

# Too Big to Nail? Legislative Solutions to Big Tech Monopolies in an Age of Relaxed Antitrust Enforcement

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*“These companies are all hailed for their innovation and progressive ideals, seemingly ushering in an age of friendly, people-loving multinational corporations. . . . Why would these companies try so hard to appear socially progressive? After all, most people already expect large corporations to favor profits over customers. The answer is that these carefully constructed images are shrewd and calculated decisions made in response to the threat of antitrust enforcement.”*<sup>1</sup>

## I. INTRODUCTION

As major technology companies—such as Amazon, Apple, Meta, and Google—continue to increase their market share and influence through horizontal acquisitions and vertical integration, concerns of monopolization have grown alongside them.<sup>2</sup> Businesses and consumers alike suffer the effects of monopolization because controlling an ecosystem of products and services forms barriers to competition for producers and subverts meaningful consumer choice.<sup>3</sup>

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1. Zachariah Foge, *American Oligarchy: How the Enfeebling of Antitrust Law Corrodes the Republic*, 12 J. BUS. ENTREPRENEURSHIP & L. 119, 119, 122 (2019).

2. See *Vertical and Horizontal Integration*, HARV. L. SCH. CTR. ON THE LEGAL PRO. (May–June, 2021), <https://thepractice.law.harvard.edu/article/vertical-and-horizontal-integration/> [<https://perma.cc/8CZ8-23VM>] (defining vertical integration to mean acquiring control of multiple stages along supply chain); *id.* (establishing horizontal integration to mean merging of competitors at one level of supply chain); see also Foge, *supra* note 1, at 119, 121 (listing market share statistics for Google and Amazon); Rebecca Kern & Spencer Soper, *Amazon Could Be Forced to Sell Logistics Business Under Bill*, BLOOMBERG (June 22, 2021), <https://www.bloomberg.com/news/articles/2021-06-22/amazon-could-be-forced-to-sell-logistics-business-under-bill?sref=ctSjKj2N> [<https://perma.cc/36XJ-VS4F>] (assessing Amazon’s market share of ecommerce sales and size of logistics division).

3. See Kern & Soper, *supra* note 2 (referencing concerns from businesses selling on Amazon); Bennett Cyphers & Cory Doctorow, *The New ACCESS Act Is a Good Start. Here’s How to Make Sure It Delivers.*, ELEC. FRONTIER FOUND. (June 21, 2021), <https://www.eff.org/deeplinks/2021/06/new-access-act-good-start-heres-how-make-sure-it-delivers> [<https://perma.cc/MVL2-2DRU>] (noting platform creates walls to lock users in by restricting ability to transfer data elsewhere); Katharine Trendacosta et al., *The ACCESS ACT Takes a Step Towards a More Interoperable Future*, ELEC. FRONTIER FOUND. (June 11, 2021), <https://www.eff.org/deeplinks/2021/06/>

Further, the rise of social media as the dominant form of interpersonal communication implicates free speech and free press issues when a handful of companies make up virtually the entire public forum while holding the power to temporarily—and even permanently—silence users without running afoul of the First Amendment.<sup>4</sup>

Following the Sherman Act's passage in the late nineteenth century, the government's first attempts to limit consolidation and anticompetition showed little reservation.<sup>5</sup> Despite the Supreme Court interpreting a "rule of reason" into the Sherman Act in the early twentieth century, the executive branch remained vigilant in its enforcement actions for most of the twentieth century.<sup>6</sup> The late twentieth century and the start of the twenty-first, however, saw a marked relaxation of the standard, especially regarding vertical agreements and integration.<sup>7</sup> Now, in the vacuum of diluted policy and nonenforcement, large tech companies have built momentum toward monopolization virtually unchecked.<sup>8</sup> Nonetheless,

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access-act-takes-step-towards-more-interoperable-future [<https://perma.cc/B7AS-JJ73>] (analyzing data lock-in concerns and need for ability to move data between platforms).

4. See Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1318 (2020) (suggesting dominant market share of communication platforms allows suppression of ideas). As private entities, these companies are not subject to the same limitations in censorship of expression as is the federal government. See *id.* at 1317-18 (noting worries over private social media companies not restricted by First Amendment). Free speech refers both to what users can say by communicating through social media and to what users can see because these companies also control the primary forms of information gathering through social media and search engines. See *id.* at 1318-19.

5. See Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2 (outlawing contracts, combinations, conspiracies in restraint of trade, and monopolization). Early landmark antitrust cases put a great deal of emphasis on the "every contract, combination . . . , or conspiracy . . . in restraint of trade" language, holding cartels and other monopolists accountable even when the restraint of trade was arguably "reasonable." See *id.* § 1 (declaring contracts, conspiracies, and combinations in restraint of trade illegal); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290, 331-32 (1897) (holding lack of uniform standard for reasonableness meant default to "every" cartel combination); see also *N. Sec. Co. v. United States*, 193 U.S. 197, 354, 360 (1904) (determining holding company formed to purchase competing railroads unlawful combination under Sherman Act). See generally RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888-1992: HISTORY, RHETORIC, LAW* 34-38 (rev. ed. 1996) (describing justices' attitudes toward law during early antitrust cases).

6. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60, 66-67 (1911) (incorporating reasonableness, though still breaking up oil trust for anticompetitive action); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927) (noting certain categories of conduct always deserve strict enforcement, regardless of reasonableness).

7. Compare *Albrecht v. Herald Co.*, 390 U.S. 145, 149 (1968) (holding maximum price fixing via vertical integration to starve competitors violation of Sherman Act), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3 (1997), with *State Oil Co. v. Khan*, 522 U.S. 3, 7, 22 (1997) (overruling *Albrecht* and holding vertical maximum price fixing evaluated under reasonableness standard), and *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (overruling existing standard which found violation for vertical restraint via distribution restriction), and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (holding *all* vertical price fixing agreements—including minimum and maximum—evaluated under reasonableness standard).

8. See Foge, *supra* note 1, at 122-23 (noting substantial decline in U.S. antitrust power in recent decades, particularly after Microsoft case); see also Maurice E. Stucke, *Should We Be Concerned About Data-opolies?*, 2 GEO. L. TECH. REV. 275, 275-77 (2018) (contrasting stricter European antitrust standards with more lax U.S. standards). Congress appears unable to decide on the proper methods to adapt and enforce antitrust policy in the digital age without compromising "the greatest engines of economic growth in recent history," while the Department of Justice (DOJ) is forced to rely on the existing—and antiquated—approach. See Herbert Hovencamp,

legislators introduced a series of bills in June 2021 to reinvigorate and modernize U.S. antitrust law by addressing, among other issues: the use of vertical integration to favor a company's own products on a platform it controls, disfavoring competitors' products; the conflicts of interest surrounding vertical integration that incentivize the discriminatory practices in the first place; and companies' efforts to lock in customers by imposing restrictions on data transferability between platforms.<sup>9</sup>

This Note analyzes the historical successes of antitrust law enforcement and how the series of court decisions to veer away from strict enforcement has led to tech giants' expansion at the expense of consumers, businesses, and society.<sup>10</sup> After outlining the purpose and early implementation of antitrust policy, this Note contrasts those early court decisions and the spirit of early antitrust laws with later cases that relaxed the standards of enforcement.<sup>11</sup> This Note then details the current issues raised by tech giants, focusing on how antitrust law has failed to meaningfully correct their harmful anticompetitive conduct.<sup>12</sup> Having identified the companies' problematic behaviors, this Note then outlines the pending legislation introduced to combat those behaviors.<sup>13</sup> Focusing on particular policy ideas within the bills—protecting consumers and small businesses and promoting innovation and fair competition—this Note explains how Congress can correct failures in antitrust enforcement by implementing these new policies.<sup>14</sup> Finally, this Note concludes by proposing that, if enacted, these policies would: (1) benefit smaller businesses by reducing barriers to entry and encouraging fair competition; (2) benefit consumers by removing some of the free choice restrictions created by tech ecosystems; and (3) to some extent

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*Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 1955-56 (2021) (describing divided Congress and DOJ relying on existing litigation-based approach while updated method needed).

9. See Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms that Could Reshape Amazon, Apple, Facebook, and Google*, CNBC (June 11, 2021), <https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html> [<https://perma.cc/N3PM-NBFR>] (describing each bill's rationale). See generally American Choice and Innovation Online Act, H.R. 3816, 117<sup>th</sup> Cong. (2021) (making discrimination against sellers' products in favor of company's products on company's platform unlawful); Ending Platform Monopolies Act, H.R. 3825, 117<sup>th</sup> Cong. (2021) (eliminating conflicts of interest in vertical integration); Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021, H.R. 3849, 117<sup>th</sup> Cong. (2021) (requiring transferability of customer data to other platforms to avoid lock-in); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117<sup>th</sup> Cong. (2021) (shifting burden of proof for lawful mergers to large companies attempting acquisition); Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117<sup>th</sup> Cong. (2021) (increasing cost to companies engaging in large mergers and allocating new fee revenue to antitrust enforcement).

10. See *infra* Part II (outlining history of antitrust law enforcement and tracking loosening standards).

11. See *infra* Section II.A-II.B (discussing early cases and legislative history, then addressing later cases in context).

12. See *infra* Section II.C (analyzing current antitrust issues with big tech companies, both litigated and not litigated).

13. See *infra* Section II.D (describing pending legislation).

14. See *infra* Part III (matching proposed policies to problems generated by nonenforcement or weakening of existing antitrust law).

ameliorate points of political division, as both parties have interests—albeit differing ones—in curbing tech monopolies’ influence.<sup>15</sup>

## II. HISTORY

### A. Origins of Antitrust Law

#### 1. Objectives of Early Antitrust Laws

The term “antitrust” derives its literal meaning from opposition to monopolies, or “trusts.”<sup>16</sup> Before formal codification in American law, however, the concept of imposing legal penalties for monopolization owes its origins to English common law.<sup>17</sup> While colorful terms such as “dead victuals” have departed, the essential purpose of preventing businesses raising prices through monopolization has remained at the heart of antitrust-like laws throughout their history.<sup>18</sup> Nonetheless, proponents of a freer market—namely, the ambitious traders and businessmen of the day—consistently opposed any interference with trade both in England and the American colonies, often with substantial success.<sup>19</sup> Even when the citizens of the nascent states in the late eighteenth century showed strong interest in legal condemnation of monopolization, and state governments acknowledged that sentiment and enacted laws to curb monopolies, lack of enforcement led to regular evasion.<sup>20</sup>

15. See *infra* Part IV (advocating for policies by suggesting likely benefits to consumers, producers, and society).

16. See *FTC Fact Sheet: Antitrust Laws: A Brief History*, FED. TRADE COMM’N., [https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition\\_Antitrust-Laws.pdf](https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf) [<https://perma.cc/SJ6K-95VV>] (noting trusts refer to massive businesses with monopoly power over entire industries); 1 EARL KINTNER ET AL., *FEDERAL ANTITRUST LAW* § 4.1 (2021) (attributing terminology of “antitrust” to congressional drive to outlaw unchecked businesses, or trusts); see also PERITZ, *supra* note 5, at 9 (describing popularization of negative sentiment toward trusts in late-nineteenth-century United States).

17. See Franklin D. Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905, 905 (1926) [hereinafter *Jones I*] (noting antipathy from consumers, kings, and judges toward monopolistic practices). English law condemned the practices of forestalling, the buying up of goods to resell at a higher price, and engrossment, the manipulation of a product’s price through false statements. See *id.* at 911 (defining engrossment); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 43 (1926) [hereinafter *Jones II*] (defining forestalling). Both practices faced condemnation in early America as England directed the first colonies to enforce English law. See *Jones II*, *supra*, at 43–44 (outlining implementation of laws against forestalling and engrossment in colonies in 1631).

18. See 5 & 6 Edw. 6, c. 14 (1552) (Eng. and Wales) (listing examples of goods prohibited from engrossment, including meat then termed “dead victuals”); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 53 (1911) (equating engrossment to monopolies whose harm of raising prices warrants condemnation); see also *Jones II*, *supra* note 17, at 54 (describing passionate hatred for monopolists in newly independent states).

19. See KINTNER ET AL., *supra* note 16, § 2.2 (describing history of opposition to trade interference in England); *Jones II*, *supra* note 17, at 44 (noting opposition’s success in effectuating repeal of forestalling and engrossing acts in colonies). But see *Jones II*, *supra* note 17, at 44 (acknowledging continued investigation of harms from engrossing following repeal).

20. See *Jones II*, *supra* note 17, at 54–55 (suggesting evasion occurred in multiple states, despite prevalent sentiment and laws against monopolies).

Both the people and their government representatives held a fundamental desire to codify limits on monopolies and the associated practices that raised prices, going so far as to enshrine their condemnation in multiple state constitutions.<sup>21</sup> This fundamental desire, though, stood at odds with an equally essential notion in American society: the freedom of contract.<sup>22</sup> Rising unrest in the late 1800s opposing increased inequality, however, indicated Congress must address and balance the two interests—fair competition and freedom of contract—with some form of legislation.<sup>23</sup> Thus commenced the genesis of American federal antitrust law via extensive debates—centered on protecting consumer welfare by keeping monopolists in check—in the 50th and 51st Congresses.<sup>24</sup>

An important first step was to define the problem: What should be the central target antitrust law must focus on?<sup>25</sup> This definitional question required a

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21. See *Jones II*, *supra* note 17, at 55 (concluding hatred of monopolies fundamental, based on adoption of antimonopoly provisions in state constitutions). The harsh language of those state constitutions that chose to condemn monopolies not only addressed the harms to commerce but also claimed that monopolies were antithetical to the concept of a free and democratic state. See, e.g., MD. CONST. art. 41 (calling monopolies “odious” and “contrary to the spirit of a free government”); N.C. CONST. art. I, § 34 (stating monopolies, like in Maryland, “contrary to the genius of a free state”); MASS. CONST. pt. 1, art. 6 (prohibiting individuals and corporations from acquiring exclusive advantages or privileges not naturally obtained through business).

22. See PERITZ, *supra* note 5, at 9 (noting differing opinions on free competition and freedom of contract caused conflict in congressional debates). Mid- and late-eighteenth century courts regarded freedom of contract as a core component of the individual liberties that defined American life, frowning upon possible legislative action to modify common-law rights. See *id.* at 11–12 (discussing judicial deference to individualism and Supreme Court’s distrust of legislative action interfering with individualism). Moreover, under the influence of the monopolists’ attorneys, some states even encouraged the existence of monopolies through permissive legislation, offering a safe haven from more restrictive states. See *id.* at 10 (listing states allowing trusts and noting sway of businesses’ lobbying on legislative outcomes).

23. See *id.* at 9, 11 (noting growing civil unrest motivator for congressional antitrust debates spanning 1888–1890). Americans understood freedom of contract as a power the private citizen or business could leverage against an overreaching government, but increasingly large and powerful private businesses—capitalizing on this freedom to grow unrestrained—demonstrated that the blind deference to individual liberties may lead to intolerable inequality. See *id.* at 11 (suggesting shift in opinion on freedom of contract when massive companies made status quo untenable); KINTNER ET AL., *supra* note 16, § 4.1 (discussing effect of changing social conditions on permissibility of businesses controlling such vast wealth).

24. See PERITZ, *supra* note 5, at 13 (summarizing start of debates on antitrust). Congressional inquiry began as an investigation into trusts via the House Committee on Manufactures, though bipartisan support from presidential candidates put the issue on a fast track, and a Senate bill followed the release of a preliminary report in quick succession. See *id.* at 13 (noting Senate introduced Bill two weeks after House Committee report). Despite conflict over free competition and freedom of contract, the core motivation of the debates remained the protection of consumers from the harms caused by monopolies—specifically, increases in price and repression of competing products in the market. See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 11, 16 (1966) (asserting protection of consumer welfare prime directive and noting harms of raising prices); KINTNER ET AL., *supra* note 16, § 4.1 (acknowledging congressional support for healthy and free competition, versus wariness over excessive legislative regulation); see also 21 CONG. REC. 2558 (1890) (statement of Sen. Pugh) (condemning “oppressive and merciless” harms to consumers of raising prices, limiting production, and destroying competition); 21 CONG. REC. 4101 (1890) (statement of Rep. Heard) (ascribing motive to monopolists of repressing supply to increase profits at expense of consumer).

25. See CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* xiii (2d. ed. 1965) (noting uncertainty over whether main target of antitrust law monopolists’ conduct or

consensus on the meaning of the term “monopoly,” and the acknowledgment that companies could achieve monopolies by both predatory (illegal) means and competitive (legal) means.<sup>26</sup> In both the original text of Senator Sherman’s antitrust bill and its heavily amended final form, the Sherman Act addressed both the “situation” of unreasonable market domination and the “type of conduct” deemed unfair and oppressive in the market.<sup>27</sup>

## 2. Additional Antitrust Law Developments

Before delving into historical enforcement of antitrust laws, it is productive to consider two impactful laws passed in the fifty years after the quintessential Sherman Act: the Clayton Act and the Robinson–Patman Act.<sup>28</sup> The Clayton Act arose from congressional sentiment that the Sherman Act was too lenient.<sup>29</sup> The Clayton Act made illegal particular anticompetitive acts—such as price

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monopolists themselves); KINTNER ET AL., *supra* note 16, § 4.1 (asserting overall objective of Congress restoring open competitive environment by reining in monopolistic control).

26. See Bork, *supra* note 24, at 29 (arriving at common definition of monopoly). “It is the sole engrossing to a man’s self by means which prevent other men from engaging in fair competition with him.” 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar). After much back and forth of hypotheticals, the senators also agreed that the law would not consider one who captured the entire market “because no one could do it as well as he could” a monopolist, whereas one who acquired competitors to eliminate competition would be a monopolist. See *id.* (suggesting fair competition acceptable, but predatory practices not). While this statement appears to exclude fairly acquired monopolies from the congressional definition of monopoly, the aim was rather to condemn monopolies gained by buying up competitors or otherwise making competition impossible. See *id.*; Bork, *supra* note 24, at 30 (contextualizing Sen. Hoar’s position accepting monopolies gained by superior competition).

27. See KAYSER & TURNER, *supra* note 25, at xiii (differentiating “situation” and “type of conduct” targets of Sherman Act). The language of Sherman’s first iteration of the Bill outlawed contracts and trusts, among other structures, that existed with the purpose of “prevent[ing] full and free competition,” as well as those that functioned to “advance cost to the consumer.” See S. 1, 51st Cong. § 1 (1889) (defining illegal conduct and forms of business). Despite the Bill’s language seeming to indicate a substantially greater emphasis on conduct than on form, Senator Sherman clarified that a massive organization containing all companies in a particular industry would naturally tend to raise prices and would constitute a harmful monopoly. See 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (denoting illegal status of injurious monopoly part of bill’s objective). The amended—almost fully rewritten—bill that ultimately became the Sherman Act toned down the absolutist language of “full and free competition” by steering toward common-law language. See S. 1 (including “full and free competition” instead of “restraints of trade” from codified law); PERITZ, *supra* note 5, at 20 (explaining changes favoring common-law language). The final version of the Sherman Act declared illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade,” as well as criminalizing those who “monopolize, or attempt to monopolize.” See Sherman Act §§ 1-2, 15 U.S.C. §§ 1-2. Despite drastic changes, the “situation” offense—like the original bill—would be a company having the status of a monopolist or a combination that restrains trade, whereas the “type of conduct” offense would be engaging in the predatory practices necessary to form such organizations or monopolies that restrain trade. See KAYSER & TURNER, *supra* note 25, at xiii (defining attributes of “situation” and “type of conduct” offenses); 21 CONG. REC. 2457 (1890) (statement of Sen. Sherman) (asserting both monopoly status and anticompetitive acts goals for condemnation).

28. See Clayton Act §§ 2-7, 15 U.S.C. §§ 13-18 (encompassing relevant provisions of 1914 Clayton Act); Robinson–Patman Act §§ 2-4, 15 U.S.C. §§ 13a-13c (containing provisions of 1936 Robinson–Patman Act, amendment to Clayton Act).

29. See *Historical Highlights: The Clayton Antitrust Act*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <https://history.house.gov/HistoricalHighlight/Detail/15032424979> [https://perma.cc/232E-XVRT] [hereinafter *Historical Highlights*] (explaining general consensus in Congress finding existing antitrust law too lenient).



discrimination and anticompetitive mergers—in contrast to the much broader provisions of the Sherman Act.<sup>30</sup> Further, the Clayton Act exempted labor organizations and added a private right of recovery for those harmed by monopolistic practices, thus protecting workers' rights and creating more opportunities for those negatively impacted by monopolies to seek redress.<sup>31</sup> The Robinson–Patman Act, like the Clayton Act, expanded antitrust protections to include small businesses in price discrimination cases, rather than just consumers.<sup>32</sup>

### *B. Progression of Antitrust Policy Enforcement*

#### *1. Early Enforcement*

The early cartel cases brought under the Sherman Act—typically in the oil and railroad industries—demonstrated the Court's initial hardline approach to

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30. See *id.* (listing examples of specified anticompetitive acts). Price discrimination, in the context of antitrust law, is the anticompetitive practice of charging different buyers varying prices for the same product or service. See *Price Discrimination*, BLACK'S LAW DICTIONARY 1440 (11th ed. 2019) (defining price discrimination in antitrust context). Anticompetitive mergers are acquisitions of other businesses where the effect of such an acquisition is "substantially to lessen competition, or to tend to create a monopoly." See Clayton Act § 7 (defining anticompetitive mergers in Clayton Act). Unlike the Sherman Act, with its two short and extremely general provisions, the Clayton Act contains several lengthy and highly specific provisions. Compare Sherman Act §§ 1-2 (consisting of two sentences each), with Clayton Act §§ 2-7 (containing multi-paragraph sections and subsections). A 1950 revision to section 7 of the Clayton Act indicated a variety of goals, including the following: applying the Clayton Act to acquisitions of assets, not just stock; applying the Clayton Act to vertical and conglomerate mergers, rather than just horizontal mergers; allowing the Federal Trade Commission (FTC) to act earlier in the monopolization process; addressing "incipient" monopolies in addition to established ones; distinguishing the Clayton Act as stricter than the Sherman Act; and encouraging smaller businesses to engage in mergers to compete with larger businesses. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 316-323, 316 n.29, 317 n.31, 318 n.32-33, 319 n.34, 320 n.35, 322 n.37-38, 323 n.39 (1962) (discussing several motivations for amending Clayton Act).

31. See Clayton Act § 6 (exempting labor unions from antitrust laws); Clayton Act § 4 (creating private right of recovery for those harmed by violation of any antitrust law); see also *Historical Highlights*, *supra* note 29 (noting Clayton Act legitimized strikes, boycotts, and labor unions).

32. See Robinson–Patman Act § 2 (applying price discrimination restrictions to businesses buying from other businesses). The purpose of including small businesses as a protected category in price discrimination cases was to mitigate situations where a massive corporation could use its equally massive checkbook and ability to buy in bulk to get a better price from suppliers, ultimately allowing the corporation to charge lower prices to the end user and push out competition. See John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 211 (2008) (explaining rationale for anomalous antitrust provision protecting businesses instead of just consumers).

The legislative history of the Robinson–Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson–Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.

Fed. Trade Comm'n v. Morton Salt Co., 334 U.S. 37, 43 (1948).

enforcement of the nascent law.<sup>33</sup> The Supreme Court strictly interpreted section 1 of the Sherman Act, forbidding even reasonable restraints on trade.<sup>34</sup> The Court dismissed the question of whether everyday business contracts—like non-compete agreements or restrictions ancillary to the sale of property—were violations by concluding that such restraints on competition were outside the scope of the Sherman Act and were therefore excluded from the absolute prohibition on trade restraints.<sup>35</sup>

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33. See *United States v. Trans-Mo. Freight Ass'n.*, 166 U.S. 290, 331-32 (1897) (explaining why *all* contracts in restraint of trade illegal, not just unreasonable restraints). In antitrust discourse, a cartel refers to a group of companies that organize, cooperate, or otherwise join together to engage in price fixing, bid rigging, and territorial allocation. See *Cartel*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining cartel). In *Trans-Missouri*, one of the first and most notable antitrust cases after the Sherman Act's passage, eighteen railways covering freight traffic in the Midwest entered into an agreement to fix prices across all of their businesses with the alleged goal of avoiding competition that would ultimately drive their prices so low as to render their businesses unsustainable. See *Trans-Mo.*, 166 U.S. at 301, 310-11 (describing group of eighteen and stating alleged rationale for price fixing). The federal government claimed that, by virtue of conspiring to fix prices, the railroad group had functionally raised prices over their hypothetical competitive rate and therefore created an illegal restraint of trade under section 1 of the Sherman Act. See *id.* at 310 (outlining government's allegation); Sherman Act § 1, 15 U.S.C. § 1 (outlawing combinations and conspiracies in restraint of trade). Justice Peckham, holding against the railroad group, addressed the issue of reasonableness: "If only that kind of contract which is in unreasonable restraint of trade be within the meaning of the statute, and declared therein to be illegal, it is at once apparent that the subject of what is a reasonable rate is attended with great uncertainty." *Trans-Mo.*, 166 U.S. at 331. Having acknowledged the vague nature of reasonableness, Justice Peckham noted the risks of reading reasonableness into the Sherman Act's prohibition on restraints of trade, suggesting that a fact-specific quality like reasonableness would deter potential litigants from engaging in the time and expense of litigation. See *id.* at 332 (addressing pitfalls of including reasonableness in Sherman Act analysis). Because of the difficulties involved in assessing reasonableness on a case-by-case basis, Justice Peckham concluded, that to allow price fixing at reasonable rates "is substantially to leave the question of reasonableness to the companies themselves." See *id.* (holding reasonableness too deferential to companies to include in Sherman Act analysis).

34. See, e.g., *Trans-Mo.*, 166 U.S. at 332 (holding reasonableness of prices fixed excluded from Sherman Act analysis); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6<sup>th</sup> Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (determining contracts designed to restrain trade not excused by any mitigating factors); *United States v. Trenton Pottery Co.*, 273 U.S. 392, 397 (1927) (suggesting reasonableness defined by Sherman Act itself in antitrust cases). The term "restraint of trade" is directly drawn from the Sherman Act, and early rulings reflected the belief that any contract or combination that restrained trade was inherently unreasonable. See *Trans-Mo.*, 166 U.S. at 333-34 (holding all restraints unreasonable). As Justice Peckham noted in *Trans-Missouri*, any contract or combination restraining trade is unreasonable because the highly fact-sensitive inquiry of reasonableness was vague enough to "leave the question of reasonableness to the companies themselves." See *id.* at 332 (addressing difficulty and subjectivity of reasonableness analysis). The Court in *Trenton Pottery* explained why the absolute stance on price-fixing agreements must remain absolute:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow.

*Trenton Pottery*, 273 U.S. at 397.

35. See *Addyston*, 85 F. at 281 (listing examples of acceptable contracts in everyday course of business); *Trans-Mo.*, 166 U.S. at 328-29 (positing certain business contracts "might not be . . . within the letter or spirit of the statute"); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 567-68 (1898) (echoing *Trans-Missouri* exclusion of contracts accompanying sale and including additional examples).



## 2. *Bifurcating Antitrust into Per Se and Rule of Reason Analyses*

The early twentieth century saw the Sherman Act's application split into two categories of analysis: per se (applying to inherently illegal conduct) and rule of reason (allowing reasonableness as a factor in evaluating questionable conduct).<sup>36</sup> Throughout this period and into the mid-twentieth century, the Court relegated strict per se enforcement to a few defined categories of conduct—price fixing and territorial divisions.<sup>37</sup> The per se rule, though applying to progressively fewer cases, retained its value by offering clear guidelines both to companies aiming to avoid violation and to judges trying to apply a very broad statute since judges could spare themselves the fact-heavy rule of reason analysis by simply identifying the presence of a forbidden agreement.<sup>38</sup> The widely applicable rule of reason emerged as the dominant method of antitrust analysis because, as long as price fixing or territorial allocation had not occurred, the purposes and effects of the conduct required a fine-tooth, fact-specific comb to spot the types of violations Congress intended to target.<sup>39</sup>

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36. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911) (interpreting rule of reason into Sherman Act jurisprudence). In *Standard Oil*, Justice White determined that without reading a test of reasonableness into the Sherman Act, functionally every contract in the business world would become illegal, as all would act in some way to restrain trade from someone else. See *id.* (noting section 1 encompassed “every conceivable contract or combination which could be made”). Therefore, Justice White held the Sherman Act must have intended to use the common-law reasonableness standard to determine whether conduct violated the Act’s provisions. See *id.* (holding Sherman Act analysis must use rule of reason standard). On the flip side of the analytical coin was the per se rule, following closer to the strict guidelines of its predecessors, whereby certain specific actions—price fixing being the chief concern—were deemed so inherently damaging to free competition that reasonableness could not factor into the analysis. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 (1940) (holding mere proof of combination with intent to fix prices violation of section 1). *Socony*’s rule held fast even when companies would not, or could not, carry out their plans; the purpose to fix prices was sufficient, rather than the power to actually do so. See *id.* at 224 n.59 (analogizing conspiracy to fix prices to other conspiracy crimes because success not necessary).

37. See *Socony*, 310 U.S. at 221–22 (holding no justification for price fixing and stating any suggestion otherwise must come from Congress); *Trenton Potteries*, 273 U.S. at 398 (noting price fixing always held illegal regardless of reasonableness); see also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (holding territorial allocation agreements classic example of per se violation); *Topco Assocs.*, 405 U.S. at 613 (Blackmun, J., concurring) (agreeing per se rule solidly established beyond any ability to oppose). The per se ban on price fixing was so strict that it even prevented organizations from setting a maximum price. See *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 348 (1982) (holding fixed price ceiling does not escape per se rule). The reasoning is twofold: First, the overall purpose of the per se rule is to completely shut down price fixing, rather than to seek lower prices. See *id.* (quoting James A. Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U.L. REV. 137, 142 (1962)) (describing inherent goal of price fixing). Second, in the case of price ceilings specifically, the Court in *Maricopa* noted that price ceilings disincentivize both highly skilled potential competitors entering the market and innovation in the field. See *id.* (suggesting limitation of potential gains holds back entrepreneurs).

38. See Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775, 837 (1965) (suggesting per se rule helped predictability and simplified judges’ evaluation); see also *The Antitrust Laws*, FED. TRADE COMM’N., <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/FGK8-6JHW>] (offering simple, straightforward guidelines of per se rule for companies).

39. See *Chicago Bd. of Trade v. United States (CBOT)*, 246 U.S. 231, 239–40 (1918) (laying out elaborate factors test observing restraint’s nature, scope, and effects). *CBOT* exemplifies the Court’s early distancing from

### 3. Vertical Restraints, Mergers, and Tying

#### i. Vertical Restraints

Vertical restraints—or limitations to competition along the manufacture-distribution-retail chain—were likewise initially subjected to the strict per se rule.<sup>40</sup> Just as use of the per se rule waned in horizontal cases, so too did the rule fall out of favor in vertical cases, which followed a similar path toward the more popular rule of reason economic analysis.<sup>41</sup> In vertical cases where the Supreme Court explicitly overruled a prior use of the per se rule, the Court often cited the general trend in antitrust law toward a relatively uniform adoption of the rule of reason as a key motivation for its decision.<sup>42</sup>

#### ii. Mergers and Acquisitions

While the federal government initially enforced a prohibition on anticompetitive mergers through the Sherman Act, after 1914 such mergers fell under the

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the per se rule, as *CBOT* was one of the most thorough rule-of-reason analyses, considering three factors—nature, scope, and effects, with nine subfactors for the effects factor—in a situation where prices had, albeit for only part of each day, been fixed. See *id.* at 238-40 (favoring extensive factors test for agreement that fixed prices after market close).

40. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 323-24 (1962) (defining anticompetitive vertical restraints on competition); Lawrence Fullerton et al., *Vertical Agreements: The Regulation of Distribution Practices in 34 Jurisdictions Worldwide*, GLOB. COMPETITION REV. 210, 210 (2008), <https://www.sidley.com/-/media/files/publications/2008/03/getting-the-deal-through—vertical-agreements-2008/files/view-united-states-chapter/fileattachment/united-states-21.pdf> [<https://perma.cc/942T-58YB>] (giving examples of vertical restraint types); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408-09 (1911) (holding fixed minimum prices along vertical distribution chain evaluated under per se rule), *overruled by* *Leegin Creative Leather Prods., Inc. v. Kay's Shoes*, 551 U.S. 877 (2007). The Supreme Court also applied this rationale to maximum price fixing in earlier cases, suggesting that setting maximum prices prevented competition because valuable goods—goods consumers would be willing to pay greater prices for—would not be produced as a consequence. See *Albrecht v. Herald Co.*, 390 U.S. 145, 152-53 (1968) (holding vertical maximum price fixes anticompetitive violations), *overruled by* *State Oil Co. v. Khan*, 522 U.S. 3 (1997). The Court even interpreted manufacturer-proffered restrictions on where geographically their products could be sold by wholesalers and retailers as per se violations, basing its decision on the analogous territorial division agreements from early per se cases. See *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 377 (1967) (comparing location restrictions to territorial divisions), *overruled by* *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

41. See *Leegin Creative Leather Prods., Inc. v. PSKS Inc.*, 551 U.S. 877, 882 (2007) (overturning *Dr. Miles* in favor of rule of reason for vertical minimum price fixing cases); *State Oil Co. v. Khan*, 522 U.S. 3, 7 (1997) (rejecting *Albrecht* and switching to rule of reason for vertical maximum price fixing cases); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58-59 (1977) (overruling *Schwinn's* use of per se rule in vertical geographic restriction cases).

42. See *Leegin Creative Leather Prods.*, 551 U.S. at 877-78 (noting trend and listing rare scenarios when per se applied); *GTE Sylvania*, 433 U.S. at 47-48 (categorizing prior vertical cases using per se rule as outliers). Aside from continuing the general trend favoring rule-of-reason analyses, the Court also overruled prior per se cases by following the similar trend of increased discretion for situations where prices ultimately lowered, regardless of method. See *Khan*, 522 U.S. at 3-4 (reasoning per se rule not applicable because trend discouraged use when prices lowered).

Clayton Act.<sup>43</sup> The Clayton Act, by identifying more specific prohibited conduct, allowed for more frequent successful prosecutions of merger and acquisition cases than the Sherman Act's short and broad language.<sup>44</sup> Nonetheless, the strict, per se-like application of the Clayton Act in cases like *Philadelphia National Bank*—where the Court held mergers were per se anticompetitive when the larger firm controlled an “undue percentage” of the market and significantly increased its market share via the merger—fell by the wayside like so many of the stricter antitrust rulings.<sup>45</sup> The Court later criticized the low burden on the government that *Philadelphia National Bank* established, suggesting it risked numerous false positives in scenarios that would otherwise be perfectly acceptable, such as when other factors impacted the relevant industry or specific company so the acquisition would not lessen competition.<sup>46</sup>

### iii. Tying

Tying refers to a restriction on the freedom of the buyer to *not* buy something rather than the restriction of another seller's freedom to compete in the market; in other words, tying is conditioning the sale of a desired product on the sale of another product (the tied product).<sup>47</sup> Early tying cases classified such behavior among the few odious categories of per se violations, suggesting that tying agreements necessarily prevented competition for the tied product.<sup>48</sup> Much like a

43. See *N. Sec. Co. v. United States*, 193 U.S. 197, 362-63 (1904) (Brewer, J., concurring) (agreeing Sherman Act violation occurred when companies combined under new holding corporation); *United States v. Union Pac. R.R. Co.*, 226 U.S. 61, 88-89 (1912) (enforcing Sherman Act against merged companies when small proportion but high volume of eliminated competition); Clayton Act § 7, 15 U.S.C. § 18 (outlawing explicitly mergers and acquisitions negatively impacting competition).

44. See Sherman Act § 1, 15 U.S.C. § 1 (barring broad restraints of trade though not specifically mentioning anticompetitive acquisitions). The Clayton Act targeted acquisitions, though its 1950 amendment expanded the provision to address harmful anticompetitive mergers that previously slipped by the provision's language. See Clayton Act § 7 (enumerating prohibited types of mergers and acquisitions in greater detail than Sherman Act); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-35 (1960) (discussing problems motivating tough-on-mergers 1950 amendment to existing Clayton Act mergers provision); *Brown Shoe*, 370 U.S. at 316, 319-20, 316 n.29, 319 n.34, 320 n.35 (listing goals of amendment: expanding protections and closing loopholes, among others); see also *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 341-42, 363 (1963) (using legislative history of 1950 amendment to further expand prohibitions and incorporate per-se-style test).

45. See *Phila. Nat'l Bank*, 374 U.S. at 363 (stating increased concentration in already unduly concentrated market prima facie anticompetitive); *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 497-98 (1974) (frowning upon *Philadelphia National Bank* ruling, suggesting test overbroad).

46. See *Gen. Dynamics Corp.*, 415 U.S. at 497-98 (holding *Philadelphia National Bank* test put low burden on government and excludes relevant factors).

47. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958) (defining tying to mean conditioned sale agreements).

48. See *id.* (including tying in list of per se violations and explaining inherently anticompetitive nature of tying). The rationale for making tying a per se violation in *Northern Pacific* was that competitors in the market for the tied good had no way of competing with the company selling the *tying* good because they were not competing in the market for the tying good. See *id.* at 6 (noting lack of leverage in other market strangles competitor's ability in tied good's market). The Supreme Court in *Northern Pacific* further considered the harm to the buyers'

broken record, however, antitrust law's gradual dilution played out again with tying, as the federal courts read in an additional requirement that a court must have well-established experience in the relevant industry to categorize a tying arrangement as a per se violation.<sup>49</sup>

#### 4. Motivations Driving the Weakening Trend

Antitrust law has always sought to balance the ethical goal of enforcing fair competition against the capitalistic ideal of efficiency, lower prices, and success in the market.<sup>50</sup> The guiding principle of maximizing consumer welfare, though, has exempted monopolies with harmful intent simply because they ultimately lower prices.<sup>51</sup> This price-efficiency mindset has driven the trend away from the categorical condemnations of the per se era discussed above (e.g., horizontal cases, vertical cases, and tying cases).<sup>52</sup> That is not to say, however, that efficiency is universally dominant in evaluating possible violations; rather, it is dominant only when it results in cost-savings *for consumers* in addition to the

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freedom of choice as a reason to consider tying agreements "unreasonable in and of themselves." *See id.* (addressing harm to consumer when leader in tying market takes over tied market).

49. *See United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001) (switching to rule of reason unless court thoroughly acquired industry experience). Here, the federal courts again looked to the per se rule's trend of diminution in other scenarios and continued the trend in tying cases. *See id.* (referencing territorial allocation and batch licensing cases). The *Microsoft* court suggested that understanding the industry from an antitrust perspective before rushing to a per se judgment was especially important because the case was one of first impression for tying added functionality to a piece of software. *See id.* (noting lack of any analogous cases offering guidance on software functionality tying).

50. *See Bork, supra* note 24, at 12 (noting Congress acknowledged monopolies exempt when gained through efficient competition). While this assessment appears to substantially complicate the harmfulness determination of a monopoly, the original Sherman Act debates clarified that the statute would not consider individuals gaining monopolies through superior skill "monopolist[s]" in the harmful sense the Sherman Act proscribed, and that monopolies gained by acquisition of competitors would be a prime example of a harmful monopoly. *See id.* at 29-30 (discussing Sherman Act debates and concluding Congress condemned predatory and merger-based monopolies); 21 CONG. REC. 3151 (1890) (statement of Sen. Kenna) (questioning whether Sherman Act would criminalize monopolies gained by skill); 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar) (explaining skilled businessmen not monopolists, instead focusing on predatory acquisitions).

51. *See Bork, supra* note 24, at 12-13 (asserting consumer welfare exclusive boundary of Sherman Act). Bork notes that the impact of breaking up monopolies maintained by undercutting competitors' prices would naturally cause prices to rise, and therefore such breakups should not occur on consumer-welfare grounds. *See id.* at 12 (mentioning price-raising effects of monopoly breakups). Thus, economic analyses of the company's relevant market and position within that market are exalted as the primary focus in antitrust cases, while considering the company's intent in achieving that position is discouraged. *See Carl Kaysen, An Economist as the Judge's Law Clerk in Sherman Act Cases*, 12 SECTION OF ANTITRUST L. 43, 47 (1958) (encouraging shift to economic analysis of market role at expense of intent analysis).

52. *See Andrew I. Gavil, Defining Reliable Forensic Economics in the Post-Daubert/Kumho Tire Era: Case Studies from Antitrust*, 57 WASH. & LEE L. REV. 831, 839-40 (2000) (noting trend away from rigid enforcement in multiple antitrust scenarios); *see also supra* Sections II.B.1-3 (discussing types of situations where antitrust enforcement has weakened). The problem with maintaining categorical condemnations is excessive deterrence; companies would avoid reasonable practices that generate positive economic results out of fear of per se liability. *See Gavil, supra*, at 840 (describing overdeterrence effect on potentially beneficial economic activity).

businesses themselves.<sup>53</sup> This mentality rewards pricing that may not be literally predatory (below cost), but that still substantially undercuts competitors at the expense of profit to eliminate competition.<sup>54</sup>

*C. Problems with Enforcing Weakened Antitrust Laws on Tech Companies in the Modern Era*

In light of the increasingly permissive standards for enforcing the primary antitrust laws—the Sherman Act and the Clayton Act—the massive tech companies of the twenty-first century have built empires with relative ease and little government oversight.<sup>55</sup> The decline of strong antitrust policy in the United States—as it pertains to tech companies—stands in contrast to foreign nations where antitrust enforcement is both more prevalent and substantial.<sup>56</sup> This difference is not entirely unexpected, given that U.S. citizens generally have more favorable sentiments toward big tech companies than citizens of other nations.<sup>57</sup> Because

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53. See Kirkwood & Lande, *supra* note 32, at 224 (stating conflicts between efficiency issues and consumer-welfare issues consistently resolved in favor of consumer welfare). The discussion revolves around whether a merger's cost savings passes on to the consumer, or rather, whether the consolidation of market power results in the dominant business charging higher prices by virtue of their dominance or charging lower prices to undercut the remaining competition. See *id.* at 224-25 (addressing different outcomes of mergers and their impacts on consumer welfare). Corporations could only rely on an efficiency argument when they could clearly demonstrate that no harm would come to the consumers and, ideally, that the consumers would actually benefit from the merger. See *id.* at 225 (defining criteria for use of efficiency defense).

54. See Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 704-05 (1975) (arguing both temporary and permanent undercutting nonpredatory unless below average cost); Foge, *supra* note 1, at 123 (using example of Amazon undercutting rivals to build monopoly). Large tech firms have the resources necessary to not universally maximize profits while cutting out competitors with their lower prices, given that the current consumer-welfare-centered legal view of this behavior is highly permissive. See Foge, *supra* note 1, at 123 (acknowledging how courts find these actions permissible because they encourage competition); see also Areeda & Turner, *supra*, at 705-06 (asserting benefits of monopolists' lower prices outweigh suppression of competitive innovation).

55. See Foge, *supra* note 1, at 123 (noting decline of antitrust influence and lack of government involvement with Amazon's trend toward monopoly). These massive companies learn from prior antitrust decisions how to engage effectively with policymakers and the American legal system—namely by pouring millions of dollars into lobbying—such that they can amass power, money, and influence greater even than the companies successfully prosecuted in the early, hardline antitrust cases. See *id.* at 122-23 (describing companies' ability to surpass previous violators and mentioning substantial lobbying investments).

56. See Mark Thompson, *EU Antitrust Officials Are Investigating Google's Vast Ads Business*, CNN (June 22, 2021), <https://www.cnn.com/2021/06/22/tech/google-eu-antitrust/index.html> [<https://perma.cc/VUP4-ENST>] (addressing Google's possible self-favoring with its advertising services at expense of competing brands); Stucke, *supra* note 8, at 278 (noting differing antitrust obligations in United States versus European Union). While the United States remains squeamish in the face of confronting these massive companies, the European Commission has secured hundreds of millions—and in some cases billions—in antitrust fines. See Stucke, *supra* note 8, at 275-77 (listing fines against Google, Meta, Amazon, and Apple ranging from low-hundreds-of-millions to billions); Tony Romm & Elizabeth Dwoskin, *Facebook, Google and Other Tech Giants to Face Antitrust Investigation by House Lawmakers*, WASH. POST (June 3, 2019), <https://www.washingtonpost.com/technology/2019/06/03/facebook-google-other-tech-giants-face-antitrust-investigation-by-house-lawmakers> [<https://perma.cc/BMZ4-ANMJ>] (noting Google faced \$9 billion in European fines within three years).

57. See Foge, *supra* note 1, at 124 (listing polls showing American favorability towards Big Tech compared to more antitrust-favorable sentiment abroad). The American public's—and specifically the younger

of the weakened state of U.S. antitrust laws, cases that do make their way through trial either face reversal on appeal or result in such meager fines that the punishment is meaningless.<sup>58</sup>

### 1. *To Legislate or Not to Legislate*

Calls come from both sides of the aisle for improvement of antitrust laws and their interaction with big tech companies.<sup>59</sup> Not only are these complaints divided regarding the nature of the flaws, but they also oppose the other bipartisan cohort that suggests the current system is acceptable without major changes.<sup>60</sup> While debate rages on, the established bias against enforcement prevents meaningful progress.<sup>61</sup>

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generation's—support for big business could be attributed to many factors, such as support for technological innovation, profitable investments in big companies, and a reciprocal relationship with the declining antitrust laws: Lack of enforcement shows the public that monopolies are not problematic, which leads political candidates to run on platforms avoiding condemnation of monopolies. See Linda Lyons, *Youthful Optimism? Young Americans Happy with "Big Business,"* GALLUP (Mar. 2, 2004), <http://www.gallup.com/poll/10816/Youthful-Optimism-Young-Americans-Happy-Big-Business.aspx> [<https://perma.cc/RA34-TP2J>] (suggesting factors encouraging younger generation to support massive tech companies); Foge, *supra* note 1, at 124 (noting trend of presidential candidates opposing antitrust enforcement).

58. See *United States v. Microsoft Corp.*, 253 F.3d 34, 118-19 (D.C. Cir. 2001) (vacating lower court's ruling forcing Microsoft to divest); *United States v. Apple Inc.*, 791 F.3d 290, 339 (2d Cir. 2015), *cert. denied*, 577 U.S. 1193 (2016) (affirming lower court's decision and holding Apple liable for conspiracy to raise price of eBooks). While the *Apple* case did impose antitrust liability, Apple ultimately settled for just over half of the demanded \$840 million—\$450 million—which amounted to just under 1% of that quarter's revenue. See Charlie Osborne, *Apple Settles Ebook Antitrust Case, Set to Pay Millions in Damages*, ZDNET (June 17, 2014), <https://www.zdnet.com/article/apple-settles-ebook-antitrust-case-set-to-pay-millions-in-damages> [<https://perma.cc/MT64-NZ8P>] (discussing state attorneys general demanding \$840 million after favorable verdict); Lawrence Hurley, *Apple Is on the Hook for the \$450m Settlement After Supreme Court Rejects Apple's eBook Conspiracy Appeal*, DIGIT. READER (Mar. 7, 2016), [<https://perma.cc/7SZC-KBLN>] (noting ultimate settlement only \$450 million); see also Press Release, Apple Inc., Apple Reports Fourth Quarter Results (Oct. 25, 2016), <https://www.apple.com/newsroom/2016/10/apple-reports-fourth-quarter-results> [<https://perma.cc/4WD4-H9TR>] (listing \$46.9 billion quarterly revenue for relevant quarter). Following the *Microsoft* case, former CEO Bill Gates noted that, while damaging, the case amounted to not much more than a "distraction" that prevented the company from entering the smartphone market effectively. See Avery Hartmans, *Google Is Facing an Antitrust Showdown with the DOJ More than 22 Years After Microsoft's Watershed Case. Here's Why the Government Scrutinized Gates and How It Played out for the Company*, INSIDER (Oct. 20, 2020), <https://www.businessinsider.com/bill-gates-microsoft-antitrust-case-history-outcome-2020-7> [<https://perma.cc/M9KM-T6JF>] (touching on Gates's discussion of *Microsoft* antitrust case).

59. See Hovencamp, *supra* note 8, at 1955 (mentioning bipartisan sentiment claiming antitrust laws currently inadequate).

60. See *id.* (noting partisan split on reason for antitrust shortfall and opposition to legislative changes). Opponents' chief concerns with modification or expansion of the antitrust laws are impediments to the big tech companies' function as massive drivers of economic growth, whereas proponents focus less on the economic impact and more on the principled opposition to the big tech companies' dominance. See *id.* (describing opposition's reasoning for not favoring change and proponents' enthusiasm for breakups).

61. See *id.* at 1956 (suggesting "biggest roadblock" to continued antitrust action precedent favoring nonenforcement); Heidi M. Sifton et al., *Congressional Antitrust Bills Seek to Regulate a New Internet Era*, 36 A.B.A. ANTITRUST L. SEC., Apr. 1, 2022, at 26, 26 (noting recent "heavily criticized" missed opportunities to pursue massive tech mergers). The bias is not unique to antitrust itself, as there is also bias against interfering with the accelerated growth and innovation of the internet, though it is becoming more apparent that turning a blind eye



## 2. Power Adores a Doldrum

In the absence of meaningful enforcement of existing antitrust laws and of any significant progress toward new legislation—all resulting from the rut of antienforcement bias—tech giants continue to expand their market share across industries and their vertical distribution chains.<sup>62</sup> The larger tech companies become, the more adept their methods to expand into new industries, because their control over information provides unique insight and advantages for entering those new industries.<sup>63</sup>

As these companies create more products, they capture more than just market share: They capture increased control over the vast amount of data woven into various aspects of our lives.<sup>64</sup> When one company presides over such a substantial majority of social interactions and personal data as Meta does with its social network, Facebook, the consumer is presented with an empty choice if a new social media competitor enters the market: Either stay with Facebook and all of your friends and data, or migrate to this new service and start building your social profile and contact lists from scratch.<sup>65</sup> A similar problem presents with physical devices linked through a shared operating system—such as Apple’s device ecosystem linked by interconnected software—which obstructs usage of or

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may no longer be tenable. See Romm & Dwoskin, *supra* note 56 (discussing attitude favoring laissez-faire treatment of internet but acknowledging growing concerns). But see Press Release, Bob Ferguson, Att’y Gen., Wash., AG Ferguson Investigation Shuts down Amazon Price-Fixing Program Nationwide (Jan. 26, 2022), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-investigation-shuts-down-amazon-price-fixing-program-nationwide> [<https://perma.cc/C49E-5UL8>] [hereinafter Ferguson Investigation] (describing recent crackdown on Amazon program allowing compromise with sellers on prices). While enforcement actions still take place, the scope of the consequences—a fine of \$2.25 million and closure of a program dealing with several hundred sellers nationwide—is not meaningful for a company the size of Amazon. See Ferguson Investigation, *supra* (noting program encompassed “small fraction” of millions of sellers generating hundreds of billions in sales).

62. See Kern & Soper, *supra* note 2 (noting Amazon currently capturing approximately 41% of all e-commerce); MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 11 (Comm. Print 2020) [hereinafter INVESTIGATION OF COMPETITION IN DIGIT. MKTS.] (predicting Amazon, Apple, Facebook, and Google to produce 30% of global economic output within decade). Amazon, which functions vertically as both a platform, a retailer, and a shipper, could see its logistics (shipping) operation surpass the valuation of Coca-Cola by 2025. See Kern & Soper, *supra* note 2 (comparing projected value of Amazon logistics to Coca-Cola).

63. See Brian Fung, *Congress’ Big Tech Investigation Finds Companies Wield ‘Monopoly Power,’* CNN (Oct. 6, 2020), <https://www.cnn.com/2020/10/06/tech/congress-big-tech-antitrust-report/index.html> [<https://perma.cc/N73Z-GKTW>] (discussing tech companies’ expansion advantages through control of information). For example, Google utilized its repositories of search data to determine the public’s sentiment toward different browsers and features, allowing it to jump into the browser market with its own product, Chrome, having a well-informed advantage. See *id.* (explaining how Google used existing search feature to assist development of Chrome).

64. See Stucke, *supra* note 8, at 275 (describing tech companies’ domination over types of data, e.g., shopping, social, search).

65. See BENNETT CYPHERS & CORY DOCTOROW, PRIVACY WITHOUT MONOPOLY: DATA PROTECTION AND INTEROPERABILITY 9 (2021), [https://www.eff.org/files/2021/06/14/privacy\\_without\\_monopoly.pdf](https://www.eff.org/files/2021/06/14/privacy_without_monopoly.pdf) [<https://perma.cc/6ZRU-NKK3>] [hereinafter PRIVACY WITHOUT MONOPOLY] (noting Facebook’s control over social lives and data limits new entrants).

switching to other nonbrand devices.<sup>66</sup> Besides creating their own products or services, tech giants often skip the innovation step and simply acquire competitors, then allow the giant's resulting subsidiaries to compete with each other as opposed to the giant competing with the market directly.<sup>67</sup>

The ecosystem lock-in problem could be a form of tying—specifically, “tech-tying”—insofar as these massive companies are conditioning use of their products, services, or operating systems on the use of additional features the consumer did not necessarily desire.<sup>68</sup> The obvious problem with the tying designation is the current reluctance to hold tech companies liable, especially given the trend in software tying cases to consider novel features or services added to an operating system to be fully integrated as opposed to being separate products.<sup>69</sup>

### 3. *Hear No Evil, See No Evil, Speak No Evil*

Consolidation of almost all social media interactions into a limited number of companies has led to increased worries that these massive companies are impinging on the right to freedom of expression under the First Amendment.<sup>70</sup> This concern is more of a perfunctory nod toward the First Amendment than an actual

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66. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 334 (addressing Apple's sustainable dominance in smartphone market due to high switching costs and ecosystem lock-in).

67. See Fung, *supra* note 63 (explaining Meta's targeted acquisitions and localized competition of its own brands). This is not limited to the main company's own market: For example, Meta acquires brands in different markets (Instagram for photo sharing, WhatsApp and Messenger for private messaging) and then pits them against each other to avoid engaging with the “actual” market. See *id.* (breaking down brand categories and competition within larger brand); see also INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 11-12 (suggesting Meta competes more within its own brand sphere than with external competitors). Additionally, Meta leverages its immense repository of data to target potentially competitive startups. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 14 (describing Meta's data-exploitation tactic to target threats to acquire or copy).

68. See Emma C. Smizer, Comment, *Epic Games v. Apple: Tech-Tying and the Future of Antitrust*, 41 LOY. L.A. ENT. L. REV. 215, 215 (2021) (defining tech-tying to mean conditional software or service agreements).

69. See *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1045-46 (N.D. Cal. Sept. 10, 2021) (finding in-app payment and commission-collection service integrated with iOS and App Store, not distinct product); *United States v. Microsoft Corp.*, 253 F.3d 34, 95 (D.C. Cir. 2001) (rejecting per se application to additional-functionality software cases). In *Microsoft*, the court suggested that applying the per se determination rigidly to cases of this nature—where a new functionality is integrated into the operating system—would impede innovation in both the hardware and software markets; the court instead offered a rule of reason test with a much more rigorous burden. See *Microsoft Corp.*, 253 F.3d at 95 (requiring showing of additional barriers besides tying agreement while simultaneously restricting definition of barriers).

70. See U.S. CONST. amend. I (establishing freedom of speech); U.S. CONST. amend. XIV, § 1 (establishing equal protection of laws to all citizens); Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1317-18 (2020) (noting growing concern of tech giants suppressing free exchange of ideas). Republicans often express concerns over tech companies suppressing free speech, though both parties express concerns over the flow of information and tech companies' ability to stem it. See Day, *supra*, at 1319-20 (mentioning conservative organizations, alongside bipartisan politicians, object to tech companies' selective censorship of speech); Cat Zakrzewski, *Bipartisan Proposals in House Would Mean Major Changes for the Way Tech Giants Operate*, WASH. POST (June 11, 2021), <https://www.washingtonpost.com/technology/2021/06/11/antitrust-legislation-curbs-silicon-valley/> [<https://perma.cc/9DQD-AUYN>] (describing Democratic and Republican legislators' differing concerns, noting Republican speech-centered concerns).

legal argument, as private companies' content policies are outside the scope of the First Amendment's protections.<sup>71</sup> Those anxious about the encroachment of Big Tech into everyday discourse have instead been forced to rely on antitrust law to address fears of censorship and information dissemination.<sup>72</sup>

Selectively presenting or deleting content impacts both individuals' freedom of speech and companies' freedom of expression in their advertising, as small businesses attempting to sell products on massive platforms may find that those platforms reduce the visibility of the small businesses' advertisements in favor of the platform's branded products.<sup>73</sup> The suppression of competing product information on a competitor-owned platform is often more overt than covert, especially when the platform's ability to suppress content functionally enables tying.<sup>74</sup> Sellers routinely accuse Amazon of coercing additional fees to gain favorable treatment in the platform's search algorithm, and Amazon has shown no qualms about suppressing sales so much that thousands of authors working under a disfavored publisher saw a substantial drop in income for several months.<sup>75</sup> Suppressing businesses attempting to enter a market, whether by

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71. See Day, *supra* note 70, at 1317-18 (acknowledging tech companies can censor speech while acting outside scope of First Amendment).

72. See *id.* at 1319-20 (listing examples of antitrust cases based on tech companies' censorship of speech); see also INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 64 (describing ease of selective press silencing).

73. See Day, *supra* note 70, at 1342 (noting EU allegations against Google of suppressing competitors' information in favor of its own products); Zakrzewski, *supra* note 70 (mentioning concerns not only over censoring what Americans say but also what they see).

74. See Kern & Soper, *supra* note 2 (describing numerous complaints from Amazon sellers of reduced product visibility when not using Amazon logistics). Sellers have alleged that Amazon engages in tying by curating its search results to suppress sellers who do not use Amazon's packing and shipping service, which can cost up to 35% more than competing shipping services. See *id.* (referencing seller allegations of higher shipping prices with acceptance coerced through diminished product visibility); Olivia LaVecchia & Stacy Mitchell, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities*, INST. FOR LOC. SELF-RELIANCE 20 (Nov. 2016), [https://ilsr.org/wp-content/uploads/2020/04/ILSR\\_AmazonReport\\_final.pdf](https://ilsr.org/wp-content/uploads/2020/04/ILSR_AmazonReport_final.pdf) [<https://perma.cc/E9G5-WMVD>] (stating Amazon gives strong algorithm preference to sellers paying to use its logistics service).

75. See LaVecchia & Mitchell, *supra* note 74, at 11 (addressing Amazon's suppression of books published by seller—Hachette—who reportedly refused additional fees); see also Brian Fung, *DC Sues Amazon over Alleged Antitrust Violations*, CNN BUS. (May 25, 2021), <https://www.cnn.com/2021/05/25/tech/dc-ag-amazon-antitrust-lawsuit/index.html> [<https://perma.cc/DT52-JWYM>] (alleging Amazon's high fees, coupled with seller contract, allow algorithm suppression for selling cheaper externally). For Hachette, a publisher supporting approximately 3,000 authors, their refusal to pay Amazon's increased fees in 2014 resulted in suspended preorders, delayed shipping, and significant enough suppression within the algorithm to meaningfully impact the income of Hachette's authors for months. See LaVecchia & Mitchell, *supra* note 74, at 11 (describing consequences leveraged against Hachette). Amazon responded to the D.C. Attorney General's allegations by suggesting that its agreement worked to help customers by favoring lower prices, though the Attorney General argued the 40% seller fee made it functionally impossible to sell at a lower price on Amazon than the seller would on its own site or another retail site, thus triggering algorithm suppression for products "not priced competitively." See *Amazon Marketplace Fair Pricing Policy*, AMAZON SELLER CENT., <https://sellercentral.amazon.com/gp/help/external/G5TUVJKZHUVMN77V> [<https://perma.cc/4JC9-84EG>] (noting Amazon may remove listings offered elsewhere for less); Fung, *supra* (presenting both D.C. Attorney General's and Amazon's arguments). Ultimately,

buying out the competition or suppressing it in favor of the platform's own products, is now known as "gatekeeping," and represents one of the primary motivators for the proposed antitrust legislation discussed below.<sup>76</sup>

#### *D. Pending Legislation Introduced to Combat Tech Monopolies*

In response to the wide-ranging concerns from consumers and businesses over the anticompetitive impacts from an era of lax antitrust enforcement, legislators introduced a package of bills in June 2021 to combat the harms of rapidly expanding tech monopolies.<sup>77</sup> The bills broadly follow the recommendations promulgated by an extensive investigation into tech platforms' anticompetitive behaviors.<sup>78</sup> The overarching theme of the bills is to tackle the tech platforms' exploitation of gatekeeping power and ecosystem lock-in.<sup>79</sup>

##### *1. The Nature of The Proposed Policies*

The June bill package addresses a variety of weaknesses in the existing anti-trust laws.<sup>80</sup> The Ending Platform Monopolies Act prohibits obvious conflicts of interest for large platforms (defining large as over 50 million monthly active users and a market cap greater than \$600 million) and defines conflict of interest

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Amazon prevailed, and the D.C. Superior Court dismissed the Attorney General's case. See David McCabe, *D.C. Suit Accusing Amazon of Controlling Prices Is Thrown Out*, N.Y. TIMES (Mar. 18, 2022), <https://www.nytimes.com/2022/03/18/technology/amazon-dc-antitrust-suit.html> [<https://perma.cc/9RXH-VVWA>] (announcing dismissal of case).

76. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 6 (discussing gatekeeper power to control market players' success or failure while coercing substantial fees); see also *infra* Section II.D (calling anticompetitive harm from gatekeeping driver for legislation). The gatekeeping advantage stems from control over the platform, as gatekeeper companies enjoy access to competitors' data by virtue of hosting them on the platform, allowing gatekeepers to use the data and control over the infrastructure to copy, buy out, suppress visibility, undercut, or remove competitors from the platform altogether. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 6 (listing advantages of gatekeeper power).

77. See Siltan et al., *supra* note 61, at 27 (justifying bills' reform to modernize antitrust laws); Feiner, *supra* note 9 (explaining reasoning behind bills and summarizing them); Brian Fung & Clare Duffy, *House Antitrust Bills Could Change the Internet as We Know It. Here's How*, CNN BUS. (June 23, 2021), <https://www.cnn.com/2021/06/23/tech/tech-house-antitrust-bills-explained/index.html> [<https://perma.cc/XD33-J2PE>] (discussing bills' relationship to four major tech firms).

78. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 19-21 (summarizing investigation's conclusions and recommendations).

79. See Siltan et al., *supra* note 61, at 27 (noting predatory mergers, self-preferencing, and lack of data portability among major harms addressed by bills); Fung & Duffy, *supra* note 77 (mentioning seller accusations of coerced fees at Amazon motivated bills). The bills address the gatekeeping power in a variety of forms, both in the predatory acquisition of competitors and the conflict of interest inherent in owning both the platform and the goods or services on a platform—which are then advantaged over competing products on that platform. See Siltan et al., *supra* note 61, at 28 (describing one bill's large-scale-mergers target and another's conflicts-of-interest target); see also Kern & Soper, *supra* note 2 (suggesting bill targets Amazon's gatekeeping via forcing sellers to use expensive services through algorithm favoring). The ACCESS Act aims to address ecosystem lock-in by mandating data portability: Consumers should have the option to collect all their data from one company and export it to another company. See Cyphers & Doctorow, *supra* note 3 (discussing ACCESS Act and its goals of fostering data portability).

80. See Fung & Duffy, *supra* note 77 (summarizing antitrust goals and possible effects of bills).

as an incentive to favor the platform's branded products over competitors' products on the platform.<sup>81</sup> The American Choice and Innovation Online Act outlaws, among other specific actions, (1) favoring a platform's products over competitors' on the platform; (2) excluding competitors from using platform services; and (3) utilizing private competitor data collected on the platform to augment its own products.<sup>82</sup> The Platform Competition and Opportunity Act revitalizes the merger restrictions of the Clayton Act, putting the burden of proof on the *platform* to demonstrate that the acquisition of a new company would not lessen competition, rather than requiring the *government* to first show that it would.<sup>83</sup> The ACCESS Act requires platforms to implement data portability, allowing consumers to freely *access* their data and bring it to another competing platform.<sup>84</sup> The Merger Filing Fee Modernization Act—supplementing the Clayton Act—increases fees on large mergers (in the hundreds of millions or more), reduces fees for small mergers (in the low hundreds of thousands), and uses the proceeds from the increased fees to further fund the Antitrust Division of the DOJ.<sup>85</sup>

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81. See Ending Platform Monopolies Act, H.R. 3825, 117th Cong. § 2 (2021) (proscribing conflicts of interest between platform and subsidiaries using platform); Siltan et al., *supra* note 61, at 28 (summarizing bill and defining conflicts of interest). This bill targets conflicts such as Amazon's logistics division, given sellers' repeated complaints that Amazon uses the division to force higher fees at penalty of suppression; as well as Google's ownership of YouTube insofar as Google has the incentive to advantage advertisement-revenue-laden YouTube videos in search results. See Fung & Duffy, *supra* note 77 (listing companies likely affected by bill).

82. See American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2 (2021) (outlawing platforms favoring own products over competitors); Feiner, *supra* note 9 (summarizing bill and giving examples of banned behaviors). Whereas the Ending Platform Monopolies Act breaks up platforms owning businesses that would create an *incentive* for the platform to favor their own business's product, the American Choice and Innovation Online Act targets the conduct of favoring or disfavoring its own products on the platform. See Feiner, *supra* note 9 (differentiating bills' purposes).

83. See Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. § 2 (2021) (shifting burden of proof to companies aiming to merge); Feiner, *supra* note 9 (summarizing bill and contrasting to existing evaluation standard). This bill's purpose is to encourage massive platforms to think twice before buying up every shiny new company and stifling small businesses' attempts to enter the market. See Feiner, *supra* note 9 (describing bill's purpose and likely effect).

84. See ACCESS Act of 2021, H.R. 3849, 117th Cong. § 3 (2021) (mandating data portability between platforms); Trendacosta et al., *supra* note 3 (discussing need for data portability and ACCESS Act's aim to mitigate data lock-in); see also CYPHERS & DOCTOROW, *supra* note 65, at 9 (explaining platform's power to lock in consumers through hoarding of personal data).

85. See Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. § 2 (2021) (upping large companies' merger fees while reducing smaller companies' fees). This bill aims to effectuate one of the major legislative goals from the 1950 amendment to section 7 of the Clayton Act: preventing large companies from engaging in anticompetitive mergers while still encouraging small companies to engage in mergers, allowing them to grow and better compete with larger companies. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 319-20 (1962) (discussing legislative goal of helping small businesses while reining in predatory conglomerates). With the rise in mergers among large tech companies, antitrust regulators are growing increasingly concerned with consolidation and its implications for reduced competition. See Luke Winkie, *Antitrust Laws Are Changing, Here's What That Means for Gaming Mergers*, IGN (Feb. 12, 2022), <https://www.ign.com/articles/xbox-activision-sony-bungie-gaming-acquisitions-antitrust> [<https://perma.cc/X7CJ-K78M>] (noting increased scrutiny and desire for regulation for big tech mergers); see also Siltan et al., *supra* note 61, at 30-31 (describing increased DOJ resource draw for modern large-scale tech mergers and bill's effort to combat).

## 2. *How Have the Bills Fared So Far?*

Two weeks after introduction, the House Judiciary Committee approved the bill package, with some bills subject to more controversy than others.<sup>86</sup> The bills' approval represented a unique bipartisan collaboration, as both Democratic and Republican legislators supported and opposed the bills.<sup>87</sup> Democratic proponents of the bills found motivation in reducing rampant consolidation of the economy into a few companies, whereas Republican proponents supported accountability for tech giants that have the power to censor speech.<sup>88</sup> Democratic opponents of the bills denounced them because of consumer privacy concerns and the likely adverse impact on jobs in their districts, and Republican opponents feared federal government overreach would intrude excessively into the free market.<sup>89</sup> The tech companies have since responded vigorously by organizing substantial petition and letter-writing campaigns, drawing on small businesses, customers, and workers to condemn the bills to their respective legislators.<sup>90</sup> While the House bills have not substantially progressed since June 2021, a Senate Bill mirroring the House's American Choice and Innovation Online Act passed the Senate Judiciary Committee with bipartisan support in January 2022, which may potentially encourage further action on the House bills.<sup>91</sup> While this functionally equivalent Bill is making its way through the Senate, corporate lobbying efforts and the political shifts accompanying the 2022 midterm elections put up significant roadblocks to antitrust reform's momentum.<sup>92</sup>

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86. See Rachel Lerman, *Big Tech Antitrust Bills Pass First Major Hurdle in House Even as Opposition Grows*, WASH. POST (June 24, 2021), <https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/> [<https://perma.cc/KXP7-RTKY>] (noting committee approved bills after two weeks, extensive overnight debate, and twenty-nine-hour revision meeting).

87. See Lauren Feiner, *Democrats and Republicans Form Odd Alliances During Tech Antitrust Debate*, CNBC (June 24, 2021), <https://www.cnbc.com/2021/06/24/-big-tech-antitrust-debate-odd-alliances-form-and-party-fractures-show.html> [<https://perma.cc/HC39-SGTK>] (suggesting partisans find rare common ground in regulating big tech companies).

88. See *supra* note 70 (describing differing reasons for each party to support bills).

89. See Lerman, *supra* note 86 (citing concerns from Democrats in tech-centered California districts and Republican objections to overly involved government); Feiner, *supra* note 87 (explaining Democrats' data privacy objections to ACCESS Act).

90. See Emily Birnbaum, *Amazon and Google Deploy Their Armies to Thwart Antitrust Bills*, POLITICO (Jan. 4, 2022), <https://www.politico.com/news/2022/01/04/amazon-google-thwart-antitrust-bills-526460> [<https://perma.cc/76S5-GRRC>] (outlining tech companies' substantial efforts to influence legislature to oppose bills). Companies like Amazon rely on the support of small businesses that feel dependent on the platform for their income. See *id.* (highlighting one Amazon vendor's fear of losing her job because of bills).

91. See Lauren Feiner, *Senate Committee Votes to Advance Major Tech Antitrust Bill*, CNBC (Jan. 20, 2022), <https://www.cnbc.com/2022/01/20/senate-committee-votes-to-advance-major-tech-antitrust-bill.html> [<https://perma.cc/WK85-BN4Z>] (suggesting Senate bill's progress could reawaken other bills). See generally American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021) (containing amended, but substantially similar, provisions of House bill).

92. See *supra* note 91 (describing Senate bill's initial momentum); Margaret Harding McGill & Ashley Gold, *Tech Antitrust Bills' Big Foe: The Calendar*, AXIOS (May 5, 2022), <https://www.axios.com/2022/05/05/tech-antitrust-clock-ticking-senate-congress> [<https://perma.cc/L7XV-CSXT>] (asserting August recess and midterm elections may deflate bills' momentum); Ashley Gold & Alayna Treene, *Antitrust Bill's Progress Sparks*



### III. ANALYSIS

#### *A. The New Bills Contain Policies that Will Succeed Where Existing Laws Have Failed*

##### *1. Fulfilling the Abstract Goals of Antitrust Policy*

The drafters of the original antitrust laws—the Sherman Act, the Clayton Act, and the Robinson–Patman Act—demonstrated a desire to codify the ethics of fair competition.<sup>93</sup> The combined legislative history suggests that, unlike what some modern courts and scholars espouse, antitrust enforcement should focus not only on maximizing consumer welfare through lowering prices, but also on protecting the competitive interests of small businesses in the market.<sup>94</sup> The problem with the mentality that antitrust has the singular goal of protecting consumer welfare through lowering prices is that mentality places too much emphasis on the Sherman Act, while neglecting the goals of the other antitrust laws.<sup>95</sup> While some cases are still evaluated based on harm done to rival companies, the main analysis remains on economic impact, and Sherman Act analyses that focus on economic impacts permit malintent and monopolizing if those practices generate economic efficiency.<sup>96</sup> Recognizing the disparity between existing antitrust policy application and its original intent, legislators drafted many provisions in the proposed legislation to fortify the currently neglected small-business-friendly aspects of antitrust policy.<sup>97</sup> Enacting stronger business-protection policies would provide

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*Tech Lobbying Splurge*, AXIOS (June 6, 2022), <https://www.axios.com/2022/06/06/antitrust-bills-progress-tech-lobbying-splurge> [<https://perma.cc/DFJ5-NJT2>] (chronicling bills' progression and companies' efforts to thwart).

93. See PERITZ, *supra* note 5, at 13–14 (noting Sherman's original ideal language on free competition never made it to finalized act); *supra* notes 29–30 and accompanying text (describing legislative intent behind Clayton Act); *supra* note 32 and accompanying text (discussing fair-competition-protection goals of Robinson–Patman Act).

94. See *supra* notes 51, 53 and accompanying text (examining scholarly sentiment claiming antitrust limited to protecting consumers and lowering prices); Foge, *supra* note 1, at 123 (suggesting courts have shifted to favoring price undercutting by big companies).

95. See *supra* note 32 and accompanying text (emphasizing antitrust law should protect small businesses, not just consumers); Gavil, *supra* note 52, at 841 (noting modern antitrust cases reduced to two broad categories, both brought through Sherman Act); see also INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 12–13 (discussing Meta's unfettered predatory acquisitions). But see Gavil, *supra* note 52, at 841 (describing “exclusionary” type cases relating to harming competing businesses).

96. See Gavil, *supra* note 52, at 843 (noting continued heavy reliance on economics in all cases); Bork, *supra* note 24, at 12 (defending monopolies when breaking them up would raise prices); Kaysen, *supra* note 51, at 47 (favoring economic analysis over intent analysis).

97. See, e.g., American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2 (2021) (outlawing large platforms' use of product visibility to leverage sellers into higher fee rates); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021) (forcing divestiture of divisions fostering gatekeeper power); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. § 4 (2021) (requiring large corporations to prove no violation in predatory acquisition cases); see INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 20–21 (recommending strengthening small-business-protection aspects of antitrust laws eroded by precedent).

a necessary course correction along the path toward the fair competition ideals underpinning all antitrust legislation in the United States.<sup>98</sup>

The current strict adherence to a doctrine of “acceptable if prices lowered”—the guiding principle of the economic efficiency analysis—neglects harms caused to both businesses and consumers when prices are forced downward.<sup>99</sup> Amazon exemplifies these harms through the combined impacts of its seller agreements, Fair Pricing Policy, and exploitation of competitors’ data.<sup>100</sup> First, the seller agreements impose hefty fees on small businesses listing products on Amazon.<sup>101</sup> Then, the Fair Pricing Policy permits Amazon to suspend or remove listings that “harm customer trust,” which includes listing products for less on any other site.<sup>102</sup> While Amazon’s policy does use the language “significantly” in reference to price differences on external listings, the fees Amazon imposes create a substantial discrepancy between what the price would regularly be elsewhere and the price that sellers must charge on Amazon to account for the fees.<sup>103</sup> Because of Amazon’s dominance as a selling platform, sellers remain captive to the fee structure even as fees steadily increase.<sup>104</sup> Finally, Amazon uses listing

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98. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 391 (urging legislative reform due to deviation from original legislative intent); Fung & Duffy, *supra* note 77 (noting general trend of tech companies’ abuse of rivals through acquisition, copying, and gatekeeping); Feiner, *supra* note 9 (explaining how each bill could address harms to small businesses); see also Fung & Duffy, *supra* note 77 (applying bills to current specific harms promulgated by specific companies). The harms described above are very much in line with those the Clayton Act and its subsequent amendments targeted. See *supra* note 30 and accompanying text (laying out goals of Clayton Act and listing motivations for amendment).

99. See Bork, *supra* note 24, at 12 (suggesting lowering consumer prices ultimate goal, regardless of monopoly status); Areeda & Turner, *supra* note 54, at 705-06 (arguing monopolists’ lower prices socially beneficial, despite preventing competition); Kirkwood & Lande, *supra* note 32, at 224-25 (favoring mergers where larger businesses charge lower prices); *Arizona v. Maricopa Cnty. Med. Soc’y.*, 457 U.S. 332, 348 (1982) (holding price ceilings per se illegal). *Maricopa* contemplated harmful byproducts of price ceilings—first, price ceilings disincentivize innovation and highly skilled competition for businesses, as new entrants cannot create anything of higher quality than the existing products or services, lest they lose profit margins. See *Maricopa*, 457 U.S. at 348 (noting suppression of entrepreneurship). Second, limiting the high-quality options that businesses can produce reduces the product range available to consumers, even when certain consumers may be willing to pay higher prices. See *id.* (suggesting individual patients may miss out on potential innovation or difficult procedures from skilled physicians).

100. See Fung, *supra* note 75 (describing fee integration in seller contract terms); *Amazon Marketplace Fair Pricing Policy*, *supra* note 75 (permitting seller removal for lower prices on external sites); INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 261 (noting Amazon’s merger strategy targets competitors to acquire data and expand into adjacent markets).

101. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 251, 274 (listing numerous Amazon-imposed seller fees and noting average rate 30%); Fung, *supra* note 75 (noting contractually mandated fees can reach up to 40% of product price).

102. See *Amazon Marketplace Fair Pricing Policy*, *supra* note 75 (defining harms to customer trust and laying out consequences).

103. Compare *id.* (prohibiting “significantly” lower prices on non-Amazon listings), with INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 251, 274, 274 n.1701 (describing range of fees and giving example of seller paying \$1 million per year), and Fung, *supra* note 75 (explaining how extensive fees force sellers to compensate by raising prices).

104. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 274 (tracking near doubling of fees and noting no seller exodus). From 2015 to 2020, Amazon raised fees from an average of 19% to an average

data to create its own competing products—unburdened by seller fees and thus offered at better prices—and to sidestep sellers to their wholesale suppliers; in both cases the seller loses out.<sup>105</sup> While this tactic may result in lower prices, lower prices should not be the only metric of consumer welfare when consumers are deprived of alternative offerings that succumb to Amazon’s reduced prices.<sup>106</sup> Even for those that believe antitrust law’s only goal is to maximize consumer welfare, the policies the bills promulgate holistically address those concerns for both price and choice.<sup>107</sup>

## 2. Modern Problems Require Modern Solutions

Another enduring problem with existing antitrust laws is that they fail to consider harms—caused by monopolists—that were not cognizable at the time of the laws’ enactment.<sup>108</sup> Ecosystem lock-in, data portability, social media censorship, and concurrent platform/media control are all unique concerns of the modern era.<sup>109</sup> The underlying theme of these modern issues is that expansive control over information allows companies to marshal that information to expand

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of 30%, yet the hike did not result in sellers leaving the platform. *See id.* (referencing Amazon internal memo describing nonsignificant impacts of fee increase).

105. *See id.* at 274-75 (providing alternative methods of cutting out competition through listing-data harvesting). Amazon claims its own products do not win out against third-party sellers, but sales data indicate Amazon products account for a substantial and growing percentage of revenue. *See id.* at 275 (refuting then-CEO Jeff Bezos’s claim of vastly inferior first-party performance).

106. *See* Foge, *supra* note 1, at 123-24 (listing extensive harms Amazon’s underpricing caused). Amazon has decimated small businesses through its restrictive seller contracts and suppression penalties for noncompliance. *See id.* at 123 (discussing harms to businesses and consumers from strong-arm tactics). Regrettably, the current federal antitrust laws lack the ability to address all these harms effectively, suggesting the need for serious reform. *See id.* at 124 (noting inability to deal with harms under existing antitrust framework).

107. *See* American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2 (2021) (banning platform discrimination against competitors via gatekeeping); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. § 2 (2021) (restricting platforms from owning subsidiaries where ownership allows gatekeeping). These two proposed bills—the American Choice and Innovation Online Act and the Ending Platform Monopolies Act—specifically target both the gatekeeping practices that Amazon uses to undercut and eliminate competition and any structures (i.e., ownership of the platform and the distribution chain) that incentivize gatekeeping practices. *See* Sifton et al., *supra* note 61, at 27-29 (describing effects of bills against discriminatory practices and incentives to engage in discrimination); Kern & Soper, *supra* note 2 (explaining how bills would impact Amazon’s practices and distribution ownership). Encouraged by sellers suffering under the coerced fee structure, the bills would separate platform–distributor companies like Amazon from the vertically integrated structures that allow them to leverage such fees on sellers who are then forced to charge higher prices. *See supra* notes 100-105 and accompanying text (analyzing how coerced fees force sellers to charge higher prices); Kern & Soper, *supra* note 2 (suggesting bill would force Amazon to divest from logistics division currently supporting fee leverage).

108. *See* Day, *supra* note 70, at 1337 (positing reason for narrow scope of antitrust laws court’s outdated definition for economic activity).

109. *See supra* note 66 and accompanying text (describing Apple’s hold over its customers through ecosystem of hardware and software products); *supra* notes 64-65 and accompanying text (discussing Meta’s dominance over data through lack of portability); Day, *supra* note 70, at 1338 (noting concerns over consolidated social media companies’ control and discretion over speech censorship); Zakrzewski, *supra* note 70 (including disclaimer “Jeff Bezos owns the Washington Post” when discussing Amazon antitrust issues).

in ways earlier companies could not.<sup>110</sup> Given that courts are beholden to existing laws and decisions, Congress must design modernized legislation to specifically target such unexpected harms.<sup>111</sup> Nevertheless, laws that create new protections or prohibitions must remain tailored to the spirit of antitrust law: promoting free and fair competition by preventing predatory monopolists from dominating in ways that negatively impact smaller businesses and consumers while retaining the ideals of a free market system.<sup>112</sup>

The five bills are tailored just so; each bill contains provisions targeting either a modern practice to prohibit or an outdated and weakened antitrust rule to revitalize.<sup>113</sup> The ACCESS Act addresses ecosystem lock-in and data-portability issues by requiring platforms to release their iron grip on customers' data in a way that ties customers to specific platforms' ecosystems and prevents new entrants from offering any reasonable alternatives.<sup>114</sup> The ACCESS Act accomplishes this while avoiding privacy-related harms to consumers.<sup>115</sup> The Ending Platform Monopolies Act, American Choice and Innovation Online Act, and Platform Competition and Opportunity Act each hold tech giants accountable for predatory acquisition of competitors and exploitation of vertically integrated platform structures, thus encouraging skills-based monopolies while punishing predatory ones.<sup>116</sup> Among these Acts, the Platform Competition and Opportunity Act would likely have a significant impact on Meta, which is known for its regular targeting of small competitors to copy new features and disadvantage or outright

110. See Fung, *supra* note 63 (contrasting issues surrounding early monopolists with tech monopolists' data-augmented predatory strategies); INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 14 (describing Meta's exploitation of data to "acquire, copy, or kill" startups).

111. See Day, *supra* note 70, at 1337 (suggesting changing nature of economy may require modernized antitrust laws); Siltan et al., *supra* note 61, at 27 (asserting existing antitrust laws have not kept up with digital economy).

112. See *supra* note 50 and accompanying text (noting need for balance between enforcement against monopolies and promoting free market competition). The core idea, which the Sherman Act's legislative history supports, is that companies should succeed on their merits, rather than by mercilessly consuming competitors. See Bork, *supra* note 24, at 29-30 (describing how Sherman Act debates evaluated harmfulness of monopolies).

113. See generally *supra* notes 81-85 and accompanying text (explaining functionality of each bill and desired outcomes).

114. See PRIVACY WITHOUT MONOPOLY, *supra* note 65, at 9 (advocating for data portability—"interoperability"—rights in competitive market); Siltan et al., *supra* note 61, at 29 (suggesting ACCESS Act helps accomplish goal of fostering interoperability in tech services market).

115. See Cyphers & Doctorow, *supra* note 3 (noting privacy concerns, ACCESS Act's existing solutions, and further suggested mitigation steps). While the ACCESS Act effectively addresses portability concerns and respects consumer privacy, legislators could further temper the Act to refine its privacy protections. *But see id.* (proposing additional privacy specifications to fill gaps in bill).

116. See 21 CONG. REC. 3152 (1890) (statement of Sen. Hoar) (differentiating procompetitive monopolies gained by skill from anticompetitive monopolies gained by acquisition); INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 20-21 (encouraging legislation to combat predatory acquisitions and multi-industry-dominance leveraging); Kern & Soper, *supra* note 2 (asserting Ending Platform Monopolies Act would address Amazon's fee-coercion tactics by severing logistics business); Fung & Duffy, *supra* note 77 (suggesting American Choice and Innovation Online Act prevents exploiting platform-user data to advantage platform's products); Siltan et al., *supra* note 61, at 28 (noting Platform Competition and Opportunity Act would penalize excessive acquisitions advantaging platform over direct competitor).

acquire those competitors.<sup>117</sup> Additionally, the American Choice and Innovation Online Act would address the issue of platforms' control over the flow of information, as the same leveraging tactics used to exclude sellers are used on the press, creating inconsistencies in the dissemination of free speech.<sup>118</sup> The Merger Filing Fee Modernization Act and the Platform Competition and Opportunity Act would both effectively remedy the weakened guidelines for evaluating mergers while disincentivizing predatory mergers through increased merger fees.<sup>119</sup> The motivations behind these two bills are in line with many of those driving the 1950 amendment to the Clayton Act—predominantly, instituting roadblocks for massive companies attempting to acquire smaller ones while encouraging smaller companies to engage in mergers to compete with larger ones—and the predicted outcome of enacting these policies is likely to accomplish those goals.<sup>120</sup>

In sum, these Acts all operate on well-established themes in antitrust law, shown through legislative history and case law, and would translate U.S. antitrust law into language that fits in a modern context to deal with digital-platform issues that the original laws and court decisions could not have predicted.<sup>121</sup> While

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117. See *supra* note 67 and accompanying text (describing Meta's predatory acquisition practices, unchecked under current framework); Fung & Duffy, *supra* note 77 (applying Act to Meta and predicting Act would directly impact and mitigate harmful practice).

118. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 64 (describing Meta's ability to coerce revenue sharing by shutting off traffic); American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2 (2021) (preventing bargaining tactic of restricting visibility and access).

119. See Winkie, *supra* note 85 (mentioning DOJ and FTC concerns over system exaggerating benefits and ignoring potential harms of mergers); *supra* note 45 and accompanying text (cataloguing weakening of Clayton Act application to mergers); see also INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 12 (noting widespread sentiment big tech mergers harmful and anticompetitive).

120. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 319-20 (1962) (listing reasons for strengthening Clayton Act focused on combatting large mergers and encouraging small ones); INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 20 (basing recommendation for stricter merger rules on restoring principles of Clayton Act); Feiner, *supra* note 9 (predicting Acts would both slow down and discourage mergers by big tech firms); Fung & Duffy, *supra* note 77 (predicting specific impacts to Meta's frequent and tactical merger strategy); Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. § 2 (2021) (raising fees for large mergers while lowering fees for small mergers).

121. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 20-21 (recommending augmentations and revitalizations follow original antitrust laws' intent). The ACCESS Act addresses the issue of tech-tying, preventing companies from forcing users into a limited range of products and services by means of data lock-in. See *id.* at 384 (asserting need for interoperability to prevent lock-in); *supra* notes 68, 114-115 and accompanying text (asserting ACCESS Act promotes competition, prevents exclusion, and protects consumer rights of privacy and choice). The Ending Platform Monopolies Act responds to the need to limit conflicts of interest created through concurrent ownership of multiple interdependent lines of business. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 378 (describing problem); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. § 2 (2021) (proscribing concurrent ownership of conflicting businesses). The American Choice and Innovation Online Act combats the manifestation of such conflicts insofar as platforms exploit their concurrent ownership to favor their own products. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 382 (discussing observed favoritism); H.R. 3816 § 2 (proscribing favoritism of own products and discrimination against other sellers' products); Fung & Duffy, *supra* note 77 (claiming Act prevents Amazon from tying services and fees to seller contracts). The Platform Competition and Opportunity Act and Merger Filing Fee Modernization Act both discourage predatory mergers by shifting the burden of proof back to the

the bills themselves are not guaranteed to become law, there is widespread and bipartisan support for them and for tech-centered antitrust reform in general.<sup>122</sup>

*B. Bipartisan Support Suggests Cracking Down on Tech Companies Offers Potential for Rare Political Unity in a Time of Polarization*

Widespread animosity toward big tech companies' exploitative dominance over small businesses and consumer data represents a rare bridge across the ideological chasm between left and right sides of the aisle both in Congress and the population at large.<sup>123</sup> Even when such unity exists, it remains begrudging and is qualified by what seems to be a principled desire to remain in separate camps.<sup>124</sup> Nevertheless, the investigations and recommendations by the Judiciary Committee that spurred the drafting of the bills include a variety of suggested policy positions that should be amenable to both sides, given the broader anti-trust-based motivations behind partisan actors on either side.<sup>125</sup> While Republicans typically fixate on tech companies' pattern of individual and press censorship to a greater degree than Democrats, censorship impacts Democrats as well, and both have united in condemning nonpartisan censorship of innocuous content, such as images of breastfeeding or plus-sized models.<sup>126</sup> Thus, the issue of speech censorship appears to be the likeliest point of coalescence, as principled

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company and raising the cost of large mergers. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 387-88 (recommending reimposing presumption of predatory mergers); Feiner, *supra* note 9 (stating Platform Competition and Opportunity Act would disincentivize predatory mergers); H.R. 3843 § 2 (increasing costs to big tech firms aiming to acquire or merge with other companies).

122. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 20-21 (advocating for methods of reform, not specific pieces of pending legislation); *infra* note 123 (showing Americans' bipartisan disfavor for current acceptance of tech monopolists' practices); Winkie, *supra* note 85 (including quotes from officials urging stricter antitrust regulation); Hovenkamp, *supra* note 8, at 1955-56 (describing general consensus antitrust laws must adapt to tech though noting disagreement on change's extent); see also Feiner, *supra* note 87 (noting even legislators opposed to bill praised its principles). Despite the uncertainty that accompanies all legislation—and especially contentious legislation—this legislative push is regarded as “clearest indication yet how lawmakers are gunning to rein in the market power of Amazon.” Kern & Soper, *supra* note 2.

123. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 12 (including polls of constituents across country overwhelmingly concerned about Big Tech's anticompetitive practices); Zakrzewski, *supra* note 70 (stating Congress, though “bitterly divided,” agrees on need for antitrust law overhaul).

124. See Feiner, *supra* note 87 (including exchange between Democratic and Republican committee members suggesting agreement not generally acceptable). Upon the Judiciary Committee Chairman—Democrat Jerrold Nadler—noting rare similarity in views, Republican Representative Matt Gaetz replied, “[I]et's not make it common, Mr. Chairman.” See *id.*

125. See Day, *supra* note 70, at 1320 (noting complaints from both sides on same issue of speech censorship); Zakrzewski, *supra* note 70 (noting Democrats prefer anti-consolidation measures while Republicans prefer pro-speech measures). The lengthy investigation into tech companies' anticompetitive practices that formed the basis for the bills proposed in 2021 included recommendations for both anti-power-consolidation and pro-free-press measures, which appeal to Democrats and Republicans respectively. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 388, 392 (including recommendations to bolster free press and crack down on harmful mergers).

126. See Day, *supra* note 70, at 1338 (describing bipartisan condemnation of past instances of both Democrat-published and nonpartisan censorship); Zakrzewski, *supra* note 70 (suggesting Republican concerns with tech companies primarily emphasize censorship issues).



objection to the consolidation of large companies is not as common as ire against social media companies' decisions to censor content left, right, and center.<sup>127</sup> The prevailing view of the American populace, however, is that both consolidation *and* biased censorship are serious concerns, which represents the first step of solving the problem as a nation: collectively acknowledging the problem's existence.<sup>128</sup> The ultimate benefit of a united front, both at the political and societal levels, would be a source of momentum and an increased arsenal to support a DOJ and FTC already gearing up for more aggressive antitrust enforcement.<sup>129</sup>

#### IV. CONCLUSION

A core purpose of the American legal system is to evolve as novel issues present themselves. The antitrust laws, demonstrably weakened over time, have not evolved to effectively protect businesses and consumers from the harms those laws were designed to combat. When such shortcomings occur, it is the duty of the legislature to promulgate new laws and amendments to correct discrepancies. In the field of antitrust, there are discrepancies not only in the lack of enforcement and judicial deference to economically efficient monopolists, but also in the laws' failure to account for the advent of the digital age, whereby forms of anticompetitive business tactics unaddressed by the original antitrust laws may flourish. Congress must, therefore, address novel issues such as platform-based conflicts of interest, consumer-data lock-in, unchecked control over the flow of information, and data-driven predatory mergers through new legislation.

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127. See *supra* note 126 (highlighting shared experiences of censorship between partisans and shared condemnation of censorship); *supra* note 118 and accompanying text (proffering reform ensuring unbiased freedom of press to distribute information).

128. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 12 (noting 79% of Americans believe consolidation anticompetitive, 58% not confident search results present unbiased information). In addition, 85% of Americans are concerned about platforms' extensive access to consumer data, and 60% support increased government action to foster data portability and combat data lock-in (a byproduct of consolidation among platforms), which shows bipartisan support among citizens for the principles of the ACCESS Act. See *id.* (providing statistics); ACCESS Act, H.R. 3849, 117th Cong. § 3 (2021) (enforcing data portability). While Americans may harbor specific concerns about anticompetitive practices, these concerns are pitted against the general satisfaction toward the convenience tech companies provide. Compare INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 12 (indicating disfavor toward tech companies' monopolistic practices), with *supra* note 57 and accompanying text (analyzing polls showing tech companies' favorability among younger Americans). The two need not be mutually exclusive, though, as policies like those in the ACCESS Act operate to *increase* convenience. See H.R. 3849 § 3 (requiring companies to enable users to easily export data to other platforms).

129. See INVESTIGATION OF COMPETITION IN DIGIT. MKTS., *supra* note 62, at 19 (encouraging Congress to take responsibility for enacting needed antitrust reforms); Winkie, *supra* note 85 (noting current DOJ and FTC "eager to take a more adversarial stance against Big Tech"). The agencies have voiced concerns that the current toolbox of guidelines for dealing with vertical mergers is substantially too lenient, and that the agencies aim to pursue antitrust actions based on less-traditional economic factors. See Winkie, *supra* note 85 (suggesting agency interest in dealing with innovation and quality issues); Day, *supra* note 70, at 1337 (pointing out need to adapt antitrust law to issues not traditionally considered economic); *supra* Section III.A.2 (arguing bills or similar legislation would adapt traditional antitrust values to modern applications).

Targeting and dismantling conglomerates that leverage their concurrent ownership of vertical distribution lines—product, platform, and shipping—to coerce exorbitant fees will allow small businesses the freedom to operate without the onus of paying the platform to compete with its products. Requiring platforms to release consumers' data upon their request will allow consumers to regain their freedom of choice and no longer be tied to a single ecosystem of products or services. Stepping in to prevent leveraging of platform access not only helps small businesses selling products, but also benefits journalistic entities by removing the platform's ability to exclude—in essence, censor—specific speech. Placing the burden on platforms to prove that their mergers are not of the ilk designed to snuff out budding competitors puts platforms in a defensive stance and makes them less likely to push the boundaries of reasonable acquisitions.

The reforms described above squarely follow the antitrust principles of encouraging free and fair competition and protecting the consumer from arbitrarily inflated prices or reduced choice, all while maintaining businesses' ability to innovate. Congress and its electorate, despite differing in motivations, should be able to unite behind the evident need for antitrust reform. Such reform, whether through the currently active bills or future legislation emulating their policies, is necessary for antitrust law to adapt to the modern era.