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Invigorating Antitrust Without Stifling Economic Progress

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JULY 2025

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Abstract

In recent decades, antitrust law has become harder and harder to enforce. This brief article proposes a number of sensible and practical antitrust reforms that would help to invigorate antitrust enforcement against a wide range of anticompetitive practices, including by dominant tech firms. However, I also caution against more radical populist antitrust proposals, which are concerned primarily with how big a firm is and not whether it is engaging in harmful conduct. By failing to distinguish between anticompetitive behavior and desirable economic growth, such policies would cause severe economic damage. More judicious antitrust reforms, like those advocated here, would invigorate competition without stifling economic progress.

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I. INTRODUCTION

In the last decade, antitrust has surged into the public spotlight. There is a widespread view that antitrust law must do more to address the abuses of large companies. This is fueled in large part by the rising prominence of Big Tech companies, whose vast web of products and services touch upon many aspects of our daily lives and public discourse.

As an economist and law professor specializing in antitrust, I have written many articles advocating pro-enforcement policies in a range of areas, including the tech sector. Below, I outline a number of policy measures that would generate substantial economic benefits for the public. These are sensible, practical opportunities for reform that could be implemented on top of existing laws, avoiding the need for a comprehensive overhaul of the antitrust system.

However, not all reform ideas are equal. A more radical reform effort seeks to reshape antitrust from the ground up, deemphasizing economic harms like high prices and focusing instead on how large corporations might undermine democracy.[1] Grounded in the populist belief that big businesses are inherently bad for society, these proposals advocate drastic preventative measures, such as breaking up large firms or prohibiting them from introducing new products, even if they have not engaged in anticompetitive behavior. Although well-intentioned, these proposals are impulsive and reckless. If enacted, they would have disastrous effects on the public: higher prices, worse products, fewer jobs, and reduced innovation and growth.

Effective antitrust reforms would enhance our economic prosperity, not diminish it. Antitrust's job is to protect competition so that markets produce desirable results for the public. The prevailing antitrust system falls short of that goal, leading to worse economic outcomes for many Americans. However, the solution is not to throttle our most productive businesses just because they're big, but rather to police them and ensure they play by the rules. We don't have to choose between a level playing field and a thriving business sector. By enacting sensible antitrust reforms, we can have both.

II. OPPORTUNITIES FOR PRO-ENFORCEMENT REFORM

Today, it is incredibly hard to win an antitrust case in the United States. Collectively, plaintiffs' win rate is extremely low.[2] Many antitrust doctrines make it very difficult for plaintiffs to demonstrate anticompetitive harm, but courts are often quick to accept theories of why a defendant's conduct might be efficient. Indeed, federal Judge and antitrust scholar Richard Posner once joked that antitrust's predominant legal framework is "little more than a euphemism for nonliability."[3]

Antitrust is grounded in industrial economics, which studies firms, markets, and competition. While this field has evolved significantly over the last 50 years, antitrust law remains heavily influenced by antiquated economic ideas of the 1970s and 80s. Those ideas tended to employ simplistic assumptions that effectively guarantee markets will be competitive and efficient. This leads to an ideology under which antitrust is rarely necessary, because markets can be trusted to thwart bad behavior on their own.

By contrast, much of modern economics is devoted to the study of market *failures*. It is now a matter of mainstream consensus that markets regularly fail to elicit vigorous competition; that market power is pervasive and frequently long-lasting; and that strategic anticompetitive behavior is often both feasible and lucrative. But antitrust law has not kept up with these advances in economic understanding. As a result, it tends to err too strongly on the side of inaction.

Fortunately, there are numerous practical reform possibilities that would strengthen antitrust enforcement significantly without jeopardizing economic growth and prosperity. In the balance of this section, I outline a few promising options (although this selection is certainly not exhaustive). The following section then explains why more extreme populist reform proposals are misguided and would undermine economic progress while also failing to achieve their intended goal of curbing firms' political influence.

A. Monopoly Leveraging

In antitrust, unilateral conduct is generally harder to challenge than agreements between two or more firms. Sometimes there are good reasons for this. But in some cases, the distinction is largely arbitrary, undermining antitrust enforcement for no good reason. Here I discuss a prominent example of the latter problem. Antitrust reforms designed to correct this problem would empower sensible enforcement not only against Big Tech firms, but against monopolists of all stripes.

This potential reform would apply to cases involving what economists call "monopoly leveraging."[4] This is where a defendant exploits (or "leverages") a monopoly in one market to impair competition in a second, related market. Many antitrust cases involving dominant firms involve allegations of this kind of leveraging. The famous *Microsoft* case was an example of this,[5] as is the (ongoing) *Google* ad tech case.[6]

In fact, some of the chief antitrust concerns surrounding dominant platforms involve this dynamic. Many leading platforms also sell their own goods on the platform, leading them to compete with some of the businesses who use the platform.[7] In such cases, the firm may leverage its control of the platform to exclude competing sellers that rely on the platform, potentially making it much harder for those sellers to compete effectively. Indeed, platforms are often described as "gatekeepers" because they typically have complete, unilateral control over what products can be sold on the platform.

The problem is, if monopoly leveraging involves purely unilateral conduct (as it often does, particularly in cases involving platforms), then it cannot be challenged unless the anticompetitive effects in the second market are so extreme as to give the defendant a second monopoly.[8] This is because only one antitrust statute applies to unilateral conduct, and it requires that that the conduct "monopolizes" a market.

Consequently, for this kind of anticompetitive conduct to be actionable, it must almost completely destroy competition in the second market. Because this requirement is so demanding, it necessarily permits a lot of harmful conduct to go unpunished. It is a little like stipulating that a driver can be reprimanded for speeding only if he exceeds the speed limit by at least 50 miles per hour.

To illustrate, consider a hypothetical. Google controls a leading mobile app store, the Google Play Store; and it also offers its own AI Chatbot, Gemeni. Suppose that Google unilaterally removed the ChatGPT app from its Google Play Store. We will suppose that Google has no good reason for excluding ChatGPT; it is merely exploiting its powerful app store to make life harder for its leading AI competitor.

Although this conduct seems transparently anticompetitive, it cannot be challenged under current law. The problem is that Google's conduct in this hypo is unlikely to give Google a full-blown monopoly in the chatbot market.[9] Then, because this conduct is also unilateral, there is essentially nothing that existing antitrust law can do about it.

In the past, courts would sometimes permit antitrust challenges in such cases. The now-defunct "monopoly leveraging doctrine" prohibited a firm from exploiting a dominant position in one market to "gain a competitive advantage" in a second market. And some courts interpreted this to permit liability even if the conduct was unlikely to give the defendant a monopoly in the second market.[10] However, beginning in the 1990s, courts started to reject this interpretation, primarily because it was seen as inconsistent with the relevant statutory text.[11] The Supreme Court ultimately affirmed the latter position,[12] leading to the demise of the monopoly leveraging doctrine.

The Supreme Court may be right that this is what the text of the Sherman Act implies. But that does not mean it is sensible as a matter of competition policy. It limits antitrust liability in a largely arbitrary way. If a monopolist's unilateral conduct seems clearly anticompetitive, then why should we care if it falls somewhat short of "monopolizing" the second market? Shouldn't *any* meaningful anticompetitive harm in the second market be actionable? In my view, the answer is clearly yes.

Overcoming this limitation would invigorate antitrust enforcement against monopolists, and it would require only a few sentences of new legislative text. All that is necessary is to stipulate that it is unlawful for a firm with monopoly power in one market to exploit that power to impair competition in a second market, even if its conduct is purely unilateral.

Importantly, however, to avoid causing unintended economic damage, any reform along these lines should be clear to require *genuine anticompetitive harm* in the second market.[14] One problem with the old monopoly leveraging doctrine was that courts sometimes misused it by effectively punishing large firms for possessing scale-based advantages (e.g. lower costs) or other efficiencies that gave them an edge over smaller businesses.[15] This fundamentally misunderstands the purpose of antitrust law. The goal is not to punish firms for being efficient (on the contrary, that should be encouraged), but rather to discipline conduct that undermines competition by impairing rivals' capacity to compete. Failing to draw this distinction would risk causing the same kind of economic harm as the populist antitrust proposals I discuss later.

In fact, this reform would also solve a separate problem that currently prevents effective enforcement against platforms that unilaterally exclude rival sellers. At present, courts generally lump such behavior into a special category of conduct called a "unilateral refusal to deal." This type of conduct is virtually impossible to challenge *even if* it is likely to fully monopolize a second market. There is a long and complex history to this; I have discussed the problem and potential solutions elsewhere.[16] But the important point is that, if the kind of reform suggested above were implemented, this would no longer be an issue, as there would be a new statutory basis for enforcement that would not be undermined by existing doctrine.

B. Antitrust Reforms for Tech Platforms

The reform proposed in the previous section would apply to a range of behaviors by digital platforms but is not limited to the tech sector. Here I discuss two other possible reforms that are aimed specifically at digital platforms.

i. Getting Tougher on Platform MFNs and Anti-Steering Rules

In a most-favored nation (MFN) agreement, one party agrees to offer the other party terms (usually a price term) that are at least as favorable as those she offers to third parties. MFNs are relatively common and can be reasonable in many situations.[17] As a result, they usually do not trigger antitrust liability.

However, powerful platforms can use MFNs in harmful ways. For example, a dominant platform marketplace could require sellers to promise that they will not set lower prices for their goods on competing platforms. This enables the dominant platform to charge sellers higher fees than rival platforms without having to worry that sellers will pass through those costs in the form of higher prices (which would push consumers to rival platforms). Economic research shows that this kind of platform MFN will often lead sellers to charge higher prices across all platforms, injuring consumers and sellers.[18]

Importantly, many platform MFNs are economically distinct from those employed by more traditional businesses. As a result, existing antitrust laws are not well suited to evaluate them and tend to understate the risk of anticompetitive harm. Policymakers could thus bolster antitrust enforcement against platforms by subjecting platform MFNs to more aggressive antitrust rules.[19]

Another reform opportunity involves platform "anti-steering" restrictions. A platform marketplace offers a way for buyers and sellers to connect and transact. Typically the platform does not set the price of a seller's goods; instead, it charges fees to sellers on all transactions (usually a prespecified percentage of the price set by the seller).

A dominant platform may charge sellers significantly higher fees than alternative outlets. For example, Apple charges a 30% commission on all app purchases in its app store; it also charges 30% on all in-app purchases or subscription fees. Thus, if a user signs up for HBO Max through the Max iPhone App, then 30% of her monthly subscription fees will be diverted to Apple. However, a seller does not have to pay Apple if the user signs up or purchases content through an alternative medium. For example, if a user signs up for HBO Max on a PC, then all of her subscription fees go to HBO.

Sellers often have an incentive to charge higher prices to users who sign up through a high-commission platform like Apple's app store. This is just like how a sales tax leads retailers to charge higher prices for goods. The seller also has an incentive to "steer" users toward alternative platforms that charge lower fees. For example, the HBO Max app on iPhone could in principle attempt to tell users that they could get a better subscription price if they sign up on a PC.

However, powerful platforms prohibit this using "anti-steering" rules. This prevents sellers from notifying consumers that they could get a better price on another platform. As a result, consumers often have no idea that they are paying more than they have to. However, courts have so far not been receptive to federal antitrust claims challenging platform anti-steering restrictions.[20]

Healthy competition requires that consumers know what their options are. Anti-steering rules thus undermine competition by preventing sellers from conveying valuable information to consumers. This diminishes the platform's incentive to charge competitive prices: it need not worry that consumers will turn to lower-priced platforms if its consumers are unaware that cheaper alternatives exist. Policymakers could thus stimulate competition and benefit both sellers and consumers by developing stricter antitrust rules for anti-steering restrictions.

ii. Repealing the Am-Ex Market Definition Rule

Platforms are "two-sided" (or multi-sided) in the sense that they deal with distinct but interdependent customer groups. For example, Uber connects drivers and riders and an app store connects app developers and app users. In the Supreme Court's AmEx antitrust decision, the Court held that platform markets typically must be defined to include both sides (i.e. both user groups).[21]

The upshot is that, to establish anticompetitive effects, a plaintiff must balance (or "net out") the effects of a platform's conduct on both user groups combined. The problem is that a platform's conduct will often affect the two sides differently. It could even harm one side while benefitting the other. In such cases, the welfare balancing required by AmEx is likely to be extremely difficult, if not a practical impossibility. Moreover, the Court's rule is simply not necessary to address the two-sidedness of platform industries.[22] And it is inconsistent with how antitrust operates in other cases where a defendant's conduct affects distinct groups of agents.[23] For these and other reasons, most antitrust scholars believe that the *AmEx* decision is seriously problematic and is likely to undermine antitrust enforcement effort against platforms.[24]

Policymakers could bolster antitrust enforcement against platforms by repealing the *AmEx* market definition rule. That would mean that a plaintiff could carry its evidentiary burden by just showing anticompetitive effects on one side of the market.[25] That doesn't mean ignoring the two-sided nature of the industry. It just means that, if there are countervailing benefits on the other side, it would be the defendant's obligation to prove them. This more equitable allocation of evidentiary burdens is how antitrust normally operates. The Supreme Court was mistaken to deviate from that tradition.

C. Banning Settlements that Extend Drug Monopolies

Pharmaceutical firms sometimes enter into anticompetitive patent settlements—often called "pay-for-delay" agreements—to extend the duration of drug monopolies.[26] These deals delay entry by generic competitors. This forces the public to spend tens or hundreds of millions of dollars more for a drug than they would otherwise pay. At present, however, such deals are unnecessarily difficult to challenge on antitrust grounds.

To get a sense of the problem, it is important to note that many granted patents are in fact invalid: they should not have been awarded in the first place. In such cases, other parties can challenge the patents as invalid; if successful, such a challenge effectively terminates the patent.

In a pay-for-delay settlement, a generic drug maker challenges the validity of a patent on a brand-name drug. If successful, generic drug makers will then be able to enter the market relatively soon, rather than waiting for the patent to expire. However, the settlement prevents this. It stipulates that the patent owner (the brand-name firm) will pay the generic firms to abandon their patent challenges and stay out of the market until the patent is about to expire. These payments are often very large, suggesting that the brand-name drug sellers recognize that their patents are very likely invalid.[27] As such, the settlement enables the drug monopoly to persist far longer than it would be expected to last if the patent challenge had been litigated to conclusion.

To illustrate, suppose the patent is just 20% likely to be valid, and that there are 15 years left before the patent expires. Then, if the patent is challenged, the expected lifetime of the drug monopoly is $.2 \times 15 = 3$ years. When generic challengers threaten to sue, they may settle with the brand-name firm by agreeing upon a date at which the generic firms will be allowed to enter the market. Thus, the patent owner were barred from paying the generic firms to accept a later entry date, they would not agree to delay entry for much longer than 3 years.[28] That would be a reasonable outcome, as the short duration of the monopoly is commensurate with the relatively low quality of the patent. But in a pay-for-delay settlement, the patent owner will simply pay the generic firms to stay out of the market for the full 15 years, effectively increasing the lifetime of the drug monopoly by 12 years.

In 2013, the Supreme Court held that pay-for-delay settlements may violate antitrust law.[29] However, the Court rejected the FTC's request that the settlements be deemed illegal *per se*. Such "per se" rules make antitrust liability essentially automatic and are reserved for practices that are obviously anticompetitive. Instead, the Court opted for a more open-ended legal framework that typically requires lengthy litigation every time a pay-for-delay settlement occurs. This makes antitrust enforcement vastly more time-consuming and expensive.

This was a mistake, however. When a payment is conditioned on delayed entry, there is simply no material question as to whether the settlement is anticompetitive. Thus, the more open-ended legal framework advocated by the Supreme Court is unnecessary; it merely serves to protract and discourage antitrust challenges to harmful agreements that steal from the public.

Congress should correct this by declaring that pay-for-delay settlements are illegal per se. Such a rule should extend to both cash and noncash forms of payment.[30] By preventing unjustified extensions of drug monopolies, this would confer massive savings to the public.

D. Civil Fines

Readers have likely heard of numerous cases in which European regulators have imposed large fines of on companies found to have violated EU competition laws.[31] But one almost never hears of this happening in the United States. Why not?

Surprisingly, the American antitrust agencies have little ability to seek fines in most antitrust cases. The Justice Department's Antitrust Division can pursue fines for *criminal* antitrust violations, which almost always involve price fixing. But the overwhelming majority of antitrust cases, including virtually all cases involving monopolists, are civil rather than criminal. And the Justice Department has no general authority to seek fines for civil antitrust violations.[32] Nor does any statute give such general authority to the Federal Trade Commission (FTC). Courts have held that the FTC can seek "equitable" monetary relief in some situations.[33] But the scope of this authority is hotly contested, and historically the FTC has not attempted to exercise it very often.[34]

Instead, in cases involving misconduct by monopolists, the antitrust agencies rely mainly on injunctions: court orders to abstain from bad conduct. To be sure, halting harmful behavior is crucially important. But a "sin-no-more" remedy, without more, may often fail to deter bad behavior. Absent antitrust penalties, anticompetitive behavior is highly profitable; that's why firms do it. So, if the only punishment for anticompetitive behavior is an order to stop doing it, then an antitrust defendant will still end up making money off its misconduct. And that means other firms will not be deterred from repeating it.

Authorizing the antitrust agencies to seek fines for civil antitrust violations would be a simple and effective way to bolster antitrust enforcement. Not only can fines be used to deter bad behavior, but they achieve that result without risking unintended economic harm. Some extreme interventions (e.g. a breakup) could also be used to deter, but they could end up causing serious collateral damage. For example, divestitures (forcing a firm to sell off part of its business to an independent company) sometimes fail, with the divested business unit effectively dying. But killing a productive business entity means killing economic value and jobs. That doesn't benefit anyone. By contrast, fines do not directly intervene in markets and so do not raise this kind of risk.

III. POPULIST ANTITRUST PROPOSALS ARE MISGUIDED AND HARMFUL

A new populist antitrust movement seeks a radical reorientation of antitrust's goals. It downplays economic harms like higher prices, focusing instead on broader political concerns. It contends that we should view antitrust as a tool for protecting our democracy from the political influence of large firms.[35] As such, antitrust populists view corporate "bigness" as inherently harmful to society.[36]

The is in contrast to mainstream antitrust policy, which views *anticompetitive behavior* as the key problem to address. Its goal is to protect the competitive process and thereby ensure that markets generate better economic outcomes for the public: lower prices, better products, more innovation and economic growth, and so on. This leads to a more nuanced view toward bigness, as explained further below.

Unsurprisingly, these policy disagreements lead to very different policy proposals. Under mainstream antitrust policy, it is important to distinguish anticompetitive behavior from benign or procompetitive practices. As a result, in most cases, we must investigate conduct before we can determine whether liability is appropriate. By contrast, antitrust populists support extreme measures that do not require evidence of anticompetitive conduct. For example, they support mandatory breakups for large firms.[37]

In other recent work, I have explained in detail why antitrust populism is so misguided.[38] In what follows, I will briefly outline a few of the most important reasons for this. I then discuss practical problems with some recent populist-inspired legislative proposals.

A. Populist Reforms Would Undermine Economic Growth and Prosperity

Populist antitrust proposals would cause extreme economic damage. They are grounded in a simplistic vision of the economy in which small firms are responsible for all progress, while big businesses exist only to steal from the public. But, as with so many complex policy issues, the truth is not nearly so black and white.

Most big firms are big because they have offered something especially valuable to the public—often lower prices or better products.[39] In many markets, a firm's scale (and hence its size) is a major driver of production efficiencies or product quality.[40] In such markets, consumers are better off with a relatively small number of large firms, as opposed to a large number of small firms. Bigness may also be a byproduct of innovation. If a firm introduces a new or significantly better product, this will attract many consumers, leading it to grow into a large business. When firms grow in this way—by offering something new and valuable, rather than by subverting competition—society benefits.

Of course, this does not mean big firms should be spared from antitrust scrutiny either. If a firm gains a monopoly not by offering consumers a better deal, but by using anticompetitive conduct to suppress competition, then it should face severe antitrust discipline. This would benefit the public by restoring competition. But in such cases, it is the firm's misbehavior, and not merely its size, that justifies antitrust intervention.

This is why mainstream antitrust policy focuses on punishing anticompetitive conduct, and not merely outlawing bigness. Indeed, to outlaw bigness is to outlaw economic growth. It is hard to overstate how detrimental such a policy would be to our economic prosperity. It would be devastating not merely to corporate executives, but to the countless consumers, workers, and trading partners who benefit from the economic activity of successful businesses. Indeed, our economy is powered in large part by big businesses. It is naïve to think we can eliminate them without suffering severe repercussions.

It is helpful to draw an analogy between large firms and pharmaceutical companies. Everyone is familiar with examples of pharmaceutical firms engaging in egregious misbehavior, such as Purdue Pharma's actions that fueled the opioid epidemic. However, most people also recognize that the solution to this problem is not to eliminate pharmaceutical firms; they generate too much value for society. Instead, the best solution is to regulate their behavior and to punish them severely when they misbehave. The same is true of large firms more generally.

Antitrust populists sometimes attempt to couch their proposals in terms of curbing anticompetitive behavior, rather than penalizing bigness as such. But on closer inspection, it is clear that this is a pretext, as they make no effort to limit their proposed interventions to cases where firms misbehave. Instead, they propose more-or-less automatic interventions that are targeted specifically at large firms.

For example, populists say that we should categorically prohibit large platforms from introducing new products, because, if we do not, they will inevitably engage in bad behavior, such as unfairly prioritizing their own products or perhaps even excluding rivals from the platform.[41] This policy would come at a huge economic cost. Every year, platforms introduce countless new (and often popular) products, but that would come to a grinding halt. This is vastly more severe than necessary to address concerns about platform misconduct. As noted above, most platform conduct of this kind is unilateral and not challengeable under existing law. Thus, the obvious solution is to update the law so that this kind of misconduct can be effectively challenged. That would address the relevant danger without unnecessarily preventing countless new products from coming to market.

Incidentally, this example is illustrative of a concerning trend within antitrust populism, which is that many of its proposals involve *restraining* competition rather than invigorating it.[42] Preventing large firms from introducing new products is simply a legislative ban on competitive entry. But antitrust is supposed to eliminate barriers to competition, not erect new ones. If populists were genuinely concerned about anticompetitive conduct they would target their interventions accordingly. Instead, their proposals simply ban large firms from participating in the competitive process at all. This betrays an agenda focused not on curbing misconduct, but on suppressing the growth of large businesses.

B. Populist Reforms Would Do Little to Curb Firms' Political Influence

One might think that, while antitrust populism would likely reduce our economic prosperity, it could perhaps make up for it by better protecting our democracy. But, for a number of reasons, this is not the case.[43] One reason is that, in light of how the courts have interpreted the constitution, populist reform efforts would not do much to limit firms' political influence. Thus, even if one shares the view (as I do) that firms have too much influence on our politics, it does not follow that antitrust populists are on the right track.

Antitrust populists argue that bigness doesn't just create economic power; it also creates political power, as large firms can marshal their vast resources to influence the government through things like lobbying and campaign donations. Thus, they argue, we must break up large firms to prevent companies from having such an outsized influence on our politics. Sounds simple enough.

The problem is that the courts have long held that antitrust cannot prevent firms from collectivizing their political activity (e.g. through coordinated lobbying efforts), regardless of what policies the firms are advocating.[44] The Supreme Court has indicated that this antitrust immunity is compelled by the First Amendment, so Congress cannot eliminate or diminish this protection.[45]

As a result, making firms smaller will do little to curb their political influence. Sure, it would make them less powerful *individually*, but *collectively* they will still have immense resources. And they are free to pool those resources and lobby in concert. In fact, it is not just lobbying or political donations that firms can collectivize, but essentially any kind of advocacy or political activity—anything that courts would characterize as "speech" for First Amendment purposes.

In fact, such coordinated advocacy is ubiquitous. A huge amount of lobbying is undertaken not by individual large firms, but by trade organizations representing many firms in an industry. Indeed, a recent empirical study finds that, during the period 1999-2017, four of the top five U.S. lobbyists were not individual companies, but large trade organizations representing many firms.[46] As an example, the second biggest lobbyist over that period was the National Association of Realtors. This is noteworthy, because the market for realtor services is characterized by a very large number of small firms. And yet they spend a huge amount of money on lobbying.

In fact, the same study finds that there is no statistically significant correlation between market concentration and total lobbying (as a percentage of revenue) within an industry.[47] Accordingly, the evidence does not support the populist claim that concentrated markets have systematically more influence on our politics.

Thus, while it may be intuitively tempting to think that breaking up big firms would protect our democracy from private influence, that is quite unlikely. Instead, it would cause immense economic damage while doing very little to suppress firms' political influence.

C. Populist-Inspired Legislative Proposals Confuse Antitrust and Regulation

Some recent proposed bills, while avoiding explicit references to populists' political motivations, are clearly inspired by antitrust populism. A notable example is the American Innovation and Choice Online Act (AICOA).[48] The bill received some support within both parties, although it ultimately failed to garner a floor vote.

Most of AICOA's text was aimed at "self-preferencing" by the largest platforms. This typically involves a platform taking relatively subtle measures to "nudge" consumers toward its own products. For example, Amazon and Apple have been accused of placing their own products and apps atop user search results, giving them a slight edge over competing products. And Google has faced criticism for including its own products (e.g. Google Maps) within certain search results when it could have included rival products instead.

AICOA would help to curb the kind of monopoly leveraging I discussed earlier. For example, if a platform removed competing products for no good reason, that conduct would very likely be illegal under AICOA. However, AICOA would go much farther than that. It would effectively ask courts to act as regulators of platform marketplaces. Most notably, one provision of the Bill would require courts to develop and apply "standards mandating the neutral, fair, and nondiscriminatory treatment of all business users."

Such standards are somewhat common in regulatory law but are wholly foreign to antitrust. This may not seem like an important distinction, but in fact there are immense practical and legal differences between regulation and antitrust. A regulatory regime (e.g. telecom regulation) has narrow scope: it applies to a single industry. It also has a regulatory agency packed with technocrats who are experts in that industry and who can help to create and enforce the agency's rules. And typically such enforcement actions are overseen by administrative judges, which both ensures a high level of subject matter expertise and offers streamlined adjudication procedures to reduce the cost of enforcement.

Thanks to these specialized resources and procedures, regulation can afford to be relatively hands-on. But antitrust does not have the same luxury. Antitrust has an extremely broad responsibility: it applies to all industries at once. And its enforcement actions run through the ordinary federal court system.[49] This means not only that cases are adjudicated by generalist judges who are not experts in the relevant industry, but also that enforcement is much slower and more expensive, since the operative procedures are not specially tailored to antitrust enforcement.

Thus, antitrust cannot hope to micromanage firms in the same way that regulation often can. For this reason, antitrust limits its interventions to cases where there is concrete evidence of a material threat to competition. It does not attempt to determine what behavior counts as "fair" or "neutral" within a given industry. Antitrust is simply too blunt an instrument for that. Thus, by asking federal courts to formulate such hands-on standards, AICOA sets them up for failure.

One might think that it would be easy for courts to distinguish platform "self-preferencing" from neutral and fair behavior. But that is not the case. In most cases, it is actually *impossible* for a platform to treat all products equally. For example, when search results are displayed on a platform, the products will have to be placed in some order. Only one product can be ranked first. It is impossible to order the results without advantaging some products (the higher ranked ones) over others. Similarly, when Google chooses which map application to include in its search results, it will necessarily preference one such application over competitors, whether it is Google Maps or someone else.

As a result, it is not possible to simply order platforms to treat everyone the same. AICOA would thus require courts to micromanage all kinds of platform decisions to ensure they are sufficiently "fair" in some sense. This includes not only the way they order search results, but almost any platform behaviors that necessarily divert more user attention to one product than another. And it would seemingly require courts to answer awkward and subjective questions, such as which product brand is the most "deserving" of the most visible placement within a platform's storefront. Requiring federal courts to do all these things—and to develop all of the legal rules and standards on their own—is simply not realistic.

The monopoly leveraging proposal I discussed above would allow antitrust enforcers to address platform conduct that materially harms competition by excluding rivals from the platform's marketplace. But it would not require courts to micromanage all of the minor or subjective decisions that all platforms must make on a regular basis, most of which have no perceptible effect on competition. This is consistent with antitrust's historical approach of focusing on serious competitive threats rather than attempting to police everything that firms do.

Another problem with AICOA is that, much like the populist writing that inspired it, it focuses myopically on a very small number of very large tech platforms. AICOA is drafted in such a way that it applies only to the world's largest digital platforms. But antitrust's underenforcement problem is not limited to Big Tech; it affects almost all areas of antitrust. If the goal is to reinvigorate antitrust, we need broader reforms. This points to another benefit of the monopoly leveraging reform discussed above, which is that it could apply to all industries, not just Big Tech.

IV. CONCLUSION

Over the last 50 years, federal antitrust law has made it increasingly difficult to challenge anticompetitive behavior, particularly exclusionary practices by monopolists. This has left antitrust increasingly out of touch with modern economics, which takes the threat of anticompetitive business practices much more seriously. To address this problem, this article proposes a number of practical and sensible antitrust reforms that would help to invigorate antitrust enforcement across a range of areas, including Big Tech and pharmaceutical markets. These reforms could be implemented on top of existing laws, avoiding the need for a comprehensive overhaul of the antitrust system.

However, I also caution against more radical populist antitrust proposals, which advocate measures like preemptively breaking up large firms or prohibiting them from introducing new products. Such reckless proposals would cause immense economic damage, leading to higher prices, worse products, and diminished innovation and dynamism. Rather than throttling our most successful businesses, antitrust should focus on policing their behavior and disciplining them when they act in ways that undermine competition. By targeting antitrust reforms at anticompetitive practices, and not merely "bigness," policymakers can invigorate antitrust without compromising economic prosperity and growth.

ABOUT THE AUTHOR

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Notes and References

1 See, e.g., Zephyr Teachout & Lina M. Khan, Market Structure and Political Law: A Taxonomy of Power, 9 DUKE J. CONST. L. & PUB. POL'Y 37 (2014).

2 In rule of reason cases (which comprise essentially all cases not involving price-fixing or mergers), 222 cases reached a final judgment between 1999 and 2009. Only one of them resulted in a win for the plaintiff. See Michael A. Carrier, The Rule of reason: An Empirical Update for the 21st Century, 16 Geo. Mason L. Rev. 827 (2008).

3 Richard A. Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision, 45 U. Chicago L. Rev. 1 (1977).

4 I am presently using the term in the economic sense and not in connection with the monopoly leveraging *doctrine*, which I will discuss later. For discussion of the economics of leveraging, see, e.g., Michael Whinston, Tying, Foreclosure, and Exclusion, 80 Am. Econ. Rev. 837 (1990).

5 Microsoft exploited its Windows operating system monopoly to exclude rivals in the market for web browsers. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

6 A district court recently found Google liable for exploiting certain parts of its ad tech business to exclude rivals in other parts of the ad tech industry. United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Apr. 17, 2025).

7 For example, in addition to operating major app stores (which are platforms), both Apple and Google also offer a wide range of apps, which compete with third-party apps. And Amazon sells many of its own products on its retail platform.

8 At minimum, the conduct must create a "dangerous probability" of acquiring an additional monopoly in the second market.

9 For one thing, Google has only excluded one rival, but there are numerous other significant competitors in the market (Claude, Grok, etc.). Moreover, Google's conduct does not prevent anyone from accessing ChatGPT through other channels, such as on a PC or a non-Android device. Finally, as the recent "DeepSeek" saga demonstrated, entry barriers in AI are not terribly large.

10 See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 275 (2d Cir. 1979).

11 See, e.g., Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 548 (9th Cir. 1991).

12 Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

13 See, e.g., Joseph Kattan, The Decline of the Monopoly Leveraging Doctrine, 9 Antitrust 41 (1994).

14 In this context, anticompetitive harm means that the monopolist's conduct impairs rivals' capacity to compete, thereby increasing the defendant's monopoly power. This harm generally manifests in reduced output, higher prices, or diminished quality or innovation. A common example involves cutting rivals off from an important distribution channel, thus making it harder for them to reach consumers.

15 See, e.g., United States v. Griffith, 334 U.S. 100 (1984).

16 See Erik Hovenkamp, *Platform Exclusion of Competing Sellers*, 49 JOURNAL OF CORPORATION LAW 299 (2024); Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 Yale Law Journal 1483 (2022); Erik Hovenkamp, *Antitrust's Refusal-to-Deal Doctrine: The Emperor Has No Clothes*, CPI Antitrust Chronicle (2024).

17 For example, a retailer may be wary of making a large order of goods from a manufacturer, because if other retailers in the area get a better price from the manufacturer they will be able to set lower retail prices. The manufacturer can allay this concern by promising the retailer that it will never have to pay more than other retailers. By removing a potential impediment to trade, this MFN would likely be procompetitive.

18 See, e.g., Andre Boik & Kenneth S. Corts, The effects of platform most-favored-nation clauses on competition and entry, 59 Journal of Law and Economics 134 (2016).

19 See, e.g., Jonathan B. Baker and Fiona Scott Morton, Antitrust enforcement against platform MFNs, 127 Yale L. J. 2176 (2017)

20 See, e.g., Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (finding no antitrust liability for an anti-steering rule); See Epic Games, Inc. v. Apple, Inc., 67 F.4th 946 (9th Cir. 2023) (same).

21 Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018).

22 See, e.g., Erik Hovenkamp, *Platform Antitrust*, 44 J. Corp. L. 713 (2019); Steven C. Salop, Daniel Francis, Lauren Sillman, & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 84 Antitrust L.J. 883, 895-98 (2022);

23 For example, "resale price maintenance" is a restraint that increases price to consumers. And yet it is not normally illegal, because it is likely to lead to positive changes in retailer behavior (it increases their willingness to stock and promote the defendant's product). This effect on retailers can raise consumer welfare by increasing the supply of the good. Thus, to understand why the restraint potentially benefits consumers, it is necessary to consider how it affects retailers. And yet in such cases courts have never considered including retailers within the market definition.

24 *See* Erik Hovenkamp, *Platform Antitrust*, 44 J. Corp. L. 713 (2019); Steven C. Salop, Daniel Francis, Lauren Sillman, & Michaela Spero, *Rebuilding Platform Antitrust: Moving on from Ohio v. American Express*, 84 Antitrust L.J. 883, 895-98 (2022); Michael L. Katz & A. Douglas Melamed, *Competition Law as Common Law: American Express and the Evolution of Antitrust*, 168 U. Pa. L. Rev. 2061 (2020).

25 Note, however, that in a two-sided market, demonstrating harm on one side may still require consideration of how the defendant's conduct affects the other side. This is because the two sides are interdependent—each side's welfare depends in part on the number of active users on the other side. Hence, to discern whether a restraint is harmful to side A, it may be necessary to rule out the possibility that it significantly increases participation by users on side B.

26 See, e.g., C. Scott Hemphill, *Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem*, 81 N.Y.U. L. Rev. 1553 (2006).

27 It may seem counterintuitive that some drug patents might be weak (likely invalid), given all the research that goes into developing drugs. When a patent covers a genuinely new drug, it is very likely to be valid. But many drug patents do not cover a new active ingredient. Instead, the patent covers some slight variation on a known drug. In such cases, the patented formulation might be invalid because it is not sufficiently novel or because it is obvious, among other possibilities.

28 Absent a payment, neither a generic firm nor the brand-name firm will agree to accept terms materially worse than it expects to get through litigation. Thus, in this numerical example, the generic firm is not willing to delay entry by much more than 3 years, while the patent owner is not willing to accept a delay period much shorter than 3 years. Hence, they will agree to delay generic entry by about 3 years. The role of the payment is to permit the generic firms to share in the (much larger) profits generated under monopoly. This persuades them to accept a long delay period even if they believe the patents are very likely invalid.

29 FTC v. Actavis, Inc., 570 U.S. 136 (2013).

30 For example, to evade antitrust penalties, some brand-name drug sellers have attempted to pay off generic drug makers not with cash, but with a promise not to launch their own "authorized generic" version of the drug. This promise is very valuable to the generic firm, so it will persuade the firm to delay its entry substantially, just like a cash payment. See, e.g., Michael A. Carrier, *Eight Reasons Why No-Authorized-Generic Promises Constitute Payment*, 67 Rutgers U. L. Rev. 697 (2015).

31 See, e.g., Foo Yun Chee, *Google loses fight against $2.7 billion EU antitrust fine*, Reuters (Sept. 10, 2024).

32 It can seek civil fines only certain kinds of procedural violations. But it has no authority to issue fines for anticompetitive behavior. See, e.g., Harry First, *The Case for Antitrust Civil Penalties*, 76 Antitrust L.J. 127, 127 (2009).

33 See, e.g., FTC v. Ameridebt, Inc., 373 F. Supp. 2d 558 (D. Md. 2005).

34 See Harry First, *The Case for Antitrust Civil Penalties*, 76 Antitrust L.J. 127, 142 (2009).

35 See, e.g., Zephyr Teachout & Lina M. Khan, Market Structure and Political Law: A Taxonomy of Power, 9 Duke J. Const. L. & Pub. Pol'y 37 (2014).

36 TIM WU, THE CURSE OF BIGNESS, 2018

37 See, e.g., ZEPHYR TEACHOUT, BREAK 'EM UP (2020).

38 Erik Hovenkamp, *Economics or Populism? The Battle for the Future of Antitrust*, U. Chi. L. Rev. (forthcoming), papers.ssrn.com/sol3/papers.cfm?abstract_id=5275801

39 Of course, there are exceptions. In markets characterized by a natural monopoly problem, for example, a firm might grow large simply because it was first to enter a market. But such examples are the exception to the rule.

40 Many products are subject to economies of scale, which means that larger firms have lower costs; some of those savings are passed through to consumers in the form of lower prices. Similarly, in markets characterized by strong network effects, high quality requires large scale. For example, for a social media platform to be attractive, it must have many users.

41 See, e.g., Lina M. Khan, The Separation of Platforms and Commerce, 119 COLUM. L. REV. 973 (2019).

42 For further discussion of this point, see Erik Hovenkamp, *Economics or Populism? The Battle for the Future of Antitrust*, U. Chi. L. Rev. (forthcoming), papers.ssrn.com/sol3/papers.cfm?abstract_id=5275801

43 I discuss the reasons for this in more detail elsewhere. See Erik Hovenkamp, *Economics or Populism? The Battle for the Future of Antitrust*, U. Chi. L. Rev. (forthcoming), papers.ssrn.com/sol3/papers.cfm?abstract_id=5275801

44 United Mine Workers v. Pennington, 381 U.S. 657 (1965).

45 Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-38 (1961).

46 Nolan McCarty & Sepehr Shahshahani, Testing Political Antitrust, 98 NYU L. Rev. 1169, 1199 (2023).

47 Id. at 1175.

48 S.2992, https://www.congress.gov/bill/117th-congress/senate-bill/2992/text

49 Some FTC enforcement actions are adjudicated in administrative proceedings, rather than federal courts, but these cases account for only a tiny fraction of antitrust cases.

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