, Microsoft, Amazon, Tesla, and Alphabet) responsible for 23.5 percent of the market cap of the S&P 500 index in early December 2021.

The questionable predictive power of traditional economic theory was illustrated when, after a much-heralded investigation, antitrust regulators appointed by former President Barack Obama declined to sue Google in January 2013 for anticompetitive behavior. The FTC spent 19 months investigating Google over allegations that the search giant was violating antitrust laws by favoring its own products over those of rival content providers, including eBay, Yelp, TripAdvisor, Facebook, and Amazon. The probe focused on Google's control over online search and search advertising, as well as the company's growing dominance in mobile phone software.

According to documents uncovered in press reports,[27] the FTC's economists successfully argued against initiating antitrust action against the company. This decision was based in large part on a series of predictions that the agency's staff economic experts made. These predictions turned out to be wrong in several respects. For instance, according to press accounts, these economic experts saw only "limited potential for growth" in ads that track users across the web—now the backbone of Google parent company Alphabet's $182.5 billion in annual revenue. Relying on theory, the experts downplayed the importance of mobile search, believing that search would continue to be conducted primarily on desktop computers—and thereby underestimating the effect of Google on Android systems. The experts predicted that Microsoft, Mozilla, or Amazon would offer viable competition to Google in mobile search. This decision, of course, occurred in a political environment of close relationships between the Obama Administration and Silicon Valley.

Just as traditional economic theory seems inadequate to the job of understanding Big Tech and predicting its behavior, empirical evidence is very difficult to come by. This is particularly troublesome. Beyond the fact that most user data are proprietary, online markets change so quickly that econometric conclusions are often difficult to make because even if the data are available, they do not exist for long enough time horizons. Yet, a pattern of highly concentrated firms—with occasional dropout and replacement by another successor firm with vast market power—seems to be emerging.

The policy implications of this quandary are not clear, but for the conservative movement, some believe that some type of policy response is necessary. The dominant internet platforms have disrupted democratic deliberation, as is evidenced by the Hunter Biden laptop story. They have a propensity to collude with government to advance political goals, as documents unearthed by the Missouri and Louisiana AG suits concerning the COVID response demonstrate. And they play a pivotal role in our economy.

As Judge Frank Easterbrook famously suggested, regulators should look at the cost of error in their judgments. This argument has usually been used to buttress a tentative and hands off approach to antitrust because judicial error in antitrust will persist (Type II error) and continue to damage markets, while failure to take antitrust action (Type I error) will correct itself in the long run as competitors challenge monopolies.[28] However, failing to take antitrust enforcement action (Type I error) includes the possibility of real injury to the structure of important American institutions such as democratic accountability and free speech. If so, a more proactive approach may be warranted.

Certain online services, such as social media, have an unquestionable negative utility, particularly on young people, as set forth above. The more "efficient" provision of such services may create more unhappiness. More broadly, the utility benefits of many online platforms and services are obscure and may be significantly overstated, as the most recent evidence suggests.[29] The FTC must become more sophisticated in measuring consumer surplus. In addition, the FTC should be open to behavioral explanations, such as habit and small hedonic differences, as keys to how platforms create and keep market power.[30]

CONCLUSION

Conservative approaches to antitrust and consumer protection continue to trust markets, not government, to give people what they want and provide the prosperity and material resources Americans need for flourishing, productive, and meaningful lives. At the same time, conservatives cannot be blind to certain developments in the American economy that appear to make government–private sector collusion more likely, threaten vital democratic institutions, such as free speech, and threaten the happiness and mental well-being of many Americans, particularly children. Many, but not all, conservatives believe that these developments may warrant the FTC's making a careful recalibration of certain aspects of antitrust and consumer protection law and enforcement.

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