

## **Liberty, Equality, and Fraternity: Evolution or Revolution in Antitrust?**

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The world of antitrust law in the United States is no stranger to contrasting views and vigorous debate. But in these last few years, the usual skirmishes on enforcement priorities, incremental developments in the courts, and modes of economic analysis gave way to an insurgency that argues that the current system of antitrust enforcement simply does not work the way it ought to prevent anticompetitive mergers and conduct, and that no amount of tinkering around the edges was likely to get that system to where it needed to be. An opening salvo was research highlighted by the Obama administration in 2016, suggesting that concentration levels were rising based on industry census data – across broad classifications like retail, transportation, finance, and utilities – and that firms' returns on invested capital had increased, coupled with simplistic conclusions that competition was now flagging and that a lack of antitrust enforcement must be to blame.<sup>1</sup>

All this might have ended with a call for boosted resources to allow U.S. enforcers to act more aggressively in the years to come, with debate taking the form of just how much those resources should be increased. The reality, however, has been a gathering storm of events giving rise to simultaneous populist movements on both sides of the political aisle, each angling for dramatic antitrust reforms for their own reasons but largely converging on intense scrutiny of four so-called “Tech Titans”: Google, Amazon, Facebook and Apple. And caught between these two sides of the populist coin are yet another two factions: those who might share some concerns about increasing concentration but prefer not to abandon the citadel

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<sup>1</sup> Council of Economic Advisors, Benefits of Competition and Indicators of Market Power (Council of Economic Advisors Issue Brief updated May 2016), available at [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502\\_competition\\_issue\\_brief\\_updated\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf). However, industry classifications identified by the Census Bureau are not antitrust markets and shifting trends in concentration do not necessarily reflect lost competition. Nuances regarding diminishing long-run average-cost curves, the possibility of dominant firms or oligopolies developing due to superior efficiency or innovation, as well as other key factors, have often been overlooked in reaching a conclusion that enforcement has been suboptimal. See Maureen K. Ohlhausen, *Does the U.S. Economy Lack Competition?*, 1 CRITERION J. ON INNOVATION 47 (2016). Other scholars also observed these shortcomings. See Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714-48 (2018); Gregory Werden & Luke Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration* (Vanderbilt Owen Graduate Sch. of Mgmt. Research, Working Paper No. 3156912, 2018), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3156912##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912##).

the consumer welfare standard as the core goal of antitrust law as we know it today, and those who see decades of hard-earned progress in scholarly understanding and the courts under threat of being overrun at the barricades.

## **I. Liberty — Reliance on Free Market Efficient Allocation of Resources and Self-Correction and Avoiding Type I Errors**

In this battle to shape the future of antitrust, the position of entrenched incumbent almost certainly belongs to the Chicago/Harvard<sup>2</sup> School—or the “Liberty” advocates, as this paper describes them. Being an incumbent usually confers an advantage, though with political winds howling for change from both sides of the political spectrum, that advantage is in doubt. Those in this camp believe in a generally noninterventionist approach to antitrust policy and enforcement that relies on free markets, rather than government-designed markets, to produce the best outcomes, driven by a conviction that misguided intervention could do far more harm than good to the economy. This conviction is underpinned by a set of principles that have gained wide adoption across the landscape of U.S. antitrust law, from courts to enforcement agency practice. First, the principle that the overriding goal of the antitrust laws should be to maximize consumer welfare, and that consumer welfare should be measured empirically using econometric tools. Second, the belief that free markets, unencumbered by excessive regulation, generally lead to the best outcomes for society over time and have the capacity to self-correct most anticompetitive or monopolistic behavior by inviting and rewarding fresh competition. And finally, a concern that even well-intentioned government intervention is *not* self-corrective and may result in reduced benefits to consumers.

The Chicago/Harvard School is largely credited with having won the last revolution (or evolution) in American antitrust in the 1970s and 80s, gradually replacing a legal regime in which “the Government always wins”<sup>3</sup> with one in which the government could win or lose, depending on the degree and quality of evidence it presented in court. Even current proponents of significant antitrust reform appear to agree that this focus on economic evidence, and the discarding of untenable presumptions and standards (such as the *per se* prohibition on vertical restraints) that resulted was a positive development in antitrust law.<sup>4</sup> Although the

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<sup>2</sup> William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law For Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1 (2007).

<sup>3</sup> *United States v. Von's Grocery*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

<sup>4</sup> Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1848 (2020) (“For example, its first proposed reductions in enforcement attacked decisions condemning very small horizontal mergers or competitively harmless vertical contracting. The changes that resulted very likely increased consumer welfare and efficiency.”).

merits of particular theories and modes of analysis as applied to antitrust issues continue to be hotly debated, the simple fact that economic analysis of a particular transaction or practice *should* be a primary consideration for enforcers or courts interpreting the antitrust laws is now uncontroversial. And equally well established is the notion that the focus of that inquiry should be on consumer welfare<sup>5</sup>—a broad concept that encompasses the price consumers pay and the quality of the products or services they buy, including factors like variety, convenience, and privacy and other values that consumers care about when making their purchasing decisions.

The second precept of the Chicago/Harvard School, and one that has come under considerably more fire of late, is their confidence in the power of free markets to “self-correct” in case of anticompetitive or monopolistic behavior. The classic example is the monopolist that charges monopoly prices and thus makes entry more attractive, putting its own monopoly at risk. Recent critics of this particular tenet argue that companies with market power, powered by a steady stream of supracompetitive profits, may be far more successful at artificially maintaining entry barriers than Chicago/Harvard theories would suggest.<sup>6</sup> The belief that overly dutiful reliance on market self-correction has led to economy-wide increases in market power and corporate profits has become a rallying cry for those seeking to change the *status quo* of antitrust enforcement.

Against free markets’ history of allocating resources efficiently and potential for self-correction, the Chicago/Harvard school weighs the potential benefits of government intervention with a significant degree of skepticism. This concern about the administrability of legal rules and the capacity of courts and antitrust agencies to implement them is a signal contribution of the Harvard School.<sup>7</sup> Unlike markets that can make automatic and swift adjustments in response to innovation and changes in consumer preferences, enforcers can take only delayed action based on their own perception of problems interrupting the competitive process. And regulators have only more blunt instruments at their disposal, based on necessarily imperfect information. These observations lead members of the “Liberty” camp to embrace a philosophy geared toward avoiding false positives—that is, enforcement actions or regulation against conduct that actually turns out to be procompetitive—while being less concerned about false negatives that leave unchallenged (at least temporarily) anticompetitive outcomes in the market. This approach reflects a belief that those false positives are particularly risky given that government intervention *cannot* be reversed by the same market forces that would

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<sup>5</sup> See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing Robert Bork’s *The Antitrust Paradox* for the proposition that the antitrust laws are a “consumer welfare prescription”).

<sup>6</sup> Hovenkamp & Morton, *supra* note 4, at 1848 (“Because a firm has a financial incentive to use the profit from market power in order to maintain it, economic theory predicts that this would occur often.”).

<sup>7</sup> Kovacic, *supra* note 2, at 14.

come to bear on attempted anticompetitive conduct. This philosophy made its way into Supreme Court jurisprudence in *Trinko*, in which the Court agreed that “[m]istaken inferences and the resulting false condemnations ‘are especially costly, because they chill the very conduct the antitrust laws were designed to protect.’”<sup>8</sup>

These Chicago/Harvard School considerations counsel in favor of a certain degree of regulatory humility, particularly in the face of highly innovative technology markets. As the author has observed, enforcers and regulators are confronted with a fundamental knowledge problem in which they must gather information on present and future competitive conditions in any given industry to formulate properly targeted regulations or enforcement actions.<sup>9</sup> But the fact that those conditions change as quickly as they do raises the risk that inherently slow-moving bureaucratic institutions will at best be working from outdated information in prescribing or proscribing certain conduct. Taken in total, these knowledge problems further highlight the “Liberty” adherent’s preference to rely on free market forces over extensive government intervention.

## **II. Equality — Enforcement Reforms to Ensure Competitor Access to an “Equal” Playing Field and to Address Economic Inequality in Society**

While the Chicago/Harvard School has long tended to emphasize the risk of Type I errors—overactive antitrust enforcement that could condemn conduct that is actually procompetitive—as the greatest potential danger to consumer welfare, a movement for reform has coalesced around the opposite conclusion. These advocates are generally united by the belief that *underactive* antitrust enforcement, with agencies and courts alike led astray by dogmatic adherence to Chicago/Harvard School principles, has led to significant increases in market concentration over time for a multitude of industries and a shifting of surplus from consumers as increasing market power drives rising monopoly profits across the economy. In a recent critique, Fiona Scott Morton and Herbert Hovenkamp point to “[e]conomic theory and evidence developed over the last forty years [that] strongly support [a] reversed premise” that markets “tend more naturally to situations of market power” rather than self-correcting to a competitive state.<sup>10</sup> In addition to a shrinking consumer surplus, many reform advocates in this category also assert there is a regressive nature of this shift in wealth: away from the average consumer and in favor of large corporations and holders of those corporations’

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<sup>8</sup> Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 414 (2004) (citation omitted).

<sup>9</sup> Maureen K. Ohlhausen, *The Procrustean Problem with Prescriptive Regulation*, 23 COMM.LAW CONSPECTUS 1 (2014).

<sup>10</sup> Hovenkamp & Morton, *supra* note 4, at 1870.

equity, who tend to be much wealthier than the average citizen.<sup>11</sup> Scott Morton and Hovenkamp argue that “[t]he higher prices (or lower quality) caused by lack of enforcement are paid by all consumers, while the profits accrue to equity holders, disproportionately to a very small percentage at the top. Four decades of underenforcement has contributed to rising inequality, and a reaction is appearing in the current political debate as populism.”<sup>12</sup>

“Equality” advocates seek what they see as a rebalancing of the scales to counteract advantages held by entrenched firms in all sectors, but with a particular ire reserved for technology platforms that they allege serve as gatekeepers to large portions of the 21st century economy. Many reform proposals in this camp seek to “level the playing field” by mandating access to competitors’ digital facilities and assets—particularly if that competitor is one of the “Tech Titans” who have drawn intense scrutiny of late.

Several recent developments provide useful examples to help crystallize the motivations behind and reforms contemplated by the “Equality” cohort. First, a report issued by the Washington Center for Equitable Growth in November 2020 and signed by a number of prominent practitioners laid out a vision for antitrust enforcement under the then-incoming Biden administration. Second, the mammoth 450-page Majority Staff Report produced following the House of Representatives’ year-long investigation of competition in digital markets provides a detailed guide to the Democratic majority’s views on areas for potential reform. Finally, the draft Competition and Antitrust Law Enforcement Reform Act of 2021, an omnibus antitrust reform bill recently released by Senator Amy Klobuchar, has the potential to become a rallying point for advocates of significant substantive reforms that at least nominally preserve the big-picture goal of antitrust as focused primarily on consumer welfare, though competitor welfare also features prominently.

### A. Equitable Growth Report

The Equitable Growth Report<sup>13</sup> lays out a three-pronged proposal for “restoring competition in the United States”: 1) Congressional action in the form of new antitrust legislation; 2) action by U.S. enforcement agencies to “optimize deterrence;” and 3) Executive branch action to coordinate antitrust policy across the federal government.

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<sup>11</sup> Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1, 10-13 (2015).

<sup>12</sup> Hovenkamp & Morton, *supra* note 4, at 1852-53.

<sup>13</sup> Bill Baer, et al, Restoring Competition in the United States: A Vision for Antitrust Enforcement for the Next Administration and Congress, Report for Washington Center for Equitable Growth (Nov. 2020), available at <https://equitablegrowth.org/research-paper/restoring-competition-in-the-united-states/> [hereinafter Equitable Growth Report].

The Report opens its proposal for legislative reform by taking aim at certain recent court decisions, making clear its authors' belief that courts have been overly reliant on economic assumptions that the authors believe to be inaccurate or outdated, including requiring "an elaborate analysis of indirect evidence of market definition, market share, and market power" rather than accepting direct evidence of competitive harm.<sup>14</sup> The Report's proposed solution is legislative reform that explicitly vacates specific court decisions and spells out "elements sufficient to establish an antitrust violation as precisely as possible," a much different approach than the common law-driven process of antitrust law in the U.S.<sup>15</sup>

The Report's recommendation to enforcers in the new Biden administration is to be less fearful of occasional losses in court, and to pursue a "strategic, intentional approach" to pushing incremental changes in caselaw "in areas where forward progress is realistic."<sup>16</sup> This recommendation encompasses use of more dramatic antitrust remedies, including breakups for consummated mergers and monopolistic conduct and "compulsory licenses" for intellectual property.<sup>17</sup> Also mentioned as specific targets for reform are rules limiting enforcement against antitrust refusals to deal and predatory pricing.<sup>18</sup>

The Equitable Growth Report also makes several procedural recommendations, including:

- Harmonizing the jurisdiction and statutory authority of the FTC and DOJ Antitrust Division, explicitly authorizing equitable monetary remedies (e.g. disgorgement) for both, "modernizing" FTC processes, and giving the DOJ industry-study authority comparable to the FTC's Section 6(b) authority;
- Updating the Hart-Scott-Rodino filing system to increase filing fees, particularly for large deals, and introduce a "Quick File" system to make smaller transactions reportable without a fee; and
- Clarifying the FTC's authority to issue its own competition regulations.<sup>19</sup>

Emphasizing that competition enforcement appropriations have been essentially stagnant for at least a decade, the Report also recommends a significant boost in funding for both agencies to provide resources needed to flex the reaffirmed

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<sup>14</sup> *Id.* at 11.

<sup>15</sup> *Id.* at 12.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> *Id.* at 33.

<sup>18</sup> *Id.* at 12 n.18.

<sup>19</sup> *Id.* at 13.

enforcement authority described above. It is worth noting that many in the “Liberty” camp also support increased resources for the U.S. antitrust agencies.<sup>20</sup>

Aside from these proposed substantive and procedural reforms, the Equitable Growth Report devotes considerable space to arguments that appear to be aimed directly at President Biden and his incoming administration: a plea to appoint aggressive and pragmatic leaders at each enforcement agency, and to formulate a strategic agenda for antitrust enforcement, including rethinking the use of antitrust remedies to avoid under-detering unlawful conduct.<sup>21</sup>

## B. House “Big Tech” Investigation Majority Staff Report

The House Majority Staff Report collects the findings and recommendations of the Democratic majority staff on the Subcommittee on Antitrust, Commercial, and Administrative Law following a year-long investigation that involved a series of hearings, review of millions of documents from major technology companies and their competitors and customers, and input from enforcement agencies and other stakeholders.<sup>22</sup> This highly-anticipated capstone to an equally high-profile investigation paints a critical picture of competition in U.S. technology markets as dominated by four so-called “Tech Titans”—Amazon, Google, Facebook, and Apple—that have allegedly tipped various markets in their favor and allegedly quashed any viable threat to their position<sup>23</sup> and, the Report asserts, will continue to do so unless Congress reforms the antitrust laws and empowers enforcement agencies to act aggressively.

The Majority Staff Report begins with lengthy and specific findings on the state of numerous technology markets, but several common points stand out: the report consistently asserts that the markets at issue have “tipped” in favor of only one or just a few dominant providers and are characterized by high concentration and numerous barriers to entry, including network effects, switching costs, lack of data access, and economies of scale or scope that make it difficult or impossible for new competitors to enter and succeed.<sup>24</sup> The report also cites alleged examples of the practice of “killer acquisitions” in which nascent competitors (or potential

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<sup>20</sup> See, e.g., Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets 3 (May 15, 2020), available at [https://judiciary.house.gov/uploadedfiles/joint\\_submission\\_from\\_international\\_center\\_for\\_law\\_economics.pdf](https://judiciary.house.gov/uploadedfiles/joint_submission_from_international_center_for_law_economics.pdf).

<sup>21</sup> *Id.* at 19-34.

<sup>22</sup> MAJORITY STAFF OF H. COMM. ON JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW, REP. ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 21-32 (Oct. 4, 2020), available at [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf).

<sup>23</sup> *Id.* at 36-46.

<sup>24</sup> *Id.* at 40-46.



competitors) are acquired before they can form a true threat, and alleges the existence of a “kill zone” for venture capital in which new entrants trying to compete too closely with major tech firms cannot obtain any meaningful investment.<sup>25</sup>

Although these findings are specific to particular markets allegedly made up of Amazon, Google, Facebook, and Apple (whose primary businesses are, respectively, a retailer, a search engine, a social network, and a device maker), the recommendations suggested by the Majority Staff Report are much more far-reaching. At lawmakers' request, the report generated a “menu of reforms . . . for purposes of potential legislative activity during the remainder of the 116th Congress and thereafter.”<sup>26</sup> That “menu” is divided into three sections:

- 1) Requirements to “restore competition in the digital economy,” including structural prohibitions on “dominant platforms” preventing expansion into adjacent markets or acquisitions, nondiscrimination requirements to prevent “self-preferencing,” and mandatory data portability;
- 2) Measures to “strengthen the antitrust laws” more generally, including strengthening presumptions and bright-line rules against mergers, clarifying or expanding numerous doctrines of liability for abuse of

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<sup>25</sup> *Id.* at 11, 18. Independent economic research also demonstrates a strong link between the potential for acquisition of small entities, their access to investment, and innovation. *See, e.g.*, Gordon M. Phillips & Alexei Zhdanov, *Venture Capital Investments, Mergers and Competition Laws around the World* 5 (Tuck Sch. Bus., Working Paper No. 3072665, 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3072665](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3072665) (“As many start-ups rely on VC funding and venture capitalists rely more on exits through acquisitions versus IPOs, our results suggest that active M&A markets have important ex ante incentive effects for generating entrepreneurship and growth.”); Igor Letina, et al., *Start-up Acquisitions and Innovation Strategies* 3 (Jan. 17, 2020), available at [http://www.econ.jku.at/t3/veranstaltungen/research\\_seminar/papers/seibel.pdf](http://www.econ.jku.at/t3/veranstaltungen/research_seminar/papers/seibel.pdf) (“Our analysis concludes that prohibiting start-up acquisitions reduces the variety of innovation projects and, on a closely related note, the probability of innovation.”); Gordon M. Phillips & Alexei Zhdanov, *R&D and the Incentives from Merger and Acquisition Activity* 34 (Nat'l Bureau of Econ. Research, Working Paper No. 18346, 2012), available at [https://www.nber.org/system/files/working\\_papers/w18346/w18346.pdf](https://www.nber.org/system/files/working_papers/w18346/w18346.pdf) (“Our results show that the possibility of an acquisition amplifies the potential gains from innovation—particularly so for smaller firms.”); Michael Mandel & Diana G. Carew, *Innovation by Acquisition: New Dynamics of High-Tech Competition*, PROGRESSIVE POLICY INST. 2 (Nov. 2011), available at [https://www.progressivepolicy.org/wp-content/uploads/2011/11/11.2011-Mandel\\_Carew-Innovation\\_by\\_Acquisition-New\\_Dynamics\\_of\\_Hightech\\_Competition.pdf](https://www.progressivepolicy.org/wp-content/uploads/2011/11/11.2011-Mandel_Carew-Innovation_by_Acquisition-New_Dynamics_of_Hightech_Competition.pdf) (concluding that (1) “acquisitions in the technology sector . . . have encouraged innovation by bringing new products to market faster and more effectively; and (2) acquisitions and innovations in the technology sector are positively associated with economic growth and job creation).

<sup>26</sup> *Id.* at 19.

monopoly power, and overruling certain Supreme Court cases that limited the reach of antitrust law; and

- 3) Reforms to “revive antitrust enforcement,” including increased penalties, more funding for the FTC and DOJ Antitrust Division, more frequent merger retrospectives, and removing barriers to private plaintiff enforcement.<sup>27</sup>

Taken in total, the Majority Staff Report offers a full slate of proposals to change dramatically U.S. antitrust law by adding new prohibitions and restrictions on large platforms (however they may be defined), codifying and expanding certain theories of antitrust harm (especially for unilateral conduct by companies perceived to have market power), and ramping up enforcement with additional agency funding and the removal of litigation barriers to private antitrust plaintiffs.

### **C. Competition and Antitrust Law Enforcement Reform Act of 2021**

The Competition and Antitrust Law Enforcement Reform Act of 2021 (CALERA) is an amalgamation of several of Sen. Klobuchar's more targeted reform proposals drafted in 2019 and 2020 that had remained dormant in the previous Congress.<sup>28</sup> Although the bill proposes major shifts in substantive standards for merger and conduct cases, it retains the basic legal framework of current law with broadly drafted language on liability, the full contours of which would be left to the courts to interpret.

With regard to mergers and acquisitions, CALERA calls for a significant lowering of the bar for what constitutes an illegal merger under the Clayton Act. Instead of condemning transactions that “may substantially lessen competition,” the new proposal would ban transactions that “may create an appreciable risk of materially lessening competition,” where “materially” means “more than a de minimis amount.” It then compounds its potential for dramatic consequences by creating new presumptions of harm for certain mergers that would assume the illegality of these transactions until proven otherwise. Those new presumption categories include specific structural characteristics, the presence of a “maverick” party, and particularly large deals meeting certain size requirements. While styled as rebuttable presumptions, when combined with the proposed need for merging parties to show a *lack* of any appreciable risk of material lessening of competition to overcome them, these presumptions are likely (and were likely intended to be) a firing squad for the vast majority of mergers falling within these categories above.

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<sup>27</sup> *Id.* at 20-21.

<sup>28</sup> S. 225, 117th Cong (2021).

On the conduct side of the ledger, CALERA veers toward a competitor welfare standard and would condemn any activity by any firm (regardless of market power) that “materially disadvantages” or “tends to foreclose or limit the opportunity of” any competitor with an “appreciable risk of harming competition.” Similar to the merger control provisions above, the bill also creates a rebuttable presumption that exclusionary conduct by certain firms is anticompetitive, if the conduct is by a firm or group of firms that have over 50% market share or otherwise have “significant market power,” meaning the ability to impose prices or terms that would not be possible in a competitive market. To rebut this presumption, parties would need to show that procompetitive benefits or recent entry “eliminate” the risk of harm, or that there is no appreciable risk of harm in the first place. In addition to these fundamental changes, CALERA does away with a host of court-imposed requirements for Section 2 violations and imposes hefty new civil penalties for antitrust violations up to the greater of 15% of annual revenues or 30% of revenues in an affected market during the period of conduct.

CALERA also includes several other changes to boost enforcement capabilities, including a substantial increase in appropriations for the FTC and DOJ to approximately double the agencies’ 2021 appropriation amounts, establishing a new “Office of the Competition Advocate” as a central clearinghouse of market data and analysis that could be used to launch new investigations or inform existing ones, a series of competition studies by the FTC and other agencies, and more.

#### **D. Common Themes in the “Equality” Proposals**

The overall theme consistent through all three of these proposals is the view that antitrust enforcement has been headed in the wrong direction, with previous administrations either too timid or under-resourced for effective enforcement efforts—and even the enforcement actions that were filed were litigated (and often settled) in the shadow of a hostile judiciary. Given the influence of many of the authors of the Equitable Growth Report, the extensive findings of the Majority Staff Report, and the potential for CALERA to attract wide support on the left, new leaders at the DOJ and FTC under a Biden administration are likely to feel a similarly urgent need for more aggressive enforcement, especially in the tech industry, leading to more frequent merger challenges and more aggressive enforcement against perceived anticompetitive conduct. It is important to note that while the Majority Staff Report and the hearings that preceded it focused on a handful of tech companies, the Equitable Growth Report and the CALERA are in

no way limited to those companies. Thus, if adopted, these recommendations will have sweeping effects across the entire U.S. economy.<sup>29</sup>

### **III. Fraternity — Populist Calls to Expand Antitrust to Protect Noneconomic Values**

One of the most fascinating developments for antitrust practitioners and observers alike has been the opening of a third front, in which market trends and recent events have driven advocates on opposite poles of the political spectrum to reach similar conclusions on the need for significant antitrust reform—and how much those conclusions have made their way into the core of each side's position. Although there is certainly disagreement on exactly what should be changed and what the most problematic abuses of market power are in today's economy, both sides seem to be converging on a consensus that increasing power is a real problem, particularly on the part of major technology platforms, and that something should be urgently done about it beyond simply enforcing the laws on the books. Populist forces in both major parties, led by high-profile figures such as Senators Elizabeth Warren and Bernie Sanders on the left, and former President Donald Trump on the right, have decried what they see as the dominating influence of these large online platforms and called for dramatic changes.

#### **A. Progressive Populism: Big is Bad?**

Taking a look first at the progressive populist camp, there seems to be a general notion that antitrust law should be expanded as a tool to address issues well beyond just the economic concerns inherent in the consumer welfare standard, to encompass what might be called “citizen welfare”: factoring in concerns such as political power, structural racism, press freedom, and harm to workers as part of its evaluation of mergers and business conduct. This expansion of the goals of antitrust even made its way explicitly into the 2020 Democratic Party platform, which calls for retroactive review of recently cleared acquisitions, as well as forward looking review, to determine whether mergers or acquisitions “demonstrably harmed workers, increased racial inequality,” or had a negative effect on “low-income and marginalized communities,” in addition to noncontroversial factors like “market concentration” and “raised consumer prices.”<sup>30</sup>

In addition to this list of new priorities to put on antitrust law's plate, progressive reform proposals largely endorse a “big is bad” philosophy that puts

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<sup>29</sup> These proposed changes are also likely to have strong repercussions on the global economy, as other enforcers feel free to impose similar restrictions and obligations on U.S. and other companies.

<sup>30</sup> *Building a Stronger, Fairer Economy*, DEMOCRATIC NAT'L COMM., available at <https://democrats.org/where-we-stand/party-platform/building-a-stronger-fairer-economy/>.

harsh restrictions on large corporations' ability to grow and on their conduct having an impact on competitors. One particularly dramatic example is the draft Anti-Monopoly and Competition Restoration Act (AMCRA), which was leaked to the legal press in late 2019 and was reportedly linked to both Sen. Warren and Congressman David Cicilline, Chairman of the House Antitrust Subcommittee.<sup>31</sup> If Sen. Klobuchar's CALERA bill is highly skeptical of mergers and potentially exclusionary conduct by large companies, AMCRA is downright hostile to the concept. Among other things, AMCRA would:

- Strictly ban all “mega mergers,” defined as any transaction where either party has over \$40 billion in annual revenues (or both have over \$15 billion), or deals of any size that result in market share over 25% or fewer than four significant competitors in a market;<sup>32</sup>
- Make all “large mergers” presumptively illegal and subject to a 2% transaction value filing fee, defined as any transaction where either party has \$5-40 billion in annual revenue (or both have between \$1-15 billion), or that results in four significant competitors in a market;<sup>33</sup>
- Launch retroactive reviews of all “mega mergers” in the last twenty years and all “large mergers” going forward, and require the unwinding of any deal that “materially harmed consumers, workers, sellers, entrepreneurship, privacy, innovation, or competition;”<sup>34</sup>
- Expand the definition of “market power” for purposes of anticompetitive conduct to include a host of attributes, including holding over 40% market share as a buyer, having over \$40 billion in annual revenue, engaging in any of a broad set of behaviors, including offering discriminatory trading terms or requiring “supplementary obligations” to a contract, and more;<sup>35</sup> and
- Transform the Sherman Act into a sweeping condemnation of a wide range of “abusive” conduct for any company with market power, including any resale price maintenance, any refusal to deal or denial of access that excludes rivals, any exclusive dealing, serving as both a platform and a merchant on the platform, price gouging, pricing below cost, not providing access to crucial infrastructure, tying products

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<sup>31</sup> See Lauren Hirsch, *Elizabeth Warren's antitrust bill would dramatically enhance government control over the biggest US companies*, CNBC (Dec. 7, 2019), available at <https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html>. See also Anti-Monopoly and Competition Restoration Act of \_\_\_\_ (draft copy of SIL19C37) (AMCRA) (on file with author).

<sup>32</sup> AMCRA § 4.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* § 6.

together, and labor issues such as non-solicitation, wage information restrictions, misclassifying employees as independent contractors, and more.<sup>36</sup>

It is difficult to overstate the seismic impact changes like these would have on the U.S. and global economy. Given the vast and vague definitions of market power, virtually any moderate- to large-sized company would need to assume that they have “market power” when planning their own conduct. The proposal not only flips the burden of proof (similar to CALERA, discussed above) but heightens the burden of proof on defendants to *disprove* that their conduct is illegal, and it would essentially require providing various types of aid to competitors (providing access to any resource that might disadvantage a rival if not provided), in addition to making a wide range of conduct illegal that is currently viewed as sometimes (or even usually) procompetitive under antitrust law. The entire business models of many of America’s most successful companies would be immediately upended.

## **B. Conservative Populism: United Against Big Tech**

Looking at the other end of the political spectrum, we have seen somewhat of a surprising evolution of thought over just the last twelve months. As recently as the middle of 2020, leading Republicans involved in the House Big Tech investigation and their allies in the scholarly and practitioner spheres were coalescing around the conclusion that the current U.S. antitrust law “is adequate for protecting competition in the modern economy.”<sup>37</sup> Former Ranking Member Jim Sensenbrenner of the House Antitrust Subcommittee remarked in July 2020 that he had “reached the conclusion that we do not need to change our antitrust laws. They have been working just fine.”<sup>38</sup> But following the dramatic events around the 2020 election, including Twitter bans for prominent conservative figures and the takedown of the Parler app popular with many of the same, we saw a surge in populist rage against big technology platforms on the right, exacerbating the perception that those platforms discriminate against conservative voices in their censorship decisions.

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<sup>36</sup> *Id.*

<sup>37</sup> Joint Submission of Antitrust Economists, Legal Scholars, and Practitioners to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets 3 (May 15, 2020), available at [https://judiciary.house.gov/uploadedfiles/joint\\_submission\\_from\\_international\\_center\\_for\\_law\\_economics.pdf](https://judiciary.house.gov/uploadedfiles/joint_submission_from_international_center_for_law_economics.pdf).

<sup>38</sup> Video at 2:38:07, *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (July 29, 2020), available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=3113>.

In terms of leading policy voices, Rep. Sensenbrenner's do-no-harm attitude was replaced by new Ranking Member Ken Buck's proposals in his "Third Way" Report, joined by Representatives Doug Collins, Matt Gaetz, and Andy Biggs in response to the Majority Staff Report.<sup>39</sup> The Third Way Report lays out some points of agreement with the Majority Staff Report, starting with their shared views of "how Apple, Amazon, Google, and Facebook have used their monopoly power to act as gatekeepers to the marketplace, undermine potential competition, and pick winners and losers, all while simultaneously cozying up to unfriendly nations like China in order to further expand their global footprint."<sup>40</sup> But it parts ways with the Majority when it comes to the hot-button issue of censorship:

Most notably, the [Majority Staff] report does not address how Big Tech has used its monopolistic position in the marketplace to censor speech. This censorship is experienced by groups and ideologies on all wings of the political spectrum but is most notably realized through tech platforms exerting overt bias against conservative outlets and personalities. . . . These concerning behaviors are the fruit of Big Tech's poisonous and monopolistic tree.<sup>41</sup>

At least for now, the perceived common enemy of growing Big Tech market power appears to have made strange bedfellows of populist elements at both ends of the political spectrum. How this confluence of events plays out, with the added drama of an evenly divided Senate and increasing polarization seemingly thinning out the political center at an alarming rate, is sure to be a point of great intrigue for U.S. antitrust practitioners, and great angst for the American business community.

#### **IV. An Evolution or Revolution in Antitrust?**

Even with so many contrasting visions for the future of U.S. antitrust law, there remains yet another related but distinct and fundamental question: once we decide where want to be going, *how* exactly do we go about getting there from here? To some extent, the answer to this process question depends largely on which substantive camp one falls in. For the "Liberty" advocates seeking to preserve what they see as hard-won victories over several decades endorsing a cautious approach to antitrust enforcement in the courts and elsewhere, the best course of action would be to provide the agencies additional resources to monitor and block obvious anticompetitive abuses and continue to rely on the courts to referee individual

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<sup>39</sup> REP. KEN BUCK, THE THIRD WAY, H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. LAW, at 3 (Oct. 6, 2020), *available at* [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Buck%20Report.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 6.



antitrust disputes based on the evidentiary standards that have been carefully developed in the caselaw. This does not mean antitrust law becomes stagnant, however, as it can continue to evolve as economic understanding of particular behaviors grows. On the other end of the spectrum, “Fraternity” adherents seeking to overhaul even the basic objectives of antitrust are likely to have little use for any incremental approach, betting instead on bold (or foolhardy, depending on your perspective) plans for reform of the ends and means of antitrust enforcement. For the “Equality” advocate looking to rein in growing market power by major technology platforms, but generally content with the current foundation of antitrust law in the consumer welfare standard, the path forward is more complex—with options on the table for both a case-by-case approach, legislative reforms, or some mix of the two.

The long-term, evolutionary approach to reform is in many ways “baked in” to the American system.<sup>42</sup> Our courts hear specific controversies before them, with their decisions constrained in large part by precedent, encouraging similar outcomes in similar cases. There will always be cases clearly on one side or the other of the law, but over a long period of time and with sufficient reflection, courts can gradually tinker with common-law standards and nudge the dividing line between legal and illegal in one direction or the other—potentially changing the outcome of future cases along that margin.<sup>43</sup> This is true across the U.S. legal system, but particularly for antitrust where statutory standards were purposefully left open-ended, condemning things like “restraints of trade” and “unfair competition” and leaving it up to enforcers and courts to hash out the details. The U.S. antitrust agencies have somewhat more flexibility in their approach, with the ability to prioritize certain issues or sectors of the economy, advocate for incremental reforms in the courts, and exercise prosecutorial discretion. With some strategic creativity and planning, the agencies can use their authority to develop the factual and economic foundation for moving the law in a favorable direction.<sup>44</sup> This

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<sup>42</sup> See, e.g., William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 477 (2003) (“The story of modern U.S. federal enforcement has far more to do with the progressive, cumulative development of policy than with abrupt, discontinuous adjustments in shaping the content of federal agency activity over time.”).

<sup>43</sup> See, e.g., *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) (articulating a narrow pathway for “duties to deal” with a competitor); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 399 (2004) (recognizing *Aspen Skiing* as “at or near the outer boundary of § 2 liability”).

<sup>44</sup> As a particularly successful example, consider the FTC’s Hospital Merger Litigation Task Force, which conducted a series of hospital merger retrospectives showing significant harm after hospital merger enforcement was repeatedly blocked in the courts. Using the results of these studies in court, the FTC was able to turn a disappointing decade with just two hospital merger injunctions (between 1997 and 2007) into a much more robust thirteen injunctions granted between 2008 and 2018. See *Overview of the Merger Retrospective Program in the Bureau of Economics*, FED. TRADE COMM’N, available at <https://www.ftc.gov/policy/studies/merger-retrospectives/overview>.



step-by-step approach has numerous advantages in terms of maximizing benefits for the American consumer: it focuses on actual (at least alleged) consumer harm happening in the moment, allows for theories of harm to be informed and tested by highly relevant evidence from the parties or industry involved, and respond to the facts on the ground, thus reducing the knowledge problem. Those advantages make each step in the journey a much surer one.

Nevertheless, as is clear from several of the reform proposals discussed in parts I and II above, many have grown disillusioned with incremental change inherent in the common law approach and insist on the necessity of major legislative reforms to update U.S. antitrust law for the 21st century. All of the reform bills currently being debated would have a major effect on antitrust enforcement going forward, but some are clearly more dramatic than others—the Warren/Cicilline bill's mandate to break up longstanding merged companies comes to mind, or its extensive list of prohibited conduct that includes nearly anything that might disadvantage a competitor.

Putting aside for a moment the question of whether this degree of reform is necessary to protect consumers, there is always the risk of unintended consequences when taking such a large leap. Try as we might to get it right, even the best antitrust practitioners, scholars, and enforcers lack a crystal ball to foresee the effects of reforms like these. Will online platforms continue to expand and innovate at the same rate if their creators are prohibited from participating as a seller on their own platforms? What about all the industries that will be subject to these new laws that are not the handful of tech companies subject to Congressional hearings? Will breaking up a long-consummated merger that missed its targeted savings from efficiencies actually serve the interests of customers and consumers in that market and what is the impact on incentives to merge in the future? These are rhetorical questions because, although we each have our own educated guess based on our preferred enforcement philosophy, none of us really knows the answer until we see survey the landscape with our own eyes. And, for good or ill, it will be the American company and the American consumer acting as the test subjects for these grand experiments in reform.

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With the battle lines drawn over the future of antitrust law, the stakes could scarcely be higher. Much of the debate has focused on the actions of the four “Tech Titans” at the pinnacle of the U.S. economy, but those companies are already under intense scrutiny and face numerous challenges from antitrust enforcers. Crucially, none of the reform battle plans on the table would limit their effects to just four companies, no matter how large they might be. Those effects are also unlikely to stop at the U.S. border and will join forces with policies of other nations unfriendly to U.S. economic interests and intellectual property protections. For example, the

mandatory competitor collaborations called for by many reform proposals expanding duties to deal or essential facilities claims could result in an “open season” on major U.S. companies, turning patentholders into a kind of global public utility with royalties determined on demand by each foreign power or foreign competitor.<sup>45</sup>

These major reform proposals have the potential to fundamentally reshape the American economy, and it appears far from clear that they have received a vetting as thorough as they warrant given their wide-reaching effects. Although it is certainly tempting for some to jump headlong into dramatic reforms in this truly fascinating and energized moment in antitrust history, we should use every tool at our disposal to be sure of our course—there may be no turning back once the revolution has begun.

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<sup>45</sup> As one example, China recently adopted an essential-facilities doctrine that “may require the compulsory licensing of IP rights by firms considered dominant.” Maureen K. Ohlhausen, *Patent Rights in a Climate of Intellectual Property Rights Skepticism*, 30 HARV. J. L. & TECH. 1, 5 (2016) (citing STATE ADMIN. OF INDUS. & COMMERCE, PROVISIONS ON THE PROHIBITION OF THE ABUSE OF INTELLECTUAL PROPERTY RIGHTS TO ELIMINATE OR RESTRAIN COMPETITION, Art. 7 (2015), [http://www.kangxin.com/en/index.php?optionid=927&auto\\_id=726](http://www.kangxin.com/en/index.php?optionid=927&auto_id=726) [<https://perma.cc/C8DA-GHMD>]).