THE NEW CENTER

Policy Paper

Think Centered

Take on Big Tech

PROMOTING COMPETITION

NEW CENTER SOLUTION:

Take on Big Tech

PROMOTING COMPETITION

The 21st century has seen the rise of technology companies that dominate their industry and our society like few corporate entities in America ever have. The combined market capitalization of Amazon, Apple, Facebook, and Google is $3.02 trillion, which is a 12% share of the S&P 500 and larger than the GDP of France.[1] Google controls 90% of internet search.[2] 94% of social media users have an account with Facebook or a Facebook-owned company.[3] Amazon handles half of all online commerce.[4]

Tech titans owe their enormous size in part to their revolutionary products, but also in part to a lack of regulatory scrutiny. Antitrust enforcers have largely ignored big tech's rise out of adherence to the 'consumer welfare standard,' the prevailing theory in antitrust law since the 1980s that discourages intervention against monopolistic practices so long as consumers are getting low prices.

Since many big technology companies have, to date, delivered lower-cost or even free services, they've escaped scrutiny of their other practices—like violating consumer privacy and inhibiting competition—that a government should have an interest in addressing.

$3.02 trillion

the combined market capitalization of Amazon, Apple, Facebook, and Google, which is a 12% share of the S&P 500 and larger than the GDP of France.

90%

of internet search is controlled by Google

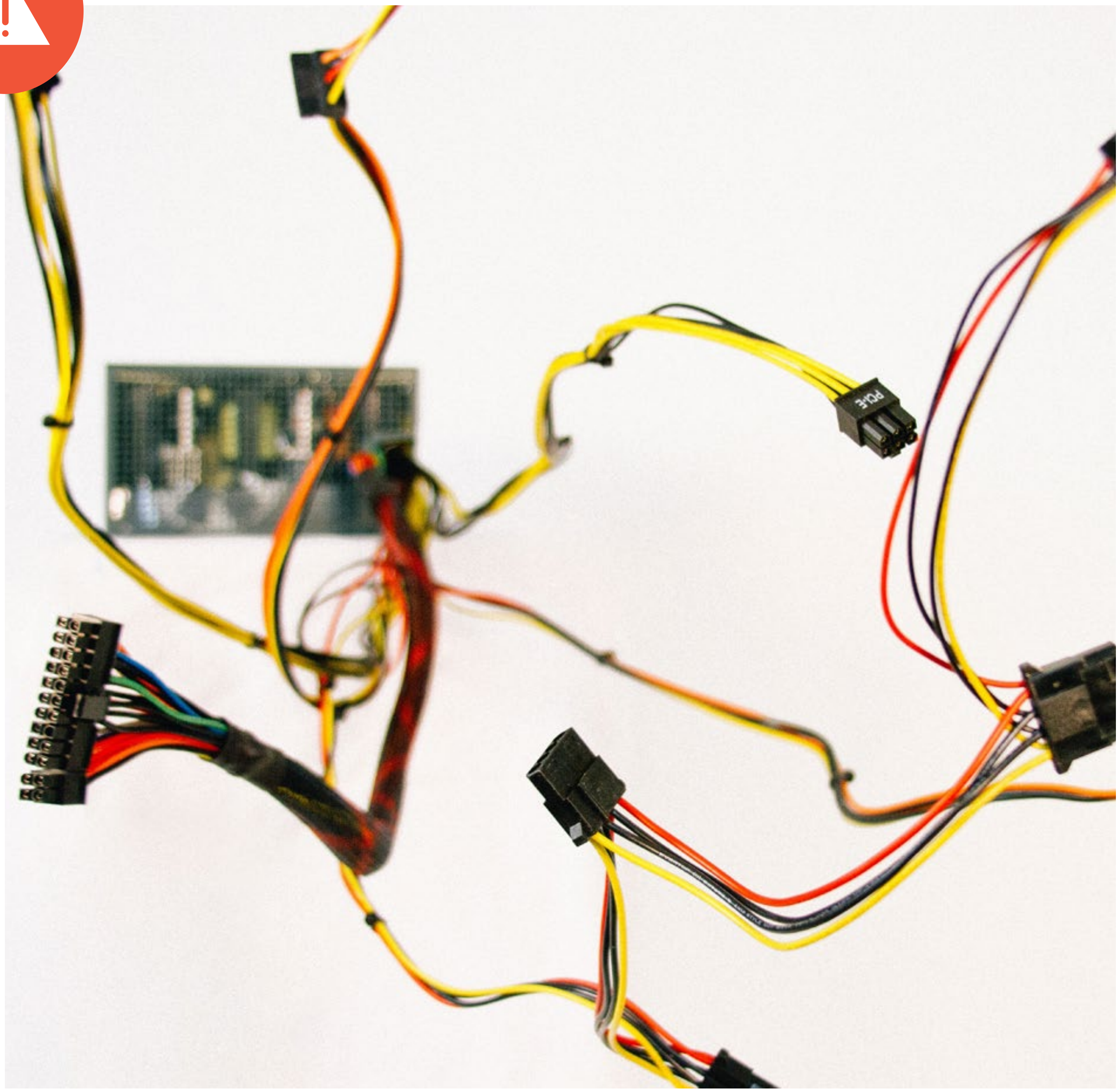
94%

of social media users have a Facebook property account (e.g. Instagram, WhatsApp, etc.)

49%

of all online commerce is handled by Amazon

This paper was developed with the research and writing contributions of The New Center policy analyst Evan Burke.



The Problem

Current Restrictions

U.S. antitrust enforcement is restricted not only by economic theory, but also by its actual capacity for regulation. The Federal Trade Commission (FTC), the agency in charge of consumer protection, is hamstrung from making trade regulation rules by congressionally-mandated bureaucratic procedures that take years to complete. As a result, it has attempted to pursue anticompetitive conduct through lawsuits and administrative adjudication, but has shied away from protracted legal fights against big tech companies that could drain its limited resources.

In the absence of serious anticompetitive scrutiny, big tech companies achieved total dominance of their respective markets, and we're starting to see the consequences.

The Solutions

Proposed Solutions: A Summary

It's time to re-evaluate American antitrust regulation for the information age.
The New Center proposes:

Re-evaluating antitrust law with consideration for how tech companies can use troves of data and massive networks to gain unfair competitive advantages and establish barriers to entry

Allowing the FTC to issue trade rules under the guidelines of the Administrative Procedure Act

Considering how proposed changes to intermediary liability laws could further diminish competition among tech platforms

1.

A Re-evaluation of the Consumer Welfare Standard

INFORMATION

Predatory Pricing

The act of slashing prices to a level that competitors cannot match, in order to undercut their profits and drive them out of business

Vertical Integration

The consolidation of two or more separate elements of a supply chain into one company

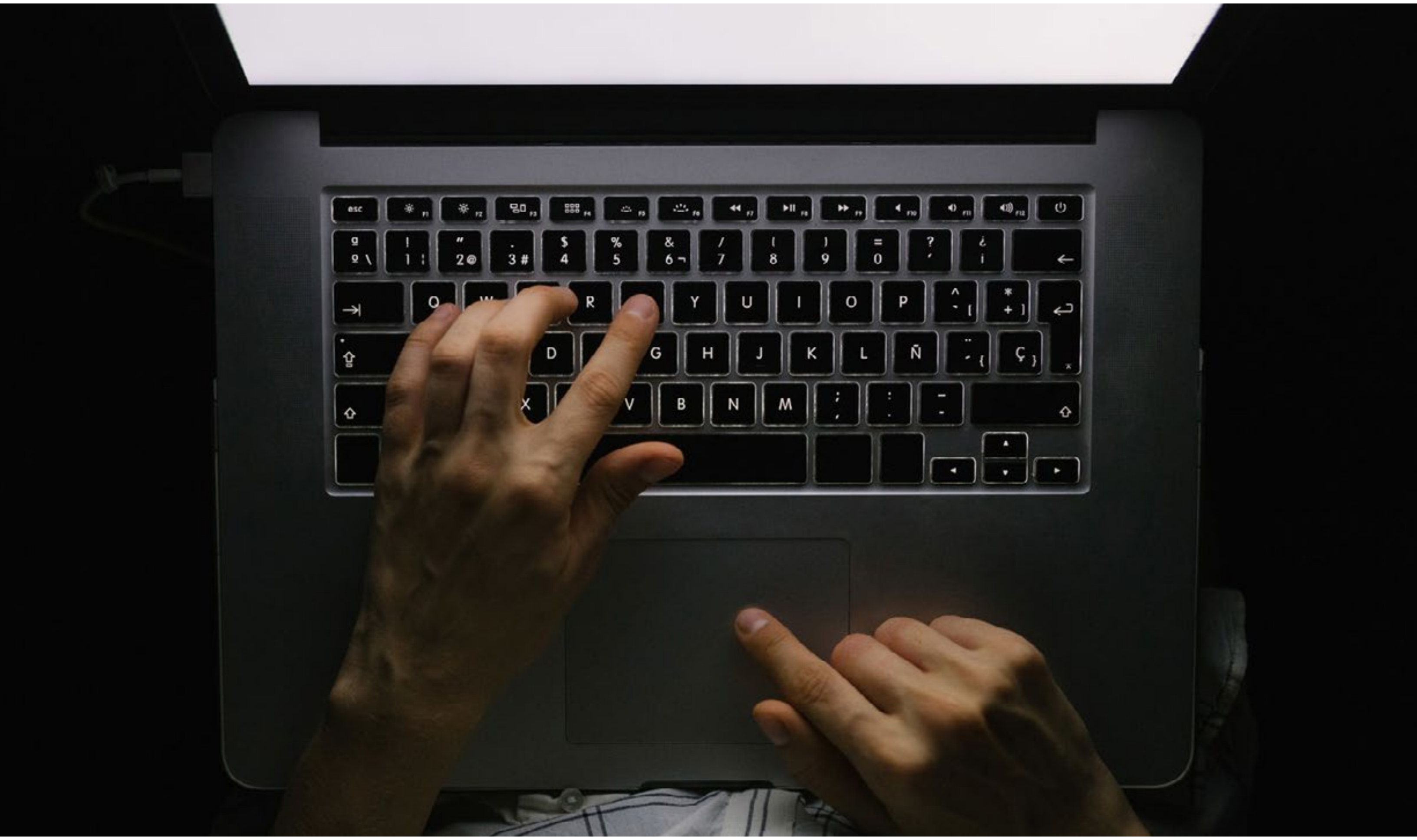
Consumer welfare (i.e. low prices) hasn't always been the definitive test for anti-competitive behavior. For most of its history, U.S. antitrust efforts focused on market structures, prohibiting both horizontal mergers that allowed a monopoly to swallow its competitors and vertical mergers that gave monopolies an unfair advantage in production.[5] Antitrust litigators through the 1960s feared that either route to the consolidation of economic power would both aid a corporation in pricing out its competitors and allow it to leverage its business clout for political gain.[6]

The subsequent decline in antitrust enforcement in the 1970s and 80s can be traced to *The Antitrust Paradox*, a legal treatise published by Robert Bork, a University of Chicago professor and later Supreme Court nominee. Bork did not believe the courts could properly estimate competitive effects of mergers by examining market structures, as there were too many potentially conflicting values in play.[7] He sought to create a guide for interpreting legislative intent that judges considering mergers could easily follow.[8]

Bork proposed that government should only be concerned with inhibiting a company's size if it is harming "consumer welfare—i.e. the government should be hands off so long as prices are low. Bork's views were adopted into the judicial mainstream during the Reagan administration, and have since remained central to antitrust doctrine.[9] Under this framework, previously restricted corporate activities like predatory pricing and vertical integration have often been ignored by government regulators.[10]

The last major antitrust case brought against a tech company was the Justice Department's 1997 suit of Microsoft. The DOJ claimed Microsoft was illegally leveraging its dominant operating system to "develop a chokehold" on the internet browser software market.[11] The government has brought no case of similar size and impact in the last 20 years, since many big technology companies have, to date, delivered lower-cost or even free services.

Without robust competition, tech companies lack an incentive to improve their questionable record in other areas, like consumer privacy and public discourse. Congress should hold a series of hearings to evaluate the relevance of the consumer welfare standard in the 21st century, and to decide whether we need a new framework better suited to our tech-driven economy.



2.
Better Laws

In 2009, Amazon attempted to acquire a rival e-commerce company called Quidsi, owner of the baby products website Diapers.com. When Quidsi refused Amazon's offer, Amazon began significantly lowering prices on its own line of baby products.[12] Amazon lost tens of millions of dollars each month, but over time eroded Diapers.com's market share. Eventually, Quidsi was forced to sell, and Amazon moved aggressively to acquire its former rival.[13] Despite engaging in near-textbook predatory pricing, Amazon never faced legal consequences for the incident.

In 2012 Facebook acquired Instagram, and in 2014 it purchased WhatsApp. Those acquisitions, among others, have allowed Facebook to dominate social media, even as user growth on the original Facebook platform has slowed.[14] It is estimated that 94% of social media users have an account with Facebook or a company owned by Facebook.[15] Yet U.S. regulators found no anti-competitive issues at play when they examined the mergers.

In July 2018, Google was found by the European Union to have engaged in anti-competitive behavior by requiring phones using its Android operating system to pre-install Google's search engine, web browser, and app store.[16] Google's Android OS runs about 80% of smartphones worldwide, and by leveraging that massive market share to promote its own products it created an enormous competitive advantage over its rivals.[17] Its actions mirror those of Microsoft in the late 1990s, which prompted a landmark suit from the U.S. government. Only this time, as the E.U. fined Google a record $5 billion, American antitrust regulators did nothing.

Each of these business practices seem problematic for competition, yet none were challenged by regulatory authorities. Why?

Because Amazon, Google, and Facebook's services are free, so none of the examples mentioned above raised prices, and thus did not constitute antitrust violations under the consumer welfare standard.

The major U.S. laws governing competition—the Sherman, Clayton, and Federal Trade Commission Acts—are over one hundred years old. Congress needs to take a serious look at the state of antitrust enforcement in the tech industry, and whether existing law needs to be updated to better address issues of competition in the information age.

Items for possible inclusion in new legislation could include:

- Addressing the ways that digital companies are using network effects to crowd out potential competitors
- Redefining and cracking down on predatory pricing practices
- Scrutinizing mergers that threaten competition within sectors more closely
- Taking seriously the anti-competitive effects of vertical integration
- Splitting up or regulating corporations that have the ability to dominate entire sectors
- Enacting new rules and procedures to speed up antitrust litigation, which sometimes drags on for a decade or more
- Exploring the use of free services to disguise monopolistic advertising practices

3.

Better Enforcement Capabilities for the FTC

In antitrust cases it does consider, the U.S. government's enforcement record has been mediocre. The FTC must issue trade rules through an arduous, 15-step process called the Magnuson-Moss procedures that take an average of over five years to complete.[18] The commission is thus completely incapable of proactively regulating unfair business practices through rulemaking; it hasn't issued a new trade rule under Magnuson-Moss procedures since 1980.[19]

At times, the FTC has also lacked the resources to properly enforce antitrust laws. In 2013, the Commission found that Google had engaged in anti-competitive behavior but ignored its own staff recommendation to take Google to court.[20] Commissioners were reportedly concerned that a protracted legal fight could draw resources away from other enforcement areas.

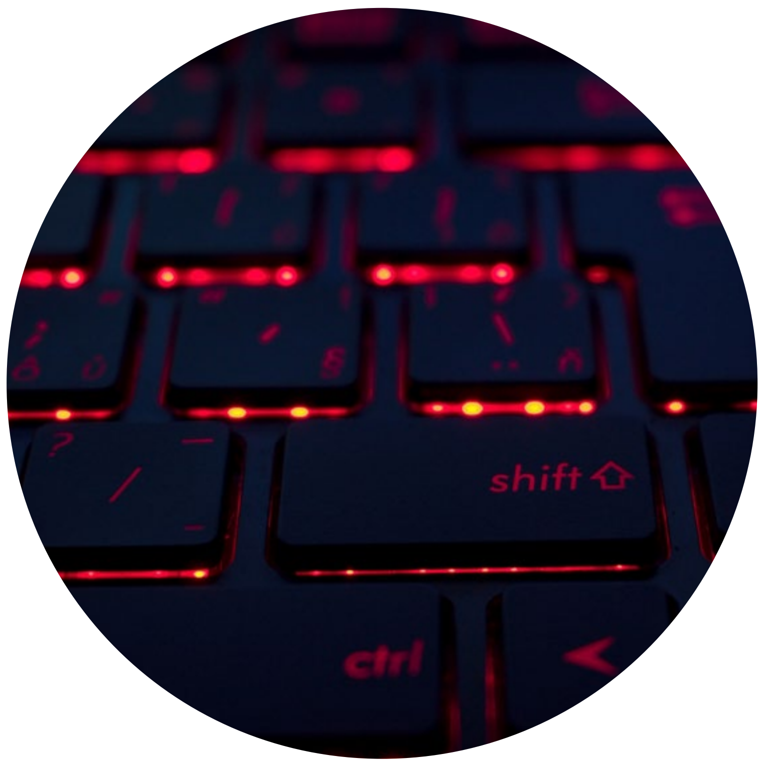
Congress must allow the antitrust authorities to do their jobs. The FTC should have Administrative Procedure Act (APA) rulemaking authority to more quickly and consistently police anti-competitive behavior. It should also have the appropriate resources to pursue cases against industry giants, while also fulfilling the rest of its mandate.

4.

AT&T, an Analogue Solution for Our Digital Economy

In 1956, the U.S. Justice Department allowed AT&T to maintain its phone monopoly in exchange for a large concession: AT&T would have to license any past patents royalty-free to any U.S. company. It had to license future patents for a small fee. These licenses helped spur the creation of Motorola, Fairchild Semiconductor, and Texas Instruments, among others. The government might consider a similar action with today's tech behemoths.[21]

5. Approaching Section 230 with Caution



Section 230 of the 1996 Communications Decency Act contains a provision protecting internet companies from legal responsibility for the content on their sites. Because of Section 230, a company like AOL could not be held liable if someone posted offensive material on one of its chat boards. It was a critical safeguard allowing the nascent internet economy to grow. Now, Congress is taking an interest in whether big tech companies are using Section 230 to evade accountability for what goes on their platforms. However, they must be careful; the wrong changes could unfairly impact smaller platforms without the resources to handle increased legal exposure for the content on their sites.

ENDNOTES

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