Debate Brief · Antitrust

November 2021

Resolved: United States antitrust laws should be abolished.

"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 necessities 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."
—Senator John Sherman to Congress, March 21, 1890

"We can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can't have both."
– Supreme Court Justice Louis D. Brandeis
As quoted by Raymond Lonergan in Mr. Justice Brandeis, Great American (1941), p. 42.

"The successful competitor, having been urged to compete, must not be turned upon when he wins."
—Justice Learned Hand
United States v. Aluminum Company of America, 1945

"The government has never shown much aptitude for real business. The Congress will not permit it to be conducted by a competent executive, but constantly intervenes. The most free, progressive and satisfactory method ever devised for the equitable distribution of property is to permit the people to care for themselves by conducting their own business. They have more wisdom than any government."
—Calvin Coolidge, *Coolidge Says*, January 5, 1931

ABOUT THE COOLIDGE FOUNDATION

The Calvin Coolidge Presidential Foundation is the official foundation dedicated to preserving and promoting the legacy of America's 30th president, Calvin Coolidge, who served in office from August 1923 to March 1929. Coolidge values include civility, bipartisanship, and restraint in government, including wise budgeting. The Coolidge Foundation sponsors the renown Coolidge Scholarship and Senators program for academic merit, along with a national debate program culminating in the Coolidge Cup, an invitational tournament held each July at the President's birthplace in Plymouth, Vermont. The Foundation was formed in 1960 by a group of Coolidge enthusiasts, including John Coolidge, the president's son. The Coolidge Foundation maintains offices in Plymouth, Vermont, where it works in cooperation with the Calvin Coolidge State Historic Site, and in Washington, D.C. The Foundation seeks to increase Americans' understanding of President Coolidge and the values he promoted.

BACKGROUND

The 1800s in America were a time of great economic growth and development. Whereas the average economic production per person (converted to today's dollars) was less than $1,000 at the time of the nation's founding in 1776, production was more than five times that amount by the time the 19th Century drew to a close. The increase came in good measure due to the rapid industrialization that occurred during the century in general and during the "Gilded Age" in particular (i.e., the period roughly from the 1870s to 1900).

Some businesses—such as those operating in the industries of oil, steel, railroads, and sugar—became very large during this period by either buying up or outcompeting their competition. Some of these large businesses made agreements and legal arrangements, called "trusts," with other businesses. Trusts were designed to protect the interests of the various businesses involved. These trusts could include, for instance, agreements to act together to ward off competition from outsiders or to keep prices at a certain level.

To some citizens and some politicians, trusts exemplified unfairness. Soon the idea of "antitrust" legislation to prohibit large and economically powerful businesses from engaging in certain business practices was born. In 1890, the U.S. Congress passed the Sherman Antitrust Act, named for Ohio Senator John Sherman. The Act made illegal "every contract, combination, or conspiracy in restraint of trade." The Act declared that "every person who shall monopolize, or attempt to monopolize, or conspire to monopolize shall be deemed guilty of a felony."[1]

In debating the bill on the floor of the Senate on March 21, 1890, (21 Congressional Record, 2455-2474), Senator Sherman argued that his intent was not to prevent businesses from forming, but rather to prevent businesses from becoming so large and powerful that they "prevent competition." Sherman said:

> *"This bill does not seek to cripple combinations of capital and labor, the formation of partnerships, or of corporations, but only to prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer."*

Equating economic power with political power, Sherman further argued:

> *"[…] 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. If the combination is confined*

[1] Young, Ryan, and Clyde Wayne Crews. "The Case Against Antitrust Law" Competitive Enterprise Institute. April 16, 2019.

> *to a state the state should apply the remedy; if it is interstate and controls any production in many states Congress must apply the remedy. If the combination is aided by our tariff laws, they should be promptly changed, and if necessary equal competition with all the world should be invited in the monopolized article. If the combination affects interstate transportation or is aided in any way by a transportation company it falls clearly within the power of Congress, and the remedy should be aimed at the corporations embraced in it and should be swift and sure.*

Additional antitrust laws followed the Sherman Act, including the Clayton Act of 1914, and the Federal Trade Commission Act of 1914. The last is especially important because it created a new entity with the power to police business activity. Later came the Celler-Kafauver Act of 1950, and the Hart-Scott-Rodino Act of 1976. Over the years, antitrust prosecution and laws have been used to break up or punish companies who the government deemed had become too big and powerful. For instance, in 1911, the Supreme Court ordered oil company Standard Oil to break itself up into 33 different companies, some of which went on to become Mobil, Amoco, Chevron, and Exxon. In 1982, in response to pressure by the U.S. Department of Justice, telephone company AT&T broke itself up into seven different companies, each to serve a different region of the country. Some of these companies later became Verizon and Qwest.

Not all antitrust cases that the government brings to court result in a victory for the government. In 1920, the U.S. Supreme Court found against government prosecutors and in favor of U.S. Steel. Even though U.S. Steel had a large share of the steel market, the court determined it was not in violation of the Sherman Act. In 1998, the government won its initial antitrust case regarding Microsoft's practice of bundling its Internet Explorer browser with its Windows operating system. People said that the combination of this innovative browser and the Windows operating system would shut other companies out of the software market. A higher court overturned the ruling after Microsoft's appeal and Microsoft was not broken up.

Today, antitrust law gets most discussion when the issue is the success and apparent dominance of "Big Tech"—companies such as Facebook, Apple, Amazon, and Google. Some people think that as these companies grow past the trillion-dollar mark in market capitalization, the government must enforce antitrust laws to restrain them. Others think that either antitrust laws never should have been part of U.S. law to begin with—or if they did have a valid purpose 130 years ago, then in today's modern economy, they are no longer valid.

Do consumers benefit from antitrust laws, or should we abolish our antitrust laws? In this debate we invite you to look at both sides. And, although we encourage you to learn about historical examples, we also want you to think about this issue in a way that is relevant to your life. You've probably used Facebook, used an Apple device, bought something on Amazon.com, or conducted a Google search. What does this issue mean for them—and for you?

COOLIDGE CONNECTION

President Coolidge believed in the wisdom of the American people. He favored freedom for individuals who run and work for businesses over government involvement or interference in those businesses. It was both necessary *and moral*, in Coolidge's view, to assume that individual know better than the government what is best for themselves and their family. Government cannot understand what is best for a given citizen, let alone how best to achieve that. Reminiscing on the progress of the U.S. economy, Coolidge remarked that, "[a]s we look back upon all this development, while we know that it was absolutely dependent upon a reign of law, nevertheless some of us cannot help thinking how little of it has been dependent on acts of legislation." [2]

Though not an ardent trust-buster of the Theodore Roosevelt kind, President Coolidge did have concerns about the threat of powerful businesses. In his autobiography, Coolidge wrote the following of his stint as a legislator in Boston:

> "*The Speaker assigned me to the Committees on Constitutional Amendments and Mercantile Affairs. During the session I helped draft, and the Committee reported, a bill to prevent large concerns from selling at a lower price in one locality than they did in others, for the purpose of injuring their competitor. This seemed to me an unfair trade practice that should be abolished.*"[3]

Later, as President of the United States in 1924, Coolidge warned that, "[i]f new capital will not flow into competing enterprise, the present concerns tend toward monopoly, increasing again the prices which the people must pay."[4] For Coolidge, price setting and special deals between the government and business were undesirable because the results would, in the end, hurt the American people.

At the same time, Coolidge believed it was necessary to create an environment in which the legal framework allowed for the natural flow of capital. Less was more when it came to legislation. The best means of ensuring economic growth was, in his view, to allow the flow of resources to be directed by individual exchanges in the aggregate rather than by overbroad, unpredictable, imbalanced, even arbitrary, labyrinths of restrictions and requirements.

> *"It is always possible to regulate and supervise by legislation what has already been created, but while legislation can stimulate and encourage, the real creative ability which builds up and develops the country, and in general makes human existence more tolerable and life more complete, has to be supplied by the genius of the people themselves. The Government can supply no substitute for enterprise."*[5]

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[2] "Education: The Cornerstone of Self-Government," on July 4, 1924. As found in *Foundations of the Republic*.
[3] Coolidge, Calvin. *The Autobiography of Calvin Coolidge*. Open Road Media, 2021.
[4] "To The National Republican Club," on February 12, 1924. As found in *The Mind of the President*, p. 129.
[5] "Education: The Cornerstone of Self-Government," on July 4, 1924. As found in *Foundations of the Republic*.

Coolidge worked to keep the federal government out of private business, but he also wanted to keep private businesses from seeking favors or special protection from the government. Private interests should be private and public interests should be public. Too much mingling between the two would lead to improper public-private relationships and distortions in markets. “It would be contrary to sound policy for business or any organization to engage in an effort to dominate political or governmental action by meddling in what does not concern them,” Coolidge stated, “That would warrant a revival of criticism against invisible government. But when industry will be affected by governmental action it might be heard sympathetically and without implication of seeking domination contrary to public interest. We cannot have employment and prosperity except on the basis of justice to business.”[6]

Coolidge prioritized economic development because it was essential to “advancing the welfare of the people.”[7] Here again, the “welfare of the people” was best served by allowing people to act as they see fit and disallowing the government from doing the same. “The most free, progressive and satisfactory method ever devised for the equitable distribution of property is to permit the people to care for themselves by conducting their own business. They have more wisdom than any government,” Coolidge remarked.[8]

Some critics characterize Coolidge’s laissez-faire leanings as evidence of undisclosed, lucrative deals with Wall Street to protect big business at all costs; however, a fairer, more accurate account holds that Coolidge, wherever possible, wanted to defer to the wisdom of the people. The more the law allowed natural competition the lower the likelihood of monopoly – a good thing for all Americans, Coolidge thought.

Notably, Coolidge did not think government was unnecessary. To the contrary, he believed the federal government had (a necessary role in American economic development/played a necessary role in American economic development). In 1930, he opposed proposed changes to the Sherman Antitrust Act, calling it "little more than a codification of common law."

Coolidge drew a distinction between *the law* and *legislation*. *Law* provided an essential framework of society, of enforceable contracts and the administration of justice; *legislation*, on the other hand, tended to stifle economic movement and was often motivated by circumstances too specific and unpredictable for the overbroad enactments they spurred. Coolidge’s was not a disagreement with government, but a disagreement with government action in certain domains. The more the law allowed natural competition the lower the likelihood of monopoly.

[6] *Calvin Coolidge Says*, December 30, 1930.
[7] “Education: The Cornerstone of Self-Government,” on July 4, 1924. As found in *Foundations of the Republic*.
[8] *Calvin Coolidge Says*, January 5, 1931.

KEY TERMS

Trust – A large grouping of business interests that are connected to one another and that in some way work together to gain or maintain substantial market power.

Antitrust Law — Laws that are intended to create fairness and preserve competition in business by preventing companies from becoming too large and powerful (i.e., monopolistic). Proponents of antitrust laws believe that these laws help to keep competition between businesses fair and equal, and that these laws benefit consumers.

The Sherman Anti-Trust Act of 1890 —The first Federal law that outlawed monopolistic business practices. The Act was named for Senate finance committee chairman Sen. John Sherman of Ohio. The Act prohibited trusts. In terms of its legal approach and authority, it was based on the constitutional power of Congress to regulate interstate commerce.

Competition — The act or process of striving for the same thing. In business, an example might be two or more businesses competing for the same customers.

Market Share — The portion (percentage) of an industry or market that is earned by a particular company. E.g., in the U.S. carbonated soft drink industry, Coca-Cola has about a 45% market share, compared to PepsiCo at 26%. Other beverage companies split the rest.

Anticompetitive practices — Business practices that prevent or reduce competition in a market. There are many practices that might be considered anticompetitive, including monopolization, collusion, product bundling, exclusive dealing, and predatory pricing.

Monopoly — A situation in which there is a single seller of a good or service in the marketplace, and therefore faces no competition. In order for a business to be considered a monopoly, it must be the sole seller of goods or services, with no close substitute available to buyers.

Collusion — When (usually powerful) firms coordinate their business activities so as to obtain an advantage. Two things on which businesses might collude are prices and restricting output.

Oligopoly — An industry with a relatively small number of sellers (e.g., three, four, five).

Federal Trade Commission (FTC) — An independent agency of the U.S. government that enforces civil U.S. antitrust law and promotes consumer protection.

Interstate Commerce Commission (ICC) — The ICC was a U.S. regulatory agency originally founded to regulate "common carriers" such as railroads, interstate trucking, and telephone companies. The ICC was abolished in 1995.

Conduct Relief and **Structural Relief** — In antitrust court cases, when the government proves monopolization, two types of remedies are "conduct relief" and "structural relief." In the first type, the business must stop engaging in specific practices that are deemed by the court to be anticompetitive. In the second type, the court requires the business to break itself up into smaller businesses and/or sell of (divest) some of its businesses and assets.

AFFIRMATIVE ARGUMENTS

1. Antitrust laws penalize successful businesses for being successful, and reward their less successful competitors for being less successful.

> "[Everybody benefits] by the entrepreneurial action that directs… additional capital toward the satisfaction of the most urgent wants on the other hand."
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> Source: Ludwig von Mises. *Socialism: An Economic and Sociological Analysis*. (1951)

Achieving success in business is hard. Succeeding takes forethought, ingenuity, and hard work to identify opportunities in which one can take "inputs," such as raw materials, and transform those inputs into "outputs" that consumers are willing to pay money for. Entrepreneurs supply their own time and effort, and risk their own capital to find ways to satisfy consumers' needs, with the hope of doing well enough to cover their costs and still make a profit.

Sometimes other entrepreneurs see the same opportunity and decide to compete to try to make a profit, too. Each business does what it believes will best improve its chances of survival. Growing in size by serving more consumers is one way for a business to maximize its chances of survival. Successful businesses can make a lot of profit and grow very large. This is simply a fact of business—inherently neither good nor bad—yet antitrust laws insist on looking at successful businesses with suspicion. Antitrust laws can force businesses to change their business practices, break themselves up into smaller businesses, or pay fines. This in effect punishes businesses for becoming "too good" at serving consumers, while in effect rewarding businesses that are less good at serving consumers. This is not right and it is not fair.

The targets of antitrust law are rarely businesses that nobody likes. In a market system, consumers already have a way to punish businesses: stop buying goods and services from those businesses, and they will go out of business. Perversely, antitrust law is often applied to businesses that consumers love the most. In the middle part of the 20th century, Kodak was a popular and iconic brand for film and cameras, yet it faced antitrust lawsuits. In the 1990s, Microsoft was the leader in personal computing and tens of millions of people happily used its products, yet it was targeted under antitrust laws. Today, Facebook, Apple, Amazon, and Google are maligned by commentators as "Big Tech" and threatened with antitrust legal action, despite the fact that they bring consumers some of the most popular products and services available today. This pattern suggests that antitrust laws are not enacted to protect consumers, as its proponents claim, but rather to protect and subsidize firms that are less efficient and less able to compete.[9] Lesser competitors should not be able to use the government to achieve what they cannot achieve in the voluntary marketplace.[10]

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[9] Younkins, Edward. "Antitrust Laws Should Be Abolished" February 19, 2000.

[10] Young, Ryan, and Clyde Wayne Crews. "The Case Against Antitrust Law" Competitive Enterprise Institute. April 16, 2019.

2. Antitrust laws are unclear, contradictory, and it is impossible for a business to know for certain when it is in violation of them.

Businesses do not literally form trusts anymore. Thus, in order to prosecute antitrust cases, the government has had to come up with business practices that it alleges to be "anticompetitive" and therefore subject to antitrust law. This has made antitrust law unclear and ambiguous.

Consider the question of pricing. If a business charges for its product a price that is higher than its competitors, then under antitrust law, the government could allege that the business is engaging in monopolistic overcharging. If the business charges the same price as its competitors, then the government could allege that the business is engaging in collusion. If the business charges a lower price than its competitors, the government could allege that the business is engaging in predatory pricing.[11]

Other business practices are also unclear. What does "collusion" mean, when businesses necessarily have to work with one another and contract with each other all the time? If businesses partner together to bring a new product to market, is that collusion? A competitor that is left out of the partnership could allege so.

Other antitrust proponents worries about "cartels," which are agreements among businesses to sell their products at the same higher-than-normal price, thus giving customers no choice but to pay a high price if they wish to buy a good. But prices go up and down for many different reasons, so how does one know whether today's price is a high cartel-driven price, versus a normal price at which multiple businesses happen to sell?

It is not even clear that cartels really exist in the marketplace. Any business that is part of an alleged cartel would have a strong incentive to be the first one to break out of the cartel and sell its product at a lower price, thus gaining market share. Ironically, the most obvious examples of real cartels are government-created cartels, such as the Organization of the Petroleum Exporting Countries (OPEC), which was created between the governments of 13 countries.[12] In reality, consumers do not need the government to worry about cartels in normal markets because cartels—if they even do exist—are unstable and self-correcting.

As Robert Levy of the Cato Institute writes:

> *Antitrust laws are fluid, non-objective and frequently retroactive. Because of murky statutes and conflicting case law, companies can never be sure what constitutes permissible behavior. Normal business practices—price discounts, product improvements and exclusive contracting—can somehow morph into an antitrust violation when examined by government antitrust regulators.*[13]

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[11] "The Problem With Antitrust Laws" Management Study Guide. Accessed 10/14/2021.
[12] Young, Ryan, and Clyde Wayne Crews. "The Case Against Antitrust Law" Competitive Enterprise Institute. April 16, 2019.
[13] Levy, Robert A. "The Case Against Antitrust" Cato Institute. November 17, 2004.

3. Antitrust laws have major economic costs, including discouraging innovation.

The economic costs of having antitrust law are hard to estimate but real. The White House Office of Management and Budget's (OMB) is tasked with coming up with cost estimates for federal regulations, but the OMB does not study the cost of antitrust laws the way it does for other regulations.[14]

Direct costs to the government include enforcement costs, investigation-related costs, and the time and resources of the courts and judicial system for hearing these cases. Figures for these expenses are not readily available, but one set of numbers from 2010 put the amount at over $2.3 billion per year.[15] There are similar compliance and defense costs to the businesses who get accused of antitrust activity. They must pay staff to respond to government inquiries for documents and records, they must pay for lawyers to litigate these cases, and more.

> In 2011, telephone company AT&T sought to acquire T-Mobile (Deutsche Telekom). The resulting company would have had about a 43 percent share of the U.S. wireless market, slightly more than Verizon's 34 percent. The Department of Justice filed an antitrust lawsuit to block the merger. The government's legal action caused AT&T to call the deal off, which resulted in AT&T having to pay a $3 billion termination fee to Deutsche Telekom, and to forfeit other things of value, including wireless spectrum allotments.
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> Source: Cowley, Stacy. "AT&T sets aside $4 billion for T-Mobile breakup fee" CNN Money. November 25, 2011.

Also expensive are the indirect costs such as opportunity costs of management time spent on antitrust allegations. There are also the unseen costs associated with "the innovations not undertaken, the competitive strategies not employed, and the mergers that are foregone due to the legal uncertainty associated with antitrust statutes and bureaucrats."[16] The mere existence of the antitrust legal threat has a chilling effect on entrepreneurs who have new, cutting-edge ideas for businesses.[17] It is also not clear that antitrust laws were ever intended apply to some business models, such as platforms like Uber and Amazon—much of the value they offer in terms of ride availability trustworthiness and customer reviews is precisely dependent on operating at a large scale.[18]

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[14] Crews, Clyde Wayne. "Nobody Knows the Cost of Antitrust Regulation, And That's Bad" Forbes. March 3, 2016.
[15] Ibid.
[16] Younkins, Edward. "Antitrust Laws Should Be Abolished" February 19, 2000.
[17] Young, Ryan, and Clyde Wayne Crews. "The Case Against Antitrust Law" Competitive Enterprise Institute. April 16, 2019.
[18] Munger, Michael C. *The Sharing Economy: Its Pitfalls and Promises*. London Publishing Partnership. 2021.

4. Antitrust laws don't actually succeed at preventing monopolies and fostering competition. Indeed, sometimes they achieve the exact opposite and *create* monopolies.

Proponents of antitrust law and critics of antitrust law agree that competition is good. However, whereas proponents believe that businesses sometimes become too powerful and must be "reined in" by the government, critics see the cure as worse than the disease.

As Edward Younkins of Wheeling Jesuit University writes:

> *"Antitrust laws purport to prevent monopolies and encourage competition. However, since their advent in 1890, history has shown that they do not prevent monopoly, but, in fact, foster it by limiting competition. These laws permit the federal government to regulate and restrict business activities, including pricing, production, product lines, and mergers, ostensibly in order to prevent monopolies and stimulate competition. In actual fact, government has been the source of monopoly through its grants of legal privilege to special interests in the economy. The social cure for such coercive monopoly is deregulation and repeal of the antitrust laws."*[19]

A business may be large and economically powerful, but as long as it is possible for another business to bring a "substitute" good or service to the market (for instance, the way that streaming video is a substitute for television and DVDs), the incumbent business must be responsive or else it will lose its position and its profit. "[N]o firm can get away with whatever it wants to do without facing the prospect of a would-be competitor entering the market," writes Younkins.[20] Markets do not make guarantees. At any point a rival firm could come along and with a product that is better, cheaper, or superior in some way. Consumer preferences change.

By contrast, government-granted privileges—of the type that some proponents of antitrust law wish to see given to smaller businesses—are the *opposite* of real competition. Those privileges, immunities, and protections do not come and go with changing consumer tastes. It is the government that can make markets less efficient by giving a private individual or business the right to be a sole provider of a good or service, in the name of helping consumers.[21] It is government-created monopolies that actually hurt consumers, because they do not face the same pressure to be responsive to consumers.

5. Antitrust laws are unnecessary for protecting competition. Competition is alive and well.

"Creative destruction" is a term used to describe how, under capitalism, businesses are constantly disrupted and replaced with new, better businesses competing eagerly for business. Economist Joseph Schumpeter popularized the phrase, describing the "process of industrial

[19] Younkins, Edward. "Antitrust Laws Should Be Abolished" February 19, 2000.
[20] Ibid.
[21] Ibid.

mutation that continuously revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one." One might feel sad to see a longstanding business shut down (i.e., the "destruction" part), but if the reason it is shutting down is because something else has come along that consumers like better (i.e., the "creative" part), then in the long run we should be happy about that progress.

Proponents of antitrust laws look at today's dominant businesses such as Facebook, Apple, Amazon, and Google, and cannot conceive how those businesses could possibly be displaced anytime soon. What they fail to appreciate is that on a longer time scale, most large businesses do eventually get upstaged, outcompeted, and displaced by competitors. In the 1980s, Digital and IBM were technology giants, and one might have wondered how any other business could have possibly competed with them—but they were not able to maintain their dominance indefinitely. As Jennifer Huddleston, Director of Technology and Innovation Policy at the American Action Forum, describes:

> *"A decade ago, when we were talking about if big tech should be broken up, we were talking about the MySpace natural monopoly, or [how] Yahoo won the search wars. … [W]e've seen time and time again that [as soon as we start to think of today's businesses as] unstoppable giants, something new and innovative comes about and completely revolutionizes the industry."*[22]

The same goes for many other large and allegedly dominant businesses, including Blockbuster (video rentals), Polaroid (cameras and film), Toys R Us (retail), Pan Am (airlines), and Borders (books). As further illustration, consider how the list of Fortune 500 companies has changed over time. Of the 500 large companies on the Fortune 500 list in 1955, only 52 companies (about 10 percent) are still on the list 64 years later in 2019. The other 89 percent of the companies from 1955 have either gone bankrupt, merged with (or were acquired by) another firm, or are simply not as big and dominant as they once were. As Mark Perry of the American Enterprise Institute points out, "Many of the companies on the list in 1955 are unrecognizable, forgotten companies today (e.g., Armstrong Rubber, Cone Mills, Hines Lumber, Pacific Vegetable Oil, and Riegel Textile)." According to Perry:

> *"[T]here's been a lot of market disruption, churning, and Schumpeterian creative destruction over the last six decades. It's reasonable to assume that when the Fortune 500 list is released 60 years from now in 2079, almost all of today's Fortune 500 companies will no longer exist as currently configured, having been replaced by new companies in new, emerging industries, and for that we should be extremely thankful."*[23]

What is more, government could—and has been-wrong about technology assessments. The premise of Microsoft antitrust litigation in the 1990s and 200s was that Microsoft's browser

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[22] Bayern, Macy. "It's not me, it's you: The pros and cons of breaking up big tech" *Tech Republic*. January 10, 2020.
[23] Perry, Mark. "Only 52 US companies have been on the Fortune 500 since 1955, thanks to the creative destruction that fuels economic prosperity" American Enterprise Institute. May 22, 2019.

was unbeatable. That turned out not to be the case, as the rise of numerous other browsers shows. The healthy churn that we see in the American business landscape is not due to antitrust enforcement. It is due to the inherently competitive nature of businesses.

6. Antitrust laws are susceptible to abuse by competitors and power-seeking politicians.

Antitrust laws are powerful tools that can be used to exact harsh punishment upon their targets. Businesses can be broken up, fined millions or billions of dollars, or prohibited from doing business in certain industries. Can we trust lawmakers and courts to wield such tremendous power wisely?

Inherent in antitrust is the suggestion that the people who make government policies and regulations know what is best for consumers better than the consumers themselves know what is best for them.[24] If we did *not* have antitrust laws, then consumers would be free to express their preferences by the purchases they make in the marketplace. *With* antitrust laws, however, some of these consumer decisions are instead made by intervening government agencies—some run by unprincipled political appointees who have an incentive to abuse their power against innocent businesses to raise their own status or to position themselves to go to work for a competitor in the industry.[25,26]

> "How could a public policy allegedly designed to help consumers have come to hurt them instead? One explanation is that antitrust regulation was never intended to protect consumers. It was intended to shield some firms from the efficiency of other firms and, like tariffs, was fundamentally protectionist. This public-choice perspective on the origins of antitrust law is reinforced by recent historical research and by the fact that more than 90 percent of all antitrust litigation involves one private firm suing another. If it looks, walks, and quacks like a special-interest duck, it's probably a special-interest duck."
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> Source: Armentano, D.T. "The Failure of Antitrust Policy" The Foundation for Economic Freedom. June 1994.

As Robert Levy of the Cato Institute has argued, "Antitrust law is wielded most often by favor-seeking businessmen and their allies in the political arena. Instead of focusing on new and better products, disgruntled rivals try to exploit the law by consorting with members of the legislature and antitrust officials."[27] It is relatively easy for a smaller, less efficient business to lodge a complaint that a larger, more efficient competitor is acting "unfairly." In the Microsoft antitrust case, it was not primarily consumers who cried foul over Microsoft's bundling of software products; it was Microsoft's competitors. They sought to gain through the courts via force what they could not earn from consumers voluntarily.[28]

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[24] Levy, Robert A. "The Case Against Antitrust" Cato Institute. November 17, 2004.
[25] Burnham, David. *Abuse of Power*. 1996.
[26] Yglesias, Matthew. "The push to break up Big Tech, explained" *Vox*. May 3, 2019.
[27] Levy, Robert A. "The Case Against Antitrust" Cato Institute. November 17, 2004.
[28] Younkins, Edward. "Antitrust Laws Should Be Abolished" February 19, 2000.

NEGATIVE ARGUMENTS

1. Antitrust laws are needed to protect competition because otherwise, an unregulated market will lead to the establishment of coercive monopolies.

There is no doubt that markets can produce material prosperity. As the saying goes, markets "deliver the goods." But the reason that markets yield such abundance is that in a functioning market, competition keeps businesses operating with consumers' interests in mind. Having a healthy dose of competition is what gives businesses the incentive to find ways to be more efficient, to lower their prices, and to be responsive to consumer feedback.[29] As Duke Professor and economist Michael Munger writes, "Competition doesn't have to be perfect to be effective, but it cannot be non-existent."[30] When competition breaks down, markets cease to work.

Antitrust laws ensure that competition does not disappear from our markets. Without antitrust laws, a business might become so big it is the only business selling a particular good or service—i.e., a monopoly. In that case, the danger to consumers is that once this large business eliminates its last competitor, it could raise its prices to consumers with impunity.

Without antitrust laws, businesses could also conspire to keep prices high, rig the bids that they make to suppliers and on government contracts, or divide up customers so that they do not have to compete with one another. Any of these actions could keep prices artificially high, which might be good in the short run for the businesses involved but bad for consumers. Imagine two companies each capable of making and selling a smartphone for the relatively low price of, say, $300. They might decide that each of them could make more profit if they enter into a secret agreement to sell their phones for $400 instead. If those are the only two businesses that are able to make that particular type of smartphone, then what is preventing them from doing that? We can thank antitrust laws for preventing that from happening.

> "Monopoly power is conventionally demonstrated by showing that both:
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> (1) the firm has (or in the case of attempted monopolization, has a dangerous probability of attaining) a high share of a relevant market, and
> (2) there are entry barriers—perhaps ones created by the firm's conduct itself—that permit the firm to exercise substantial market power for an appreciable period."
>
> Source: "Competition and Monopoly" U.S. Department of Justice. Accessed October 15, 2021.

Antitrust laws in the U.S. have been around for almost 130 years. In the past, they have been applied to railroads, oil companies, and steel manufacturers. Today, the biggest and most powerful companies tend to be the "Big Tech" companies, such as Facebook, Apple, Amazon, and Google. Each of these companies has competed vigorously to get where they are. But now

[29] Antitrust Enforcement and the Consumer. U.S. Department of Justice. Accessed October 18, 2021.
[30] Munger, Michael C. *The Sharing Economy: Its Pitfalls and Promises*. London Publishing Partnership. 2021.

that they are so powerful, we have to ask whether the tactics they use to stay in power count as fair competition or are actually unfair to their competitors, to consumers, and to society. Amazon, for instance, has engaged in price wars against the very companies that sell goods on its website, using the data that gets generated by the millions of consumer transactions its platform to push competition out of business.[31] Apple requires app developers to use its proprietary in-app purchase system and charges an in-app purchase commission of 30 percent.[32] Critics argue that, since there is only one iOS operating system and only one Apple app store, Apple in effect has a monopoly position.

Antitrust laws are important for protecting competition because at a certain point, some businesses become so large that there are no other competitors to keep them in check. Only the government, which wields political power instead of economic power, can hold businesses such as Big Tech accountable. Antitrust laws are not intended to punish businesses just for being big, and they are not "anti-market" or "anti-business."[33] Rather, they are like the rules of sports, which ensure that participants play fairly and ultimately are good for the game overall.

2. Breaking up large businesses is good for innovation.

Antitrust laws sometimes result in courts ordering that a large business be broken up into smaller businesses. This improves the competitive landscape by creating multiple firms that now must compete with businesses in a given sector or with each other.

For instance, in 1982, telephone company AT&T settled an anti-trust case by splitting its large local telephone network into seven smaller regional companies. These became known as the Regional Bell Operating Companies or "Baby Bells."[34] With local telephone access split from long-distance service, new competitive businesses could enter the market—and they did. Out of the AT&T breakup, we got innovative new companies such as Sprint and MCI. Business analysts also believe that the breakup accelerated the emergence of fiber optic networks, first in big cities with corporate customers, and then more broadly later on.

Antitrust laws can spur new innovative business opportunities that otherwise might not have had the chance to flourish because it is a tool that is uniquely suited to battle "path dependency." Path dependency is the phenomenon whereby a society or a market gets stuck with an inferior technology or solution for no better reason than because it is inherently costly or challenging to change directions (i.e., paths). Large, monopolistic businesses facing little competition might not have an incentive to adopt a new technology if they are making a

[31] Yglesias, Matthew. "The push to break up Big Tech, explained" *Vox*. May 3, 2019.
[32] Kalra, Aditya. "Apple hit with antitrust case in India over in-app payments issues" *Reuters*. September 2, 2021.
[33] Markham, William. "Why Antitrust Laws Matter?" Law Offices of William Markham. 2006.
[34] Evans, Benedict. "Would breaking up 'big tech' work? What would?" August 10, 2020.

comfortable profit with the current technology. Antitrust laws step in and cause that disruption, for the good of everyone.

3. Antitrust laws prevent concentrated business interests from abusing their economic and technological powers.

In the U.S. in recent years, industries are getting more concentrated and consolidated, and businesses are getting more profitable. Those might sound like neutral or even good things, but there are downsides. As researchers from the Brookings Institution describe:

> *"Not only are today's firms astoundingly profitable, they are persistently profitable. While a profitable American firm in the 1990s had a 50 percent chance of finding itself similarly successful 10 years on, a very profitable American firm today enjoys over an 80 percent chance. That persistently high profits remain unchallenged suggests many firms may be receiving a return on market power."*[35]

In many sectors, "from little things like cat food to big things like telecoms, cable providers, airlines, and technology platforms," a small number of businesses dominate 75-90 percent of the market.[36] Large businesses can more easily flex their muscle. Nobel Prize-Winning economist Joseph Stiglitz laments as a prime example of this "the spread of arbitration clauses in labor contracts and user agreements, which allow corporations to settle disputes with employees and customers through a sympathetic mediator, rather than in court."

> "They've bulldozed competition, used our private information for profit, and tilted the playing field against everyone else. And in the process, they have hurt small businesses and stifled innovation."
>
> Source: Warren, Elizabeth. "Here's how we can break up Big Tech" March 8, 2019.

The new prevailing attitude among high tech business leaders is that obtaining large size and market power is "the only way to ensure durable profits."[37] In the tech sector, businesses are facing scrutiny over the means that they employ to retain this type of power. Social media companies such as Facebook take advantage of "network effects," which is the phenomenon whereby a technology or connective platform becomes more valuable the more people there are who use it. They achieved this growth in part through novel ways of increasing user engagement, but these practices are now under question as also contributing to depression, anxiety, and political polarization. Apple is facing a lawsuit for anti-consumer practices including purposely degrading the performance of older iPhones.[38] Google's search engine allegedly discriminates against Google's vertical rivals, and monitor consumers' purchasing behavior

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[35] Galston, William, and Clara Hendrickson. "The consequences of increasing concentration and decreasing competition—and how to remedy them" Brookings Institution. January 5, 2018.
[36] Stiglitz, Joseph. "Market Concentration Is Threatening the U.S. Economy" *Columbia Insights*. March 12, 2019.
[37] Ibid.
[38] Freeman, Wilson, and Jay B. Sykes. "Antitrust and 'Big Tech'" Congressional Research Service. Sep. 11, 2019.

without adequate consent.[39,40] And so on. If these practices are worth being concerned about, then we need antitrust laws to help us hold businesses accountable.

4. Antitrust laws protect runaway wealth accumulation, and reduce income inequality.

The Silicon Valley revolution has been good to our nation's wealthiest households, but not as good to our nation's poorest households. While some high-tech workers have seen their income and investments soar, other blue-collar workers have experienced relatively stagnant wages. This has left us with a society characterized by inequality. As Nobel Prize-winning economist Joseph Stiglitz and his coauthors write:

> "Perceptions of inequality, redistribution, and national identity changed a great deal over the course of the twentieth century."
>
> Source: Piketty, Thomas. *Capital in the Twenty-First Century*. (2014) p349.

> *"In the United States, the share of wealth owned by the richest one percent of the adult population has exploded, from 22 percent in the late 1970s to 37 percent in 2018. Conversely, over the same period, the wealth share of the bottom 90 percent of adults declined from 40 percent to 27 percent. Since 1980, what the bottom 90 percent has lost, the top one percent has gained."*[41]

Figure 1 shows how income gains among the wealthiest households have far outpaced income gains among less affluent households over the past four decades. The share of the nation's total household income going to the top 1 percent of households rose from 7.4 percent in 1979 to 13.5 percent in 2017. Meanwhile, the share going to the bottom 80 percent over the same period fell from 58.6 to 53.0 percent.[42]

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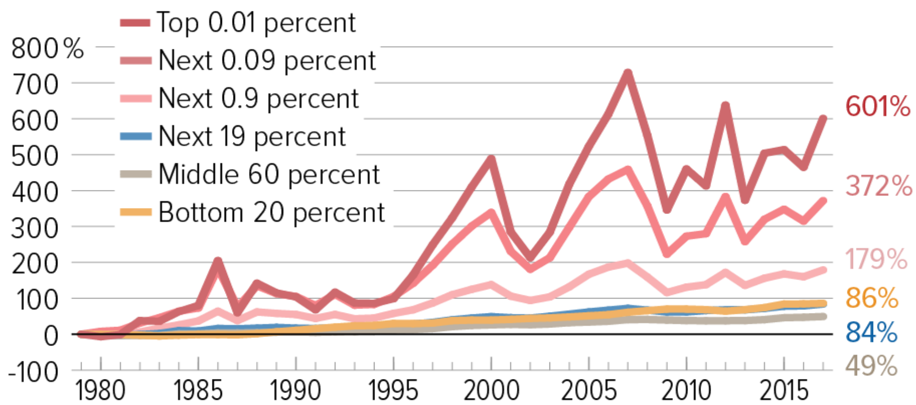
[39] Anand, Praharsha. "Pros and cons of breaking up big tech" *IT Pro*. March 5, 2021.
[40] "Factbox: Key arguments in the U.S. antitrust suit versus Google" Reuters. October 20, 2020.
[41] Stiglitz, Tucker, and Zucman. "The Starving State: Why Capitalism's Salvation Depends on Taxation" Foreign Affairs. January/February 2020.
[42] Marr, et al. "Asking Wealthiest Households to Pay Fairer Amount in Tax Would Help Fund a More Equitable Recovery" Center on Budget and Policy Priorities. April 22, 2021.

Figure 1. Percent Change in Income After Transfers and Taxes Since 1979



Source: Marr, et al. Center on Budget and Policy Priorities. April 22, 2021.

Policymakers cannot and should not *prevent* entrepreneurs from creating new businesses and financiers from profiting by their investments, but they can at least enforce existing antitrust laws to make sure that some people do not benefit too much from their business advantages, and that all entrepreneurs and business owners have a fair chance to share in the wealth.

5. Imposing antitrust fines on large businesses raises revenue for the government.

> "The U.S. government took in $20.3 billion in fines and penalties in fiscal year 2018. Of that total, $9.9 billion came from fines, penalties, and forfeitures based on customs, commerce, and antitrust laws."
>
> Source: USAfacts.org. January 20, 2020.

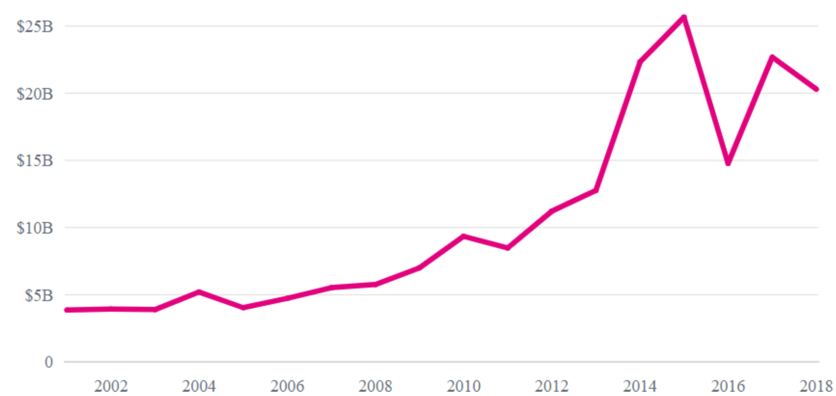
Antitrust fines can be a source of revenue for the government. In 2019, for example, Facebook paid a $5 billion penalty and agreed to submit to new Federal Trade Commission restrictions regarding user privacy. It was one of the largest penalties ever assessed by the U.S. government for any violation.[43]

As significant as the 2019 Facebook penalty was, the antitrust enforcement fines that the U.S. government has imposed on Big Tech companies is less than those imposed by other countries. For instance, the European Commission has fined Google more than $9 billion.[44] The European Commission is also issuing antitrust charges against Apple in relation to its pricing and commission practices with its App Store, which it says break EU competition rules. Apple's fine could be 10 percent of

[43] "FTC Imposes $5 Billion Penalty and Sweeping New Privacy Restrictions on Facebook" Federal Trade Commission. July 24, 2019.
[44] Sagers, Chris. "Antitrust and Tech Monopoly: A General Introduction to Competition Problems in Big Data Platforms" Testimony Before the Committee on the Judiciary of the Ohio Senate. October 17, 2019.

its annual revenue, or as much as $27 billion (based on Apple's annual revenue of $274.5 billion).[45] If other country's fines are any indication, the U.S. goes too easy on big business.

Figure 2. Estimated Federal Government Revenue from Fines and Penalties



Source: USAfacts.org. January 20, 2020. Adjusted to 2018 dollars.

6. Antitrust is the best oversight tool we have. It is cautiously applied and less error-prone than alternatives such as sector-specific regulation.

Sometimes it is hard for regulators to know whether to apply antitrust law in a particular case. Mergers and acquisitions are a good example. There is often uncertainty about whether proposed merger will be good for competition overall or bad for competition. But unlike other areas of regulation, antitrust enforcement is guided by "error-cost analysis." Overseers consider the potential costs of false positives (i.e., blocking a procompetitive merger or condemning efficient conduct) as well as false negatives (i.e., permitting an anticompetitive merger or allowing conduct that unfairly excludes rivals).[46] Legal scholars have argued that in antitrust cases, courts have appropriately adopted this method of

> "The maintenance of a free market is as much a matter of constant policing as the flow of traffic on a busy intersection. It does not stay orderly by trusting to the good intentions of the drivers or by preaching to them. It is a simple problem of policing, but a continuous one." […]
>
> "The competitive struggle without effective antitrust enforcement is like a fight without a referee."
>
> Source: Thurman Arnold, head of U.S. Antitrust Division from 1939-1943.

[45] Warren, Tom. "EU accuses Apple of App Store antitrust violations after Spotify complaint" *The Verge*. April 30, 2021.
[46] Melamed, Douglas. "Antitrust Law and Its Critics" Forthcoming in *Antitrust Law Journal, vol 83*. 2020.

evaluation in order to avoid false positives, even if it allows some anticompetitive conduct to occur. This suggests that antitrust laws are *not* too harsh on businesses when it comes to decisions about enforcement.

Professor Douglas Melamed of Stanford Law School writes:

> *"Antitrust law is a law of general application that applies to almost all industries. Antitrust enforcers and tribunals will thus not have deep industry expertise, comparable to that of a sectoral regulator, except perhaps in the tiny portion of industries that have been subject to repeated antitrust scrutiny. Because antitrust principles must be applicable to all industries, they cannot be fashioned to fit the idiosyncrasies of particular industries. Fact-finding, or more precisely application of general principles to very diverse facts, thus does the heavy lifting in antitrust enforcement."*[47]

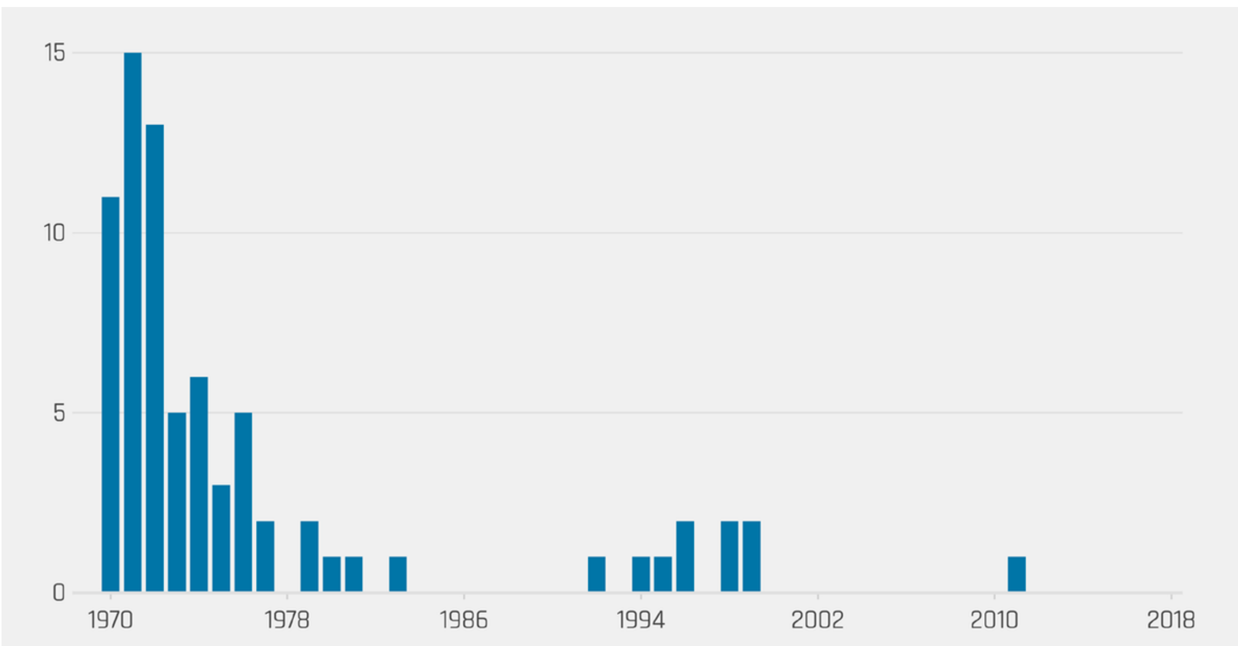
Acknowledging these enforcement risks, courts have accordingly crafted a "pro-defendant body of jurisprudence."[48] Because these cases are dealt with by courts rather than by politically appointed regulators and agency staff, the antitrust laws that we have are a better mechanism for overseeing commerce and trade than other regulatory mechanisms that would be invoked if we were to get rid of antitrust law altogether.

[47] Ibid.
[48] Devlin, Alan, and Michael Jacobs. "Antitrust Error" William & Mary Law Review. 52:1 (2010-2011).

APPENDIX A. Antitrust Enforcement in the United States

Researchers at Yale University who study antitrust enforcement data point out that there has been a decline in antitrust enforcement in the United States in recent decades. The federal government, through its two agencies—the Antitrust Division of the Department of Justice and the Federal Trade Commission—are bringing fewer antitrust cases to court than in decades past. Additionally, the researchers at Yale argue that since the 1970s, "the range of conduct that would be condemned by courts as anticompetitive has decreased significantly," and that "the evidence required to prove any particular anticompetitive harm has increased appreciably, resulting in much more freedom for business to seek profit through anticompetitive means." The chart below is based on data from the Department of Justice.

The Decline of Anti-Monopoly Enforcement in the United States
U.S. Department of Justice, 1970-2016

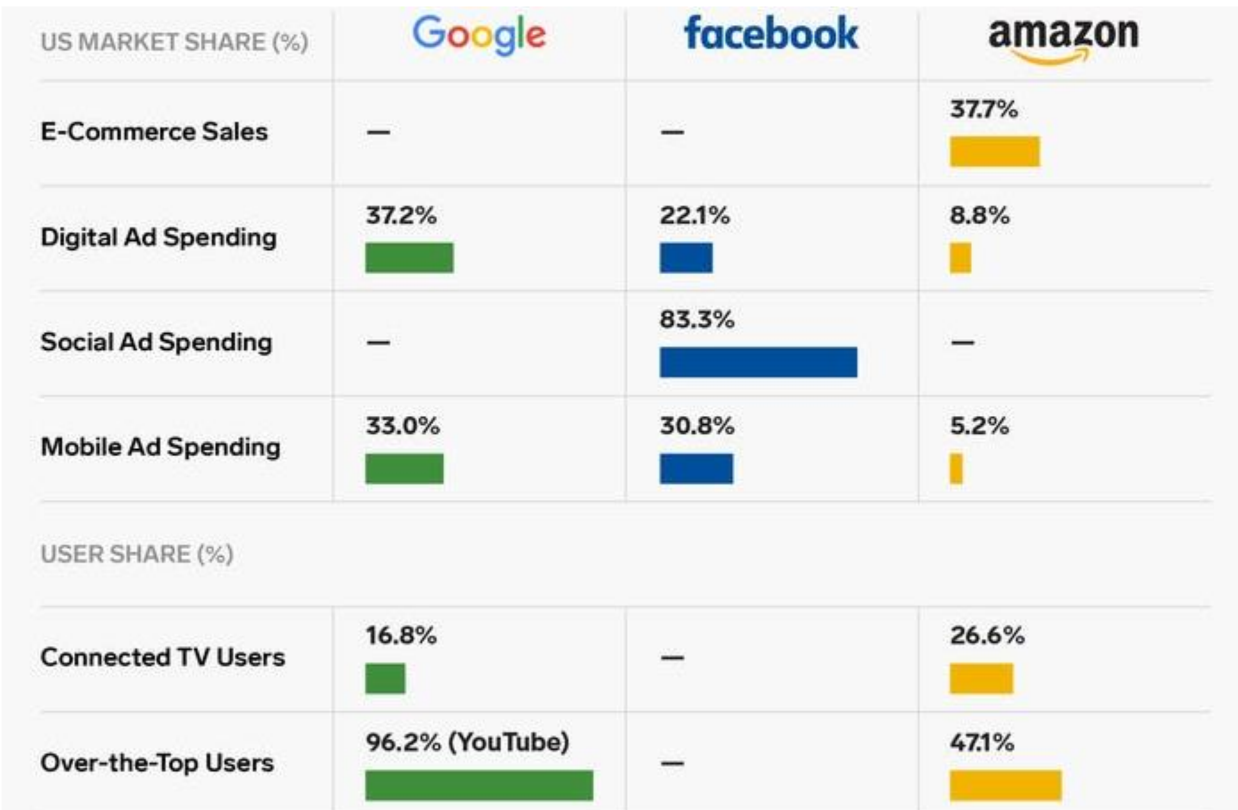


Source: "Workload Statistics," available at https://www.justice.gov/atr/division-operations.
See also: "Antitrust Enforcement Data" Thurman Arnold Project at Yale. Accessed October 14,2021.

APPENDIX B. Market Dominance for Certain Large Technology Companies

Google, Facebook, and Amazon have captured large portions of their respective markets. For instance Google (through YouTube, which it owns) dominates the user video space. About 83 percent of all social ad spending online goes to Facebook, and almost 38 percent of all e-commerce sales in the U.S. are made through Amazon.com.

Share of Key Online U.S. Markets



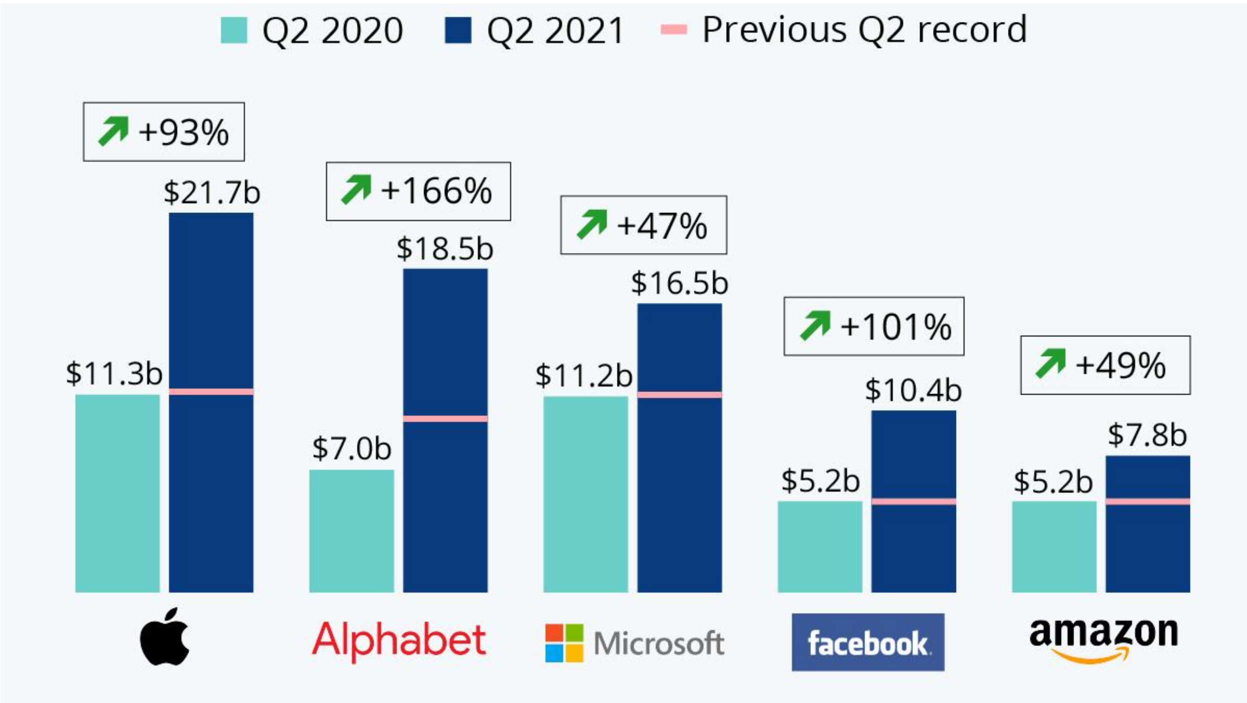
US MARKET SHARE (%)	Google	facebook	amazon
E-Commerce Sales	—	—	37.7%
Digital Ad Spending	37.2%	22.1%	8.8%
Social Ad Spending	—	83.3%	—
Mobile Ad Spending	33.0%	30.8%	5.2%
USER SHARE (%)			
Connected TV Users	16.8%	—	26.6%
Over-the-Top Users	96.2% (YouTube)	—	47.1%

Source: Oreskovic, Alexei. "This chart shows just how much Facebook, Google, and Amazon dominate the digital economy" *Business Insider*. June 16, 2019.

APPENDIX C. Record Profits for Large Technology Companies

The chart below shows the net income (i.e., profit) for selected tech companies in the second quarter of 2021, compared to the year before. All of the companies below have experienced strong profit growth in recent quarters and in recent years. Some analysts believe that the pandemic had a "stimulating effect" on online advertising and consumer spending.

Net Income of Selected Tech Companies in the Second Calendar Quarter of 2021 vs. 2020



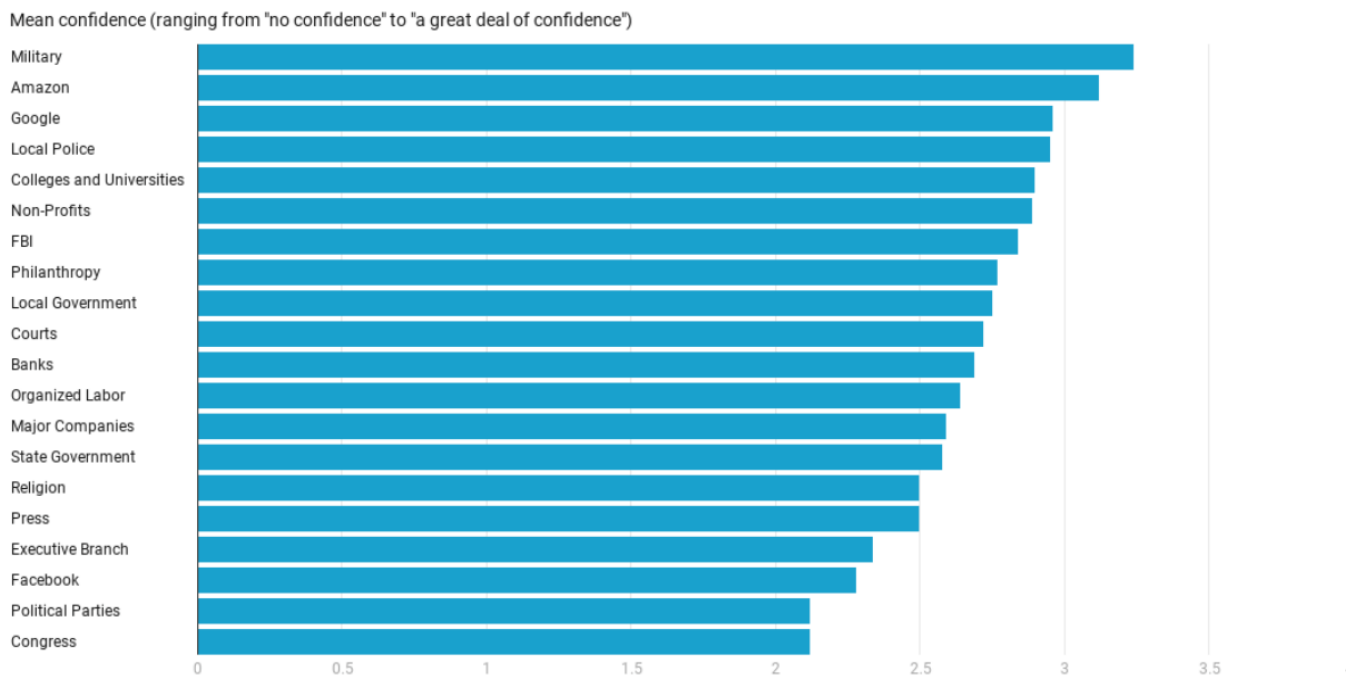
Note: Data from company filings.

Source: Richter, Felix. "Tech Giants Crush Profit Records in Q2" Statista. July 30, 2021.

APPENDIX D. Consumer Opinion of Big Technology Firms

One of the main justifications for antitrust laws is to protect consumers against businesses that allegedly seek to prey upon them. Yet it is not clear that most consumers agree with that view of the relationship. Some big technology companies are among the most trusted and beloved institutions in the country. According to a survey conducted by researchers at Georgetown University, Amazon and Google ranked second and third, behind only the military. Congress ranked last among the list of choices given.

Consumer Responses to the Survey Question,
"How much confidence do you have in the following institutions?"



Source: Stapp, Alec. "[10 Myths About Big Tech and Antitrust]" Progressive Policy Institute. July 28, 2020.

APPENDIX E. Rhetorical Sample from President Joe Biden (for Negative side)

Part of President Biden's economic strategy is to increase enforcement of antitrust laws. Below is an excerpt of remarks delivered by President Biden on July 9, 2021, at the signing of an executive order that included provisions toward this goal:

> *Capitalism without competition isn't capitalism; it's exploitation. Without healthy competition, big players can change and charge whatever they want and treat you however they want. And for too many Americans, that means accepting a bad deal for things that can't go — you can't go without.*
>
> *So, we know we've got a problem — a major problem. But we also have an incredible opportunity. We can bring back more competition to more of the country, helping entrepreneurs and small businesses get in the game, helping workers get a better deal, helping families save money every month. The good news is: We've done it before.*
>
> *In the early 1900s, President Teddy Roosevelt saw an economy dominated by giants like Standard Oil and JP Morgan's railroads. He took them on, and he won. And he gave the little guy a fighting chance.*
>
> *Decades later, during the Great Depression, his cousin Franklin Roosevelt saw a wave of corporate mergers that wiped out scores of small businesses, crushing competition and innovation. So he ramped up antitrust enforcement eightfold in just two years, saving families billions in today's dollars and helping to set the course for sustained economic growth after World War Two.*
>
> *He also called for an economic bill of rights, including, quote, "the right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies."*
>
> *Between them, the two Roosevelts established an American tradition — an antitrust tradition. It is how we ensure that our economy isn't about people working for capitalism; it's about capitalism working for people.*
>
> *But, over time, we've lost the fundamental American idea that true capitalism depends on fair and open competition. Forty years ago, we chose the wrong path, in my view, following the misguided philosophy of people like Robert Bork, and pulled back on enforcing laws to promote competition.*
>
> *We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And where — what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents.*
>
> *I believe the experiment failed. We have to get back to an economy that grows from the bottom up and the middle out.*
>
> *The executive order I'm soon going to be signing commits the federal government to full and aggressive enforcement of our antitrust laws. No more tolerance for abusive actions by monopolies. No more bad mergers that lead to mass layoffs, higher prices, fewer options for workers and consumers alike.*
>
> *My executive order includes 72 specific actions. I expect the federal agencies — and they know this — to help restore competition so that we have lower prices, higher wages, more money, more options, and more convenience for the American people.*

Source: Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy. July 9, 2021. whitehouse.gov.