

# Five Conservative Principles to Apply Against Weaponized Antitrust

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## KEY TAKEAWAYS

Some legislators, especially on the far Left, want to weaponize antitrust law, and ultimately give the federal government unprecedented control over the economy.

Conservative principles are key to preventing this massive expansion. The answer to legitimate concerns about Big Tech is not to further empower Big Government.

Conservatives should be pushing an agenda to reduce competition-killing government intervention, and fight cronyism and corporate welfare at every turn.

Some policymakers, especially on the far Left, are proposing to reshape federal antitrust law in ways that would expand federal control over the economy.<sup>1</sup> Like Supreme Court Justice Louis Brandeis,<sup>2</sup> they believe that big business is bad, in and of itself, and that the country should move back to the past failures of antitrust, including greater federal control over the economy. This would include using antitrust law for non-competition purposes (and even non-economic purposes), such as labor rights and political corruption.<sup>3</sup>

Also, some legislators appear to want to use antitrust as a way to punish “Big Tech,”<sup>4</sup> including some conservatives who are rightly concerned about the chilling of speech. Even those proposals that are limited to Big Tech would help to provide a template and the starting point for going after other industries.<sup>5</sup>

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This paper, in its entirety, can be found at <http://report.heritage.org/bg3644>

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These legislators would be weaponizing antitrust (that is, making it much easier for the federal government to wield antitrust power to reshape industries and the entire economy,<sup>6</sup> or using antitrust as a means to punish a disfavored industry). Currently, there are numerous bills that would weaponize antitrust<sup>7</sup> by changing existing antitrust law. The Biden Administration is trying to weaponize antitrust on its own<sup>8</sup> through questionable and expansive interpretations of existing law. This *Backgrounder* highlights five important conservative principles that policymakers and the public should bear in mind when assessing this barrage of policy proposals. The *Backgrounder* shows the serious dangers of weaponized antitrust and why it is a path that would severely undermine American freedom and the American economy.

## Five Conservative Principles for Antitrust

It is critical to keep basic and foundational conservative principles in mind regarding the numerous efforts to weaponize antitrust. Unless these principles guide policy, the result could lead to permanent damage to everyday freedoms and industries across the entire economy, not just to Big Tech.

Among other things, conservatives and anyone concerned with free enterprise and economic freedom should reject any efforts to punish economic success, to favor some businesses over other businesses (cronyism), to embrace European Union competition policy<sup>9</sup> over U.S. antitrust law, to give the Left its potentially most dangerous weapon to reshape the economy, and to implement the arrogance and failure of central planning. This is what is at stake in this fight against weaponized antitrust. It is a fight against policies that are the very antithesis of conservative principles. The following are five conservative principles to apply in this fight:

### **1. Antitrust Law Should Be Used Appropriately and Judiciously.**

Antitrust is a narrow tool with very powerful remedies (it can, for example, break up companies) to address anticompetitive conduct, such as price-fixing and bid-rigging, and therefore should be used carefully.

Instead of expanding antitrust law, conservatives should ensure that existing antitrust law is used appropriately and judiciously, and only when it is clearly the right tool to address a specific and genuine public policy problem. Even if a policy problem has been identified that legislators think warrants government intervention, there is a vast chasm between using a scalpel approach to regulate the specific issue of concern and using a sledgehammer approach by broadening antitrust to control ordinary business practices and centrally plan industries and the economy.

This principle of using antitrust appropriately and judiciously does not mean that antitrust should never be applied, and it certainly does not mean that it should not apply to Big Tech the same as it does to other industries. However, policymakers should reject legislative changes to existing antitrust law or agency changes to its implementation that would weaponize it. Existing antitrust law is flexible and ideal for addressing the fact-specific nature of antitrust cases, and well-suited to addressing new challenges as they arise.<sup>10</sup>

Further, antitrust has nothing to do with the speech concerns of conservatives. Applying antitrust to speech concerns is like trying to squeeze a square peg into a round hole. It will not solve the problems, and it could give the far Left its most powerful weapon to radically change the American economic system (plus, there are direct solutions to address speech concerns, such as reforming Section 230 of the Communications Decency Act of 1996).<sup>11</sup> As Representative Jim Jordan (R-OH), ranking Member of the House Judiciary Committee, succinctly explained about last year's House Democrat antitrust report,<sup>12</sup> the report "advances radical proposals that would refashion antitrust law in the vision of the far left."<sup>13</sup> Numerous bills have been introduced that would implement some of these radical proposals, including legislation that would force companies to divest businesses, punish economic success, and block certain businesses from being able to grow.<sup>14</sup>

Justified anger toward Big Tech should not lead conservatives to lose sight of their principles. The Left has plenty of targets in mind to neutralize, such as fossil fuel companies, among other businesses, should antitrust become an acceptable way of doing so. Further, the Left would welcome conservatives falling for what might be a Trojan Horse: in this case, a trap to take advantage of conservative anger toward Big Tech by obfuscating their efforts to weaponize antitrust across the economy.

**2. Antitrust Should Focus on Consumer Welfare.** Early antitrust law was inconsistent and unpredictable, and reflected a desire to protect small businesses and achieve vague political and social objectives. Through the work of conservative scholars, such as Judge Robert Bork, antitrust has a true focus: It should be concerned solely with economic welfare (as opposed to an approach that includes vague non-economic objectives)<sup>15</sup> and it should help to ensure that consumers are protected from anticompetitive behavior.

In 1979, the U.S. Supreme Court, citing Bork's landmark book *The Antitrust Paradox*, concluded that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"<sup>16</sup> The consumer welfare standard was born. Today, the widely accepted purpose of antitrust law is to promote consumer welfare. This was a major achievement for conservatives, made even more impressive by the wide acceptance it has received across the ideological spectrum.

Modern antitrust is focused on preventing harm to the competitive process and, thereby, preventing harm to consumers, not harm to competitors.<sup>17</sup> If antitrust started to focus on competitors, this would lead to even more cronyism than exists today by propping up businesses that are simply being outcompeted by other businesses. Taking action to help them would undermine the competition that antitrust law is intended to protect, and as a result would hinder innovation, harm consumers, and hamper economic growth.

It is baffling why any conservative would want to undermine the consumer welfare standard, which is so beneficial for consumer welfare and competition, and such an important achievement resulting from the hard work of conservatives. It is less baffling though why the far Left would like to move away from it and push for an antitrust policy that would allow it to use antitrust to go after any industry or even the entire economy to push ideological objectives, including objectives that have nothing to do with competition or consumer welfare.

This is not some fanciful notion. The House Democrat antitrust report, co-authored by the new Federal Trade Commission (FTC) Chairman Lina Khan, recommends amending existing antitrust law to make it far more difficult for companies *across the economy* (not just technology) to merge or acquire other firms.<sup>18</sup> Senator Elizabeth Warren (D-MA) has made it clear that she thinks that the federal government knows how an industry should be structured, as evidenced by this claim she made during her presidential campaign: “That’s why my administration will make big, structural changes to the tech sector.”<sup>19</sup>

The Biden Administration is pushing failed antitrust thought from the past, including greater federal control over the economy, through its appointments and its actions. The FTC recently rescinded a bipartisan framework it developed during the Obama Administration which, in part, supported the consumer welfare focus of antitrust law.<sup>20</sup> The Biden Administration has just issued an executive order directing agencies across the government to ostensibly address competition issues.<sup>21</sup> This would be fine if the government were going to focus its review on how its regulations and policies hinder competition, but the focus is primarily on directing agencies to use government intervention to shape industries and dictate how businesses operate and serve their customers.<sup>22</sup> It protects competitors, not the competitive process; it punishes economic success and buys into “big is bad”; and it presumes that bureaucrats can centrally plan the economy.<sup>23</sup>

The far Left’s efforts to try to turn almost every policy issue into a means to address climate change or so-called social justice provides a sneak peek at how antitrust could be abused to meddle in issues that have nothing to

do with competition.<sup>24</sup> For example, some are pushing securities regulation as a way to achieve environmental, social, and governance objectives.<sup>25</sup>

These existing efforts are a back-door approach to accomplishing environmental objectives and simultaneously trying to alter the very purpose of American businesses, and as a result, radically change the entire economy. The use of antitrust, given its significant remedies, has the potential to be the most powerful weapon in the far-Left arsenal to achieve such objectives. It would not be a stretch to envision the far Left seeking to break up companies because, for example, they use or invest in fossil fuels. After all, environmental extremists have already pushed Treasury Secretary Janet Yellen to take drastic action to fight climate change, such as by forcing oil and gas companies to sell off fossil fuel assets.<sup>26</sup>

**3. Antitrust Should Not Punish Success/Big Is Not Inherently Bad.** There is an unfortunate mindset, as seen in the new Biden executive order, that there is an inherent problem when firms get to be big. Antitrust law rejects this notion and does not punish firms for their success. As Georgetown University scholars John Mayo and Mark Whitener explained, “Antitrust doesn’t condemn a firm for developing a universally popular search engine, ketchup or pharmaceutical drug, even if that success leads to market dominance. It’s how a monopoly is obtained or preserved that matters—not its mere existence.”<sup>27</sup>

Antitrust rightfully is not concerned with just market share (and other factors that establish monopoly power) but also whether the firm has engaged in anticompetitive conduct. For example, in 2004 a *unanimous* U.S. Supreme Court in *Verizon v. Trinko*, explained, “the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.”<sup>28</sup> Even classic antitrust cases, such as *Standard Oil*,<sup>29</sup> were not focused on whether the companies were “too big” or “too powerful.”<sup>30</sup>

Yet some recent legislative proposals would discriminate against businesses solely because of their size.<sup>31</sup> A firm’s size says nothing about its market share, whether it is lowering prices, producing more goods and services, in a competitive market, investing in research and development, or it is innovating.<sup>32</sup> Chris Edwards of the Cato Institute explained in recent congressional testimony,

Some of the largest corporations are the most innovative.... Boston Consulting Group produced a list of the “most innovative” companies globally, and 14 of the top 20 are large U.S. corporations. Two-thirds of U.S. business research and development is done by the largest corporations of more than 5,000 employees.<sup>33</sup>

Additionally, big firms are not insulated from churn and may not even continue to exist, even over short periods of time. Throughout history, big companies have been overtaken by new competitors resulting in new and different key players. As Edwards also explains,

Only 52 companies from the 1955 list of Fortune 500 companies are still on the list today. Indeed, the churn rate of top corporations has increased over time. Companies in the S&P 500 Index in 1980 stayed on the list for more than 30 years, on average, but today the average is down to about 20 years.<sup>34</sup>

Making it difficult for big and successful firms to flourish, to innovate, and to grow is bad policy and undermines economic freedom. It could also result in making industries less competitive in the global marketplace. In 2020, the United States was a global leader with 22 businesses,<sup>35</sup> across all industries, in the top 50 of the *Fortune* Global 500 businesses.<sup>36</sup> These rankings fluctuate, but the United States is consistently a key contender for these top spots.<sup>37</sup> This helps to illustrate that American businesses are creating wealth and jobs, increasing choice, and maintaining America's leadership on the world stage. The success of firms should be celebrated, not punished. Their business acumen and creativity should be admired, not admonished.

**4. Antitrust Should Not Be an Excuse for the Federal Government to Engage in Central Planning of the Economy.** Without getting into a long discussion on the harms of socialism and the benefits of free enterprise,<sup>38</sup> which is beyond the scope of this *Backgrounders*, it is still worth explaining why proponents of weaponized antitrust are mistaken when placing so much faith in the federal government's economic planning skills. Federal officials do not have special powers to know what an industry is supposed to look like (such as its size, the nature of its competitors, its concentration level) or the ability to easily foresee the impact of transactions, such as mergers and acquisitions. This is not a unique criticism of the federal government. Nobody has such powers.

Taking snapshots of the market as it is today does not mean the snapshot will look the same tomorrow. Yet these snapshots inform those who seek to weaponize antitrust. They treat the market as static and fail to respect its dynamic nature. This is a challenge in the antitrust context. Even when seeking to project what the market will look like down the line, this is an extremely difficult task that is at best an informed guess.

Some legislators claim that there is too much concentration in certain industries,<sup>39</sup> as if policymakers and the government know what a specific industry should look like. Concentration itself can be a very imprecise and misleading measure; it does, for example, little to explain the level of

competition within an industry.<sup>40</sup> There is nothing necessarily wrong with high concentration levels in an industry so long as it is a reflection of how a specific market has evolved to meet demand. It could merely be reflecting the importance of increased efficiency, and cost reductions that translate to lower-priced goods for consumers. In addressing competition issues, the first question should be how government intervention artificially distorts the structure of industries that reduce the number of competitors and prevents efficiencies that allow businesses to meet consumer demand.

Finally, there is also a more pernicious and morally dubious effect from using antitrust as an excuse to engage in central planning. Significant government intervention can already lead to greater cronyism, corporate welfare, and political corruption. By choosing to intervene in the market, often picking winners and losers, the government and policymakers are encouraging private actors to go to them so that the government intervenes in a way that works in the private actors' favor, as well as to engage in defensive efforts to ensure that the intervention does not work against them.

Weaponizing antitrust would significantly exacerbate these problems as the scope of the intervention would be much greater. The well-connected could go to the government to take extreme steps, such as re-shaping industries in ways that suit their business needs, thereby circumventing the competitive process and leaving consumers with fewer options. This may lead to corruption that accrues to the personal benefit of policymakers at the expense of citizens. The well-connected would be seeking to secure benefits not accruing from business acumen and meeting the needs of consumers, but instead using government to aid them in competing against the firms that are successfully meeting these needs. This can lead to the worst kind of cronyism and public corruption, one that leads to a closed economic system whereby groups are unable to compete at all unless they gain support from the right people in government.

**5. Antitrust Should Require that Government Bear the Burden in Mergers and Acquisitions.** Some legislators complain about the federal government having the burden of blocking mergers and acquisitions, as if this is a bad thing. If the federal government is going to try to stop voluntary transactions, it should be expected to bear the burden of making the case as to why such an extreme action is warranted.

The House Democrat antitrust report recommends shifting the burden in mergers by placing “the burden of proof upon the merging parties to show that the merger would not reduce competition.”<sup>41</sup> Private actors would in effect have to prove a negative. A current House bill would effectively ban, except in narrow circumstances, some technology firms from being able to

enter into voluntary economic transactions with firms that want to merge or be acquired.<sup>42</sup> To effectively ban certain transactions or create unreasonable obstacles on private businesses, such as requiring them to prove a negative, is an assault on basic principles of due process and economic freedom.<sup>43</sup>

Some of the legislative proposals<sup>44</sup> regarding mergers would have the United States adopt flawed European Union competition policy. Such policies would create arbitrary blanket rules to block certain transactions, such as incorrectly assuming that size is a proxy for competition, and pre-emptively deciding that it is automatically anticompetitive for certain big companies to merge or acquire a firm. Such blanket rules are themselves anticompetitive by blocking transactions that could further competition. By recognizing the complex fact-specific nature of cases and being flexible, American antitrust law can address anticompetitive transactions, without simultaneously and pre-emptively blocking pro-competitive transactions.

In addition, this dangerous burden-shifting effort also completely ignores the harm that it would cause to entrepreneurs and the targeted companies. In 2019, half of U.S. startups across the economy said that their most realistic long-term goal is to be acquired.<sup>45</sup> Making their desired exit strategy far less likely will discourage entrepreneurs from starting businesses in the first place. It will discourage innovation and hurt Americans who rely on new and better goods and services in their daily lives.

There are also cases where a technology may not have been developed at all without a merger or acquisition. The companies that can afford to acquire another firm often have expertise, economies of scale, and resources to make a product commercially viable.<sup>46</sup> The firms that are being acquired do not need government protection. These firms are not victims, but are making a voluntary decision that is in their best interest.

## Recommendations for Policymakers

Conservatives should stick to their core principles, including the five principles detailed in this *Backgrounders*. By doing so, they, along with anyone following these principles, can avert the threat posed by weaponized antitrust. Policymakers, for their part, should:

- **Allow federal antitrust enforcement agencies to properly apply antitrust law to address anticompetitive conduct.** There is no need to amend antitrust statutes when modern antitrust law is flexible and well-suited to address any potential antitrust violations, including within the technology sector.

- **Address competition issues by going after government intervention that undermines competition in the first place.** Policymakers should address competition concerns by focusing its attention on how government at all levels (federal, state, and local) undermines competition. For example, they should remove the seemingly endless regulations that create barriers to entry, prevent individuals from entering their chosen profession, discourage entrepreneurs from starting businesses, and force existing businesses to shut down.<sup>47</sup>

## Conclusion

Existing antitrust law is a powerful governmental tool and therefore should be used judiciously and only as necessary to address genuine anticompetitive conduct and to promote consumer welfare. This governmental tool, if turned into a weapon, could be used to undermine the free enterprise system and hurt competition, and in so doing, would still fail to address the speech concerns that conservatives rightly have with Big Tech. It could even be used to push central planning of the economy and promote far-Left ideological objectives that have nothing to do with the economy at all.

The current focus on competition is an incredible opportunity to achieve a freer and more competitive economic system. Conservatives should aggressively push an agenda that reduces government intervention that hinders competition in the first place. They should also fight cronyism and corporate welfare at every turn. After all, the United States is an economic model for the world because of its free enterprise system, economic freedom, and the innovation of the American people, not because of the central planning skills of bureaucrats in Washington, DC.

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## Endnotes

1. See, for example, Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong., 1st Sess., and Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong., 1st Sess.
2. “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, because I believe that our society, which rests upon democracy, cannot endure under such conditions.’” Ryan Young and Clyde Wayne Crews, “The Case Against Antitrust Law: Ten Areas Where Antitrust Policy Can Move on from the Smokestack Era,” Competitive Enterprise Institute, April 17, 2019, <https://cei.org/content/the-case-against-antitrust-law> (accessed July 15, 2021).
3. Kristian Stout, “Big Tech and the Regressive Project of the Neo-Brandeisians,” Law & Liberty, June 1, 2020, <https://lawliberty.org/forum/big-tech-and-the-regressive-project-of-the-neo-brandeisians/> (accessed July 15, 2021). See also Joshua D. Wright et al., “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” *Arizona State Law Journal*, Vol. 51 (May 2019), <https://arizonastatelawjournal.org/2019/05/07/requiem-for-a-paradox-the-dubious-rise-and-inevitable-fall-of-hipster-antitrust/> (accessed July 15, 2021), and Ashley Baker and Richard A. Epstein, “What Is the Goal of Antitrust?” Paragraph, July 15, 2021, <https://paragraph.com/dialogue/fcc700e3d2f4485a8789b46d566d6c7a> (accessed July 15, 2021).
4. For the purposes of this *Backgrounder*, “Big Tech” does not have a specific definition, but generally means the dominant Internet platforms and other major technology companies.
5. The following report lists and discusses many of these bills: “Weaponizing Antitrust to Achieve Radical Ideological Goals,” Heritage Foundation *Factsheet* No. 214, June 22, 2021, <https://www.heritage.org/technology/report/weaponizing-antitrust-achieve-radical-ideological-goals>.
6. This power includes breaking up companies, regulating product offerings, and restricting mergers and acquisitions.
7. See, for example, Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong., 1st Sess., and Ending Platform Monopolies Act, H.R. 3825, 117th Cong., 1st Sess.
8. President Biden issued an executive order purported to promote competition. Among other problems, the executive order would actually suppress competition and hinder innovation. The order protects failed incumbents by encouraging them to go to the government for favors to help them to compete against companies that customers actually prefer. The White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed July 15, 2021). Also see Daren Bakst, Gabriella Beaumont-Smith, and Peter St. Onge, “Biden’s ‘Competition’ Executive Order Realizes a Central Planner’s Dream,” *The Daily Signal*, July 13, 2021, <https://www.dailysignal.com/2021/07/13/bidens-competition-executive-order-is-a-central-planners-dream/>. Furthermore, the Federal Trade Commission rescinded a bipartisan framework it developed during the Obama Administration, which, in part, supported the consumer welfare focus of antitrust law. News Release, “FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act,” U.S. Federal Trade Commission, July 1, 2021, <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under> (accessed July 15, 2021).
9. EU competition policy incorrectly assumes that size is a proxy for competition, is driven by competitor complaints, and pre-emptively decides that it is automatically anticompetitive for certain big companies to merge or to acquire a firm. See, for example, Maria Coppola and Renato Nazzini, “The European and U.S. Approaches to Antitrust and Tech: Setting the Record Straight—A Reply to Gregory J. Werden and Luke M. Froeb’s *Antitrust and Tech: Europe and the United States Differ, and It Matters*,” Competition Policy International, May 2020, p. 3, <https://www.ftc.gov/system/files/attachments/key-speeches-presentations/europe-column-may-2020-full.pdf> (accessed August 2, 2021); Geoffrey Manne and Samuel Bowman, “Lessons for the United States from the EU’s Approach to Antitrust,” International Center for Law and Economics, May 2021, <https://laweconcenter.org/resource/tldr-lessons-for-the-united-states-from-the-eus-approach-to-antitrust/> (accessed July 15, 2021); and European Parliament, “Competition Policy,” <https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy> (accessed August 2, 2021).
10. Alden F. Abbott, “Antitrust and the Winner-Take-All Economy,” Heritage Foundation *Legal Memorandum* No. 224, January 23, 2018, <https://www.heritage.org/government-regulation/report/antitrust-and-the-winner-take-all-economy>.
11. Solutions to Big Tech’s viewpoint suppression and censorship are multifaceted. They include focused reforming of Section 230, promoting the principles of federalism through constitutional state legislative action, and amplifying free-market alternatives by entrepreneurs and technologists, as well as vivifying civil society efforts to promote transparency within these companies. See “Weaponizing Antitrust to Achieve Radical Ideological Goals,” Heritage Foundation *Factsheet* No. 214.
12. U.S. House of Representatives, “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations,” October 6, 2020, p. 391, [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) (accessed July 15, 2021).
13. News release, “Ranking Member Jim Jordan Statement on Judiciary Democrats’ Antitrust Report,” House of Representatives Judiciary Committee Ranking Member Jim Jordan, October 6, 2020, <https://republicans-judiciary.house.gov/press-release/ranking-member-jim-jordan-statement-on-judiciary-democrats-antitrust-report/> (accessed July 15, 2021).
14. The following report lists and discusses many of these bills: “Weaponizing Antitrust to Achieve Radical Ideological Goals,” Heritage Foundation *Factsheet* No. 214.

15. See, for example, Joshua D. Wright et al., “Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust,” *Arizona State Law Journal*, Vol. 51 (May 2019), <https://arizonastatelawjournal.org/2019/05/07/requiem-for-a-paradox-the-dubious-rise-and-inevitable-fall-of-hipster-antitrust/> (accessed July 15, 2021).
16. *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), <https://supreme.justia.com/cases/federal/us/442/330/> (accessed July 15, 2021).
17. Antitrust scholars Geoffrey Manne and Justin Hurwitz nicely capture the paradox: “For Bork, the paradox of antitrust is that antitrust law, meant to shield consumers from anticompetitive business practices, had come to be used to shield competitors from competition, at the expense of consumers’ welfare.” Geoffrey Manne and Justin Hurwitz, “Big Tech’s Big-Time, Big-Scale Problem,” Cato Institute *Policy Report*, May/June 2018, <https://www.cato.org/policy-report/may/june-2018/big-techs-big-time-big-scale-problem> (accessed July 15, 2021).
18. U.S. House of Representatives, “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations,” October 6, 2020, p. 391, [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) (accessed July 15, 2021).
19. Elizabeth Warren, “Here’s How We Can Break Up Big Tech,” *Medium*, March 8, 2019, <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> (accessed July 15, 2021).
20. U.S. Federal Trade Commission, “Statement of Enforcement Principles Regarding ‘Unfair Methods of Competition’ Under Section 5 of the FTC Act,” August 13, 2015, [https://www.ftc.gov/system/files/documents/public\\_statements/735201/150813section5enforcement.pdf](https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf) (accessed July 15, 2021), and news release, “FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act,” U.S. Federal Trade Commission, July 1, 2021, <https://www.ftc.gov/news-events/press-releases/2021/07/ftc-rescinds-2015-policy-limited-its-enforcement-ability-under> (accessed July 15, 2021).
21. The White House, “Executive Order on Promoting Competition in the American Economy,” July 9, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/> (accessed July 15, 2021), and The White House, “Fact Sheet: Executive Order on Promoting Competition in the American Economy, July 9, 2021,” <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/> (accessed July 15, 2021).
22. Bakst, Beaumont-Smith, and St. Onge, “Biden’s ‘Competition’ Executive Order Realizes a Central Planner’s Dream.”
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29. *Standard Oil Co. of New Jersey v. United States*, 211 U.S. (1911), <https://www.law.cornell.edu/supremecourt/text/221/1> (accessed July 15, 2021). See also “The great ‘trusts’ (such as Standard Oil) and industry-dominating companies (such as U.S. Steel and certain railroads) of the late 19th and early 20th centuries were deemed by the popular press—and by populist and progressive politicians—as threats to American small businesses, American workers, and, indeed, the American social fabric. Those giant enterprises had dramatically transformed the American economy in a highly disruptive fashion. Somehow American society survived that vicious onslaught, despite the fact that the early period of American antitrust enforcement, in hindsight, appears far from radical. Most successful early government enforcement actions were against hardcore cartels and mergers to monopoly—cases that would not raise an eyebrow today. Indeed, the two major cases involving structural break-ups of dominant enterprises—Standard Oil and American Tobacco—involved predatory practices and mergers to monopoly that clearly would be attacked by current antitrust enforcers,” in Abbott, “Antitrust and the Winner-Take-All Economy,” p. 2.
30. *United States v. U.S. Steel*, 251 U.S. 417 (1920), <https://supreme.justia.com/cases/federal/us/251/417/> (accessed July 15, 2021) (rejecting the government’s argument that U.S. Steel had monopolized the steel industry). See also Abbott, “Antitrust and the Winner-Take-All Economy.”
31. See, for example, Ending Platform Monopolies Act, H.R. 3825, 117th Cong., 1st Sess.
32. Furthermore, policies should not be based on measures such as size alone, and certainly not without accounting for the limitations of the measures.
33. Chris Edwards, “Corporate Power and Shared Prosperity,” Cato Institute *Testimony*, July 14, 2021, <https://www.cato.org/testimony/corporate-power-shared-prosperity> (accessed July 15, 2021).
34. *Ibid.*
35. State-owned enterprises are included in the list and arguably should not be. Without state-owned enterprises, American businesses make up 26 of the top 50 businesses of the Fortune Global 500. See “Global 500,” *Fortune*, 2020, <https://fortune.com/global500/> (accessed July 15, 2021).
36. “Global 500,” *Fortune*, 2020.
37. *Ibid.*
38. David R. Burton, “Comparing Free Enterprise and Socialism,” Heritage Foundation *Special Report* No. 213, April 30, 2019, <https://www.heritage.org/economic-and-property-rights/report/comparing-free-enterprise-and-socialism>.
39. Concerns over the scope of concentration levels should not be taken as conventional wisdom. See, for example, Robert D. Atkinson and Filipe Laga de Sousa, “No, Monopoly Has Not Grown,” Information Technology & Innovation Foundation, June 7, 2021, <https://itif.org/publications/2021/06/07/no-monopoly-has-not-grown> (accessed July 15, 2021), and Geoffrey Manne, “What If Rising Concentration Were an Indication of More Competition, Not Less?” Truth on the Market, December 14, 2019, <https://truthonthemarket.com/2019/12/14/what-if-rising-concentration-were-an-indication-of-more-competition-not-less/> (accessed July 15, 2021).
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41. U.S. House of Representatives, “Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations,” October 6, 2020, p. 393, [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) (accessed July 15, 2021).
42. Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong., 1st Sess., and “Weaponizing Antitrust to Achieve Radical Ideological Goals,” Heritage Foundation *Factsheet* No. 214.
43. To learn more about the importance of economic freedom, see Terry Miller, Anthony B. Kim, and James M. Roberts, *2021 Index of Economic Freedom* (Washington, DC: The Heritage Foundation 2021), <http://www.heritage.org/index>.
44. Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong., 1st Sess.; Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong., 1st Sess.; Ending Platform Monopolies Act, H.R. 3825, 117th Cong., 1st Sess.; and Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong., 1st Sess.
45. Silicon Valley Bank, “2019 Startup Outlook: US Report,” <https://www.svb.com/startup-outlook-report-2019/us> (accessed July 15, 2021)
46. For example, Walker & Company Brands, a health and beauty company that makes Bevel men’s grooming products and Form beauty products, agreed to be acquired by Procter & Gamble and in doing so, as explained in a Vox article, “Walker and Company gets to tap into P&G’s research and development expertise—the company spent \$1.9 billion on those efforts in 2017—as well as its global retail relationships and supply chain efficiencies. It also gets marketing support from a company that spent \$7 billion on advertising across all of its brands last year.” See Jason Del Rey, “Procter & Gamble Has Acquired the Startup Aiming to Build the Procter & Gamble for People of Color,” *Vox*, December 12, 2018, <https://www.vox.com/2018/12/12/18136744/walker-company-procter-gamble-acquisition-tristan-walker-bevel> (accessed July 15, 2021).
47. To learn about many related government obstacles, see, for example, Daren Bakst and Patrick Tyrrell, “Big Government Policies that Hurt the Poor and How to Address Them,” Heritage Foundation *Special Report* No. 176, April 5, 2017, <https://www.heritage.org/poverty-and-inequality/report/big-government-policies-hurt-the-poor-and-how-address-them>.