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## From Sherman to Shut Down – Understanding Antitrust Legislation Targeting Big Tech

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# **From Sherman to Shut Down – Understanding Antitrust Legislation Targeting Big Tech**

*Dayna L. Linneman* \*

## ABSTRACT

Beginning in the late 19<sup>th</sup> and 20<sup>th</sup> centuries and extending into present day, United States antitrust legislation has sought to safeguard consumers and maintain fair competition among businesses. While the purpose of antitrust legislation has always been to encourage free market principles, changing technologies within recent decades, as well as the rise of so-called “Big Tech”, has disrupted the “traditional” business landscape. This article begins with a general history of antitrust legislation within the United States in an effort to provide context regarding legislators’ recent push for legislation targeting Big Tech giants. In analyzing recent antitrust legislation, this article provides insights regarding the potential dangers which could result from the passage of these bills. Ultimately, this article argues that American legislators, and more generally Americans at large should consider the potential unintended consequences the passage of these bills could have for businesses, and more specifically the tech industry, at large.

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## I. INTRODUCTION

Beginning in the late 19<sup>th</sup> and 20<sup>th</sup> centuries and extending into the present day, antitrust legislation within the United States has sought to safeguard consumers and maintain competition among businesses.<sup>1</sup> Serving as the bedrock for antitrust law-making, the Sherman and Clayton Antitrust Acts, passed in 1890 and 1914, were the first to establish antitrust policies.<sup>2</sup> Most notably, these Acts strove to prohibit monopolization, trade restraint, improper competitive tactics, and mergers that threaten to stifle competition.<sup>3</sup>

Generally speaking, the American public has historically placed a large emphasis on encouraging competition and free market principles.<sup>4</sup> Despite this, “the legal rules governing *competition* policy – much like the meaning of marketplace *fairness* – have changed over the years.”<sup>5</sup> Undoubtedly, changing technologies, as well as the rise of so-called “Big Tech”, an acronym used in reference to the largest and most prestigious companies in the tech industry, has disrupted the business landscape.<sup>6</sup> As a result, U.S. legislators have begun attacking the ever-evolving Big Tech industry, using antitrust legislation as a means of reining in the overwhelmingly powerful tech sector.<sup>7</sup>

In recent years, the U.S. House Committee on the Judiciary has adopted a proactive approach, proposing a series of bills intended to aggressively address antitrust regulation and reform.<sup>8</sup> These bills, introduced in June 2021, “seek to increase the authority of U.S. antitrust agencies, prevent companies from acquiring other firms, . . . and prevent platforms from selling or promoting their own products in an attempt to disadvantage competitors.”<sup>9</sup> Passage of these bills, many of which unapologetically target Big Tech companies, including Amazon, Apple, Facebook, Google, and Microsoft, could result in the nation’s “largest expansion of U.S. government antitrust power in generations.”<sup>10</sup>

In spite of legislators’ efforts to monitor dominant digital platforms, those supporting these bills have not taken adequate time to consider the potentially detrimental effects the passage of these will have. Rather than continuing to pursue passage of these proposed bills, legislators should consider revising the current proposed legislation. In doing so, legislators would be able to produce more efficient legislation which does not have unintended consequences, including discouraging Big Tech companies from continued innovation and growth.

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1. See *Explaining the History and Future of Antitrust Laws in the U.S.*, CTR. FORWARD 1 (Aug. 2021), <https://center-forward.org/wp-content/uploads/2021/08/Antitrust-Basic.pdf>.

2. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Oct. 3, 2022).

3. *Id.*

4. Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective 2* (Harv. Bus. Sch. Working Paper No. 19-100, 2019), [https://www.hbs.edu/ris/Publication%20Files/19-110\\_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf](https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf).

5. *Id.* at 3 (emphasis in original).

6. David Meyer and Nicole Goodkind, *What Will the Future Look Like? Europe Offers Some Clues*, FORTUNE (Aug. 16, 2021, 5:00 AM), <https://fortune.com/2021/08/16/big-tech-regulations-europe-explainer>.

7. *Id.*

8. CENTER FORWARD, *supra* note 1.

9. *Id.*

10. *Id.*

Section II of this article seeks to provide a general overview of the history of antitrust legislation in the United States. In doing so, this section highlights how legislators have revised their approaches to policy drafting. More specifically, how those who draft and propose legislation have changed their approach to better address changes in our nation’s economy, and technological advancements, including the rise of Big Tech, as well as the emergence and implementation of the consumer welfare standard.

## II. A BRIEF HISTORICAL BACKGROUND OF ANTITRUST LEGISLATION IN THE UNITED STATES

To understand more recent pieces of antitrust legislation, it is necessary to consider the historical foundations of antitrust law and policy. In response to the rise of trusts, a term that became closely associated with big business, “competition policy”, alternatively known as “antitrust”, originated.<sup>11</sup> While a trust may be established within a single firm, uniting majority shareholders able to dictate management decisions, they may also be used to coordinate several separately operated firms, such as cartels.<sup>12</sup> Throughout the 1880s, the use of trusts increased exponentially, requiring states and the federal government, for the first time, to begin enacting antitrust laws.<sup>13</sup>

At the most basic level, ratification of these antitrust laws endeavored “to regulate business competition, focusing on coordination among firms and business tactics used to monopolize industries.”<sup>14</sup> While these laws initially appeared to counterbalance areas of concentrated economic power, by the end of the nineteenth century, communication and transportation technologies had significantly advanced.<sup>15</sup> Consequentially, state laws had become increasingly inadequate, requiring the federal government to intervene in a more assertive manner.<sup>16</sup>

Although there has been a plethora of antitrust legislation throughout U.S. history, the federal government enforces three major antitrust laws: The Sherman Antitrust Act of 1890, The Clayton Antitrust Act of 1914, and The Federal Trade Commission Act of 1914.<sup>17</sup> Each of these statutes is described in greater detail below.

### A. *The Sherman Antitrust Act of 1890*

As the end of the 20<sup>th</sup> century approached, several states had already taken it upon themselves to pass statutes preventing the use of monopolistic business practices.<sup>18</sup> Regardless of this state action, new concentrations of economic wealth began to materialize, predominantly in the U.S. Steel, Standard Oil, and railroad industries.<sup>19</sup> One of the strongest examples of this was John Rockefeller’s Standard

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11. Sawyer, *supra* note 4, at 1–2.

12. *Id.* at 2.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. CENTER FORWARD, *supra* note 1.

18. *Sherman Anti-Trust Act (1890)*, NAT’L ARCHIVES, <https://www.archives.gov/milestone-documents/sherman-anti-trust-act> (last modified Mar. 15, 2022).

19. CENTER FORWARD, *supra* note 1.

Oil Company.<sup>20</sup> Through the creation of a trust, Standard Oil Company gained the ability to effectively manipulate various aspects of the oil market.<sup>21</sup> More specifically, Standard Oil Company utilized their newly created trust to coordinate groups of oil refiners capable of controlling price and supply while simultaneously circumventing state-level taxes and corporate regulations.<sup>22</sup>

Seeking to address the continued abuse of trusts and the inability of state law to handle such corrupt behavior, the Sherman Antitrust Act was drafted and proposed in 1890.<sup>23</sup> This landmark piece of legislation represented the first time the issue of monopolistic business practices was addressed at the federal level.<sup>24</sup> Although states were able to retain their regulatory power over corporations, the language of the Sherman Act “promised to ‘rein in the trusts’ through federal prosecutions.”<sup>25</sup> The Act outlawed all contracts, combinations, and conspiracies that unreasonably restrained trade, including agreements among competitors to price-fix, rig bids, and allocate customers, as well as monopolization tactics.<sup>26</sup> Over the next century, gaps in the Sherman Act would come to the forefront, exposing the Act’s insufficient relief against anti-competitive behaviors.<sup>27</sup>

### B. *The Clayton Antitrust Act of 1914*

The Clayton Antitrust Act, our nation’s second major piece of antitrust legislation, did not come to fruition until 1914, several decades after the adoption of the Sherman Antitrust Act.<sup>28</sup> In large part, the Clayton Act was intended to clarify and strengthen the Sherman Act, whose vague language had afforded corporations an abundance of loopholes.<sup>29</sup> Specifically, the Sherman Act’s failure to explicitly define key terms including “monopoly” and “trust”, as well as what constitutes an “unreasonable” restraint of trade, enabled powerful businesses to continue forming restrictive arrangements adversely impacting competition.<sup>30</sup>

Unlike the text of the Sherman Act, which only declared monopolistic practices illegal, the Clayton Act expanded upon the former, clarifying key points and prohibiting other harmful practices earlier legislation had not addressed.<sup>31</sup> According to George A. Hay, Professor of Law and Economics at Cornell Law School, “the most significant provision that supplements the Sherman Act deals with mergers, primarily between competitors.”<sup>32</sup> Within this provision, the Clayton Act describes unlawful mergers as those which have the effect of substantially lessening

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20. Sawyer, *supra* note 4, at 2.

21. *Id.*

22. *Id.*

23. NATIONAL ARCHIVES, *supra* note 18.

24. *Id.*

25. Sawyer, *supra* note 4, at 2.

26. CENTER FORWARD, *supra* note 1.

27. Sawyer, *supra* note 4, at 2.

28. The Editors of Encyclopedia Britannica, *Clayton Antitrust Act*, ENCYCLOPEDIA BRITANNICA (Dec. 21, 2021), <https://www.britannica.com/event/Clayton-Antitrust-Act>.

29. *Id.*

30. Coryanne Hicks, *The Sherman Antitrust Act is the First in a Line of Federal Laws Protecting Consumers From Unfair Prices*, BUS. INSIDER (Aug. 22, 2022), <https://www.businessinsider.com/sherman-antitrust-act>.

31. *Id.*

32. *Id.*

competition.<sup>33</sup> For this reason, the Clayton Act appears forward-thinking, allowing the government to block mergers that have not yet taken place but have the predictive effect of hindering competition.<sup>34</sup>

In addition to refining the definition of anticompetitive conduct, the Clayton Act established new methods for suing those partaking in illegal activity.<sup>35</sup> Under the Clayton Act, private parties were granted the ability to sue for triple damages upon a showing they experienced harm from conduct violating either the Clayton Act or Sherman Act.<sup>36</sup> Later amendments, including the Robinson-Patman Act of 1936, the Celler-Kefauver of 1950, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976, came to further strengthen the Clayton Act.<sup>37</sup>

### C. *The Federal Trade Commission Act of 1914*

Enacted in 1914, the Federal Trade Commission Act (“FTCA”) created the Federal Trade Commission (“FTC”) in addition to the Clayton Act discussed above.<sup>38</sup> Under this legislation, the U.S. government was now equipped with numerous legal tools to continue combating anticompetitive, unfair, and deceptive business schemes.<sup>39</sup> Through the establishment of the FTC, a bipartisan federal agency dedicated to conducting investigations, suing companies and individuals who violate the law, and developing rules to ensure an energetic marketplace, the FTCA set a new precedent for enforcing antitrust law and policy.<sup>40</sup>

One of the FTCA’s most noteworthy features is its authorization of the FTC to enforce various provisions of the Sherman Antitrust Act of 1890 and the Clayton Antitrust Act of 1914.<sup>41</sup> With this authorization, the FTC is able to actively monitor businesses and intervene when individuals or companies are suspected of taking part in antitrust activities.<sup>42</sup> Furthermore, the FTC “reviews all major mergers and agreements, analyzing their potential effects on consumers and competition.”<sup>43</sup> Similar to the Clayton Act, the FTCA, through its delegation of powers to the FTC, is forward-thinking, allowing individuals working within that agency to take proactive measures, such as reviewing mergers and agreements before they are finalized, rather than a more reactive approach.<sup>44</sup>

Section III of this article seeks to call attention to the so-called “new wave” of antitrust legislation in an effort to show how current policymakers have chosen to address the continued expansion of Big Tech. More specifically, politicians’ efforts to propose bipartisan legislation targeting tech giants’ overwhelming power and influence.

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. Sawyer, *supra* note 4, at 10.

39. The Editors of Encyclopedia Britannica, *Federal Trade Commission Act*, ENCYCLOPEDIA BRITANNICA (Aug 16, 2017), <https://www.britannica.com/event/Federal-Trade-Commission-Act>.

40. *Mission*, FED. TRADE COMM’N, <https://www.ftc.gov/about-ftc/what-we-do> (last visited Oct. 3, 2022).

41. The Editors of Encyclopedia Britannica, *supra* note 39.

42. Hicks, *supra* note 30.

43. *Id.*

44. FEDERAL TRADE COMMISSION, *supra* note 40.

### III. A NEW WAVE OF ANTITRUST LAW AND POLICY

#### A. *The Rise of the New Brandeisians*

According to Laura Phillips Sawyer’s article *US Antitrust Law and Policy in Historical Perspective*, “Most recently, a group of progressive, politically active reformers has called for reviving antitrust enforcement against dominant firms, particularly those in the digital economy.”<sup>45</sup> This group, often referred to as the “New Brandeisians,” has taken it upon themselves to revamp antitrust, basing their ideologies on influential legal and judicial figure Louis D. Brandeis.<sup>46</sup> Appointed to the U.S. Supreme Court in 1916, Louis D. Brandeis was a Boston lawyer, activist, and campaign advisor, who “advocated dismantling monopolies to protect independent proprietors and maintain decentralized economic power.” From his perspective, corporation consolidations and the “curse of bigness” inevitably led to large businesses acquiring excessive economic power, raising prices, collecting profits, and abusing their political influence, resulting in mass corruption within a liberal democracy.<sup>47</sup>

In recent years, the New Brandeisians have been highly critical of dominant digital platforms, including Google, which, since its inception in 1997, has dominated the search engine market, maintaining over 92 percent market share as of June 2021.<sup>48</sup> Directing their criticisms to internet platforms, New Brandeisians argue these businesses “employ predatory pricing strategies to capture market share, expand into new industries, and achieve market dominance.”<sup>49</sup>

One of the strongest examples of this is Amazon, which began in 1994 as a small online book retailer, and has quickly grown into the world’s largest e-commerce retailer.<sup>50</sup> In large part, Amazon’s introduction of Amazon Prime, a membership program that provided free two-day shipping, in 2005, as well as the Kindle e-reader, in 2007, successfully locked in customers.<sup>51</sup> From here, Amazon expanded its services, now offering video streaming, cinema production, grocery retailing, marketing, and more.<sup>52</sup> After several years of only producing small profits, “Amazon posted record-high profits (\$2.5 billion) in the second quarter of 2018, with net sales of \$52.9 billion.”<sup>53</sup>

#### B. *Congress’s Momentum for Antitrust Reform*

While it is clear that concerns regarding the concentration of power and wealth achieved by monopolistic entities have always been of interest, politicians now face

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45. Sawyer, *supra* note 4, at 1.

46. *Id.* at 23.

47. *Id.* at 10.

48. Joseph Johnson, *Worldwide Desktop Market Share of Leading Search Engines From January 2010 to January 2020*, STATISTA (Mar. 1, 2022), <https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines>.

49. Sawyer, *supra* note 4, at 23.

50. *Id.*

51. *Id.* at 25.

52. *Id.* at 23–24.

53. *Id.* at 24.

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new challenges addressing the size and scope of the ever-evolving tech industry.<sup>54</sup> According to Martha C. White’s article *Momentum Is Building for Antitrust Reform. Here’s What That Means for Big Tech*, “Monopolistic power is a worry that sometimes makes strange bedfellows, especially in Congress. But there is momentum for antitrust reform on both sides of the aisle.”<sup>55</sup> In recent years, this statement has proven to be true, as legislators have begun to recognize the need for bipartisan antitrust legislation to provide a long overdue check on the power and influence of Silicon Valley titans.<sup>56</sup>

Following a 15-month investigation into digital tech platforms, the House Judiciary Committee introduced a set of antitrust bills.<sup>57</sup> This proposed legislation, which appears to directly target a select few Big Tech companies, represents a major departure from antitrust law and policy which has presided over the last few decades.<sup>58</sup> Under these bills, companies that fall into the category of “covered platforms,” which is likely to include Amazon, Apple, Facebook, Google, and Microsoft, would be subject to strict regulation.<sup>59</sup>

Although there are several proposed bills, two of the most noteworthy bills include the Platform Competition and Opportunity Act and the American Innovation and Choice Online Act. Introduced in June 2021 by U.S. Senators Amy Klobuchar (D-MN) and Tom Cotton (R-AR), both pieces of legislation constitute bipartisan action to protect consumers and terminate anticompetitive acquisitions.<sup>60</sup>

At a time when the digital economy has become increasingly prone to monopolization, the Platform Competition and Opportunity Act seeks to halt the continuation of harmful consolidation.<sup>61</sup> This Act primarily focuses on limiting “all mergers and acquisitions by covered platform companies, subject to an exception for acquisitions under \$50 million.”<sup>62</sup> Essentially, this Act prohibits partial as well as total acquisitions, regardless of whether they result in positive or negative effects on customers and competition.<sup>63</sup> This places a high burden on Big Tech companies to show their acquisitions and mergers would not threaten to stifle competition.<sup>64</sup>

Whereas the Platform Competition and Opportunity Act focuses on mergers and acquisitions, the American Innovation and Choice Online Act is much more concerned with large tech companies promoting their own products and services.<sup>65</sup> Simply put, this bill “. . . would prevent Amazon, Facebook, and other large tech

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54. Martha C. White, *Momentum Is Building for Antitrust Reform. What That Means for Big Tech*, MSN (Nov. 12, 2021), <https://www.msn.com/en-us/news/politics/momentum-is-building-for-antitrust-reform-here-s-what-that-means-for-big-tech/ar-AAQDAbT>.

55. *Id.*

56. Cat Zakrzewski & Gerrit De Vynck, *Senate Advances Antitrust Legislation, Despite Reservations From California Democrats*, WASH. POST (Jan. 20, 2022), <https://www.washingtonpost.com/technology/2022/01/20/senate-advances-antitrust-bill/>.

57. CENTER FORWARD, *supra* note 1.

58. *Id.*

59. *Id.*

60. Press Release, United States Senator Amy Klobuchar, Klobuchar, Cotton Introduce Bipartisan Legislation to Protect Competition and Consumer Choice Online (Nov. 5, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/news-releases?ID=6DD6F99C-C71B-4299-B96D-9A744263297D>.

61. *Id.*

62. CENTER FORWARD, *supra* note 1.

63. *Id.*

64. *Id.*

65. Zakrzewski & De Vynck, *supra* note 56.



companies from boosting their own products and services over their rivals' . . ."<sup>66</sup> Despite this, the bill does not explicitly state "how companies could avoid alleged conflicts of interest in operating their current business models."<sup>67</sup> As a practical matter, the passage of this bill would make it difficult, if not impossible, for companies to introduce new products and features, as this may be seen as disadvantaging their competitors.<sup>68</sup>

### C. President Biden's Response

In the time since his January 2021 inauguration, President Joe Biden has taken a considerable number of steps to build momentum for major antitrust reform.<sup>69</sup> Among the most significant of these actions has been President Biden's placement of "antitrust scholar and Big Tech critic Lina Khan to lead the FTC . . . along with the DOJ's Antitrust Division – on the front lines of antitrust compliance."<sup>70</sup>

At just 32 years old, Khan, who for many years has served as a leading voice for more robust antitrust enforcement, represents the youngest individual to ever be appointed as FTC Chair.<sup>71</sup> Subscribing to many of the ideals stemming from the New Brandeis Movement discussed above, Khan, and many others, believe an overly narrow focus on consumer welfare could be potentially harmful.<sup>72</sup> From Khan's perspective, choosing to focus solely on consumer welfare allows tech giants to earn "a free pass . . . and ignores how these companies have created the web's dominant platforms . . ."<sup>73</sup>

While leading one of the nation's most powerful regulatory watchdogs, Khan has remained diligent in her efforts to push for increased regulation of Big Tech.<sup>74</sup> Seeking to swiftly implement her agenda, Khan sent a memo to all FTC staff just months after being placed in her new role.<sup>75</sup> Within this memo, which was first distributed in September 2021 and has since been released to the public, Khan described her policy priorities and overall vision for the agency.<sup>76</sup> More specifically, Khan outlined the five main principles of her plan for the future of the FTC: (1) the adoption of a more holistic approach to identifying harms; (2) focusing on targeting root causes rather than looking at one-off effects; (3) integrating more analytical tools and skillsets; (4) being forward thinking and acting fast to mitigate harm; and (5) democratizing the FTC.<sup>77</sup>

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66. *Id.*

67. CENTER FORWARD, *supra* note 1.

68. *Id.*

69. White, *supra* note 54.

70. *Id.*

71. Shannon Bond, *New FTC Chair Lina Khan Wants to Redefine Monopoly Power for The Age Of Big Tech*, NPR (July 1, 2021), <https://www.npr.org/2021/07/01/1011907383/new-ftc-chair-lina-khan-wants-to-redefine-monopoly-power-for-the-age-of-big-tech>.

72. *Id.*

73. *Id.*

74. *Id.*

75. Lauren Feiner, *FTC Chair Lina Khan Outlines New Vision for Antitrust Enforcement, Consumer Protection*, CNBC (Sept. 23, 2021), <https://www.cnbc.com/2021/09/23/ftc-chair-khan-outlines-vision-for-antitrust-enforcement-consumer-protection.html>.

76. *Id.*

77. *Id.*

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In addition to appointing Khan, the White House has taken several proactive steps to ensure other key antitrust policy roles are filled by other Big Tech critics.<sup>78</sup> One of the most impactful measures President Biden took involved the strategic nomination of antitrust legal crusader Jonathan Kanter to serve in the U.S. Department of Justice’s Antitrust Division.<sup>79</sup> Following Kanter’s nomination receiving Senate confirmation, he was confirmed as Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice in November 2021.<sup>80</sup> With this, Kanter joined FTC Chair Lina Khan, as well as National Economic Council advisor Tim Wu.<sup>81</sup> According to Lauren Feiner, “Progressives cheered President Joe Biden’s decision to nominate Kanter, completing the trifecta of antitrust reformers ...”<sup>82</sup>

#### *D. Antitrust Legislation’s Focus on Big Tech*

Historically, concerns regarding “the concentration of wealth and power achieved by monopolistic – or potentially monopolistic – entities have always been wrapped up in each respective era’s technological innovations.”<sup>83</sup> Taking this into consideration, it is largely unsurprising the focal point of modern antitrust debates has continued to revolve around Big Tech companies at the root of most technological advancement.<sup>84</sup> While it is clear strong bipartisan support from members of Congress, as well as President Biden, has led to a major push for Big Tech reform, it is important to consider yet another reason the tech industry has become the focal point for antitrust legislation – the rise and spread of the COVID-19 pandemic.

In response to the pandemic, U.S. users, subject to the restraints of stay-at-home orders and social distancing, spent substantially more time using various forms of social media.<sup>85</sup> As a result of this increase in social media usage throughout 2020, and eventually 2021, several social media platforms saw tremendous increases in their annual user growth rates.<sup>86</sup> The strongest examples of this include Facebook and TikTok, a social app used to create and share short videos, which surged in popularity during the pandemic.<sup>87</sup> While Facebook experienced an 8.7% increase in its annual user growth rate during 2020, TikTok saw a staggering 85.3% increase in its annual user growth rate within that same time period.<sup>88</sup>

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78. White, *supra* note 54.

79. *Id.*

80. *Meet The Assistant Attorney General*, THE U.S. DEP’T OF JUST., <https://www.justice.gov/atr/staff-profile/meet-assistant-attorney-general> (last visited Oct. 6, 2022).

81. Lauren Feiner, *Senate Confirms Big Tech Critic Jonathan Kanter to Lead DOJ Antitrust Division*, CNBC (Nov. 16, 2021), <https://www.cnbc.com/2021/11/16/senate-confirms-jonathan-kanter-to-lead-doj-antitrust-division.html>.

82. *Id.*

83. White, *supra* note 54.

84. *Id.*

85. S. Dixon, *Social Media Use During COVID-19 Worldwide — Statistics & Facts*, STATISTA (Feb. 8, 2022), [https://www.statista.com/topics/7863/social-media-use-during-coronavirus-covid-19-worldwide/#topicHeader\\_\\_wrapper](https://www.statista.com/topics/7863/social-media-use-during-coronavirus-covid-19-worldwide/#topicHeader__wrapper).

86. *Id.*

87. *Id.*

88. *Id.*

Unsurprisingly, these numbers allowed TikTok to claim the title of the most-downloaded app in the world during the first quarter of 2020.<sup>89</sup>

In her November 2021 article for the New York Times, Martha C. White addressed the relationship between the pandemic and the dramatic increase in lawmakers' legislation targeting the tech industry. According to White, "The heightened focus on Big Tech took on new urgency during the pandemic."<sup>90</sup> She goes on to assert that "As constraints on business and social activity forced Americans to rely more on digital platforms for communication and commerce, tech giants became more prominent, more profitable and visibly more powerful."<sup>91</sup>

Advocates for antitrust reform have begun to argue Big Tech companies no longer need to monopolize in order to overcome their smaller competitors.<sup>92</sup> For the most part, these individuals base their arguments solely on the fact these larger, more dominant companies have access to a tremendous amount of data based on the millions of individuals who use their products.<sup>93</sup>

Yet another area that has driven the heightened interest in Big Tech is data privacy issues.<sup>94</sup> While historically antitrust law has been focused on price and output, in more recent years it has also become concerned with consumer data privacy, an area which is closely intertwined with "the question of consumer value and the inherent value of ... personal data to big technology firms."<sup>95</sup>

### E. Big Tech Pushback

Reacting to legislative efforts seeking to minimize the influence of Big Tech, several companies, including Amazon, Apple, and Google among many others, have taken it upon themselves to launch an all-out attack.<sup>96</sup> Following the introduction of the American Innovation and Choice Online Act, Apple, the world's most profitable tech company, drafted a stern letter to lawmakers.<sup>97</sup> Within this letter, Apple warned politicians that passage of this Act is likely to result in an increased number of security breaches.<sup>98</sup> Apple advocates argue the company's "control over the App Store is essential to deliver a secure and private experience to its customers" stating without Apple maintaining this control, users run the risk of installing malware and other malicious software.<sup>99</sup> According to Apple, implementation of the American Innovation and Choice Online Act, as well as other antitrust bills under consideration in the U.S. Senate, would threaten iPhone users' security by

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89. Kim Lyons, *TikTok Says it Has Passed 1 Billion Users*, THE VERGE (Sept. 27, 2021), <https://www.theverge.com/2021/9/27/22696281/tiktok-1-billion-users>.

90. White, *supra* note 54.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Lauren Feiner, *The Senate Will Get Its Best Shot at Regulating Big Tech, and Apple, Google and Amazon are Already Playing Defense*, CNBC (Jan. 20, 2022), <https://www.cnbc.com/2022/01/20/senate-to-mark-up-antitrust-bills-targeting-apple-google-and-amazon.html>.

97. Lauren Feiner, *Apple Says Antitrust Bills Could Cause 'Millions of Americans' to Suffer Malware Attacks*, CNBC (Jan. 18, 2022), <https://www.cnbc.com/2022/01/18/apple-says-antitrust-bills-increase-risk-of-iphone-security-breaches.html>.

98. *Id.*

99. *Id.*

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“allow[ing] sideloading, where apps are downloaded outside the App Store.”<sup>100</sup> Allowing users to engage in sideloading apps for their devices is problematic as it would allow app developers to disregard Apple’s privacy policies and authorize attacks from harmful scammers.<sup>101</sup>

In response to these statements, a spokesperson for Senator Amy Klobuchar criticized Apple’s interpretation of these bills, stating, “Apple’s arguments about ‘sideloading’ really amount to a desperate attempt to preserve their app store monopoly.”<sup>102</sup> Klobuchar’s spokesperson went on to say “this multi-trillion dollar company is more than capable of protecting privacy and security while still giving consumers greater choice by allowing competition.”<sup>103</sup>

Similar to Apple, Google has vocalized its concerns, arguing these antitrust bills are overly restrictive and threaten the security of its products.<sup>104</sup> In a blog post, Google’s Chief Legal Officer, Kent Walker, argued this legislation prevents “Google from integrating automated security features ... making it harder to detect security risks across products if forced to break the connections between them.”<sup>105</sup> Walker went on to declare these bills would force Google to disclose sensitive information with other companies and lead to “spammy and low-quality services.”<sup>106</sup> He concluded his blog post arguing these bills would weaken American innovation and ultimately result in harm to consumers and small businesses who regularly use Google’s services.<sup>107</sup>

In his article *10 Things the American Innovation and Choice Online Act Gets Wrong*, Dirk Auer highlights what he believes to be misguided efforts to dismantle the Big Tech sector.<sup>108</sup> Throughout Auer’s text, he discusses several misconceptions that he argues underpin the legislation.<sup>109</sup> To begin, Auer argues there is no evidence that self-preferencing is generally harmful as it is a normal aspect of how platforms operate.<sup>110</sup> In his opinion, “Platforms that preference their own products frequently end up increasing the total market’s value by growing the share of users of a particular product.”<sup>111</sup> To demonstrate this argument, Auer references Facebook’s integration of Instagram, which he argues led to a substantial increase in user demand for not only Instagram itself, but also other photography apps.<sup>112</sup> As a result of this increased consumer awareness of apps focusing on photography, it is clear independent developers also reaped the benefits of Facebook’s \$1 billion purchase.<sup>113</sup>

Yet another argument Auer makes is that consumers tend to prefer “closed ecosystems”, even if it requires them to pay a premium.<sup>114</sup> In explaining this statement,

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. Dirk Auer, *10 Things the American Innovation and Choice Online Act Gets Wrong*, TRUTH ON THE MKT. (Jan. 18, 2022), <https://truthonthemarket.com/2022/01/18/10-things-the-american-innovation-and-choice-online-act-gets-wrong>.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

Auer used the example of app stores, arguing centralized platforms, such as Apple's App Store, allow consumers to avoid the negative externalities "bad" apps impose.<sup>115</sup> Moreover, it is plausible consumers make many of their decisions at the inter-platform level through their decision to purchase one type of device over another.<sup>116</sup> An excellent example of this would be consumers purchasing an iPhone because they prefer to utilize the App Store and Safari in contrast with an Android smartphone which utilizes a Chrome Browser and Google Search.<sup>117</sup> By allowing consumers in the digital space to have access to closed, versus open, systems, companies may be giving the majority of users the option they prefer.<sup>118</sup>

Taking the arguments above into consideration, it is easy to understand and appreciate the many reasons why parties within the dynamic and innovative tech sector are seeking to prevent the passage of these bills.<sup>119</sup> From their perspective, the American Innovation and Choice Online Act, despite its title, does little to further innovation or consumer choice.<sup>120</sup> Arguably, the passage of this legislation could impair American competitiveness, online services, and undermine only a handful of companies while allowing many others to continue engaging in the same type of behaviors.<sup>121</sup>

#### IV. PROPOSED SOLUTION

Many times, the best solutions can be seen and simply stated, but are much more difficult to accomplish. That is likely the solution to the proposed antitrust legislation discussed throughout this article. Under the most ideal circumstances, existing antitrust legislation would be amended to balance the interests of those dominating the tech industry, their consumers, and policymakers. However, it appears this has not, and will not, be the case for the foreseeable future as the current proposed legislation appears more concerned with micromanaging Big Tech rather than focusing on encouraging competition and consumer choice.

In assessing how policymakers may improve antitrust legislation in the future, it is important to acknowledge the flaws and unintended consequences associated with the current proposed legislation. More specifically, the potential ramifications the American Innovation and Choice Online Act will have if it comes to fruition. To begin, the current state of this bill does not allow covered platforms to self-preference or pre-install their own products.<sup>122</sup> This is largely problematic as consumers are likely to be denied access to more cost-effective products or services, leading to higher prices and decreased levels of consumer choice.<sup>123</sup> As for data

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Wayne Brough, *The American Innovation and Choice Online Act Does Little for Innovation or Choice*, R STREET (Jan. 19, 2022), <https://www.rstreet.org/2022/01/19/the-american-innovation-and-choice-online-act-does-little-for-innovation-or-choice>.

120. *Id.*

121. *Bipartisan Senate Panel Approves Restrictions on Big Tech Companies*, MISH TALK (Jan. 23, 2022), <https://mishtalk.com/economics/bipartisan-senate-panel-approves-restrictions-on-big-tech-companies>.

122. Letter from Kristina Pusok, Dir. Am. Consumer Inst., to U.S. Senate (Jan. 12, 2022), [https://www.theamericanconsumer.org/wp-content/uploads/2022/01/Antitrust-letter\\_ACI\\_01\\_12\\_2022d.pdf](https://www.theamericanconsumer.org/wp-content/uploads/2022/01/Antitrust-letter_ACI_01_12_2022d.pdf).

123. *Id.*

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privacy and security, covered platforms are unable to “materially restrict or impede a business user from accessing data generated on the covered platform” and may not “impose strict terms and conditions on small businesses . . . us[ing] the platform.”<sup>124</sup> Given many of these covered platforms “operate sophisticated cybersecurity programs and offer substantial data privacy protections,” allowing smaller companies with fewer protections to have access to consumer-related data is likely to lead to more frequent privacy and security breaches.<sup>125</sup> Further, this bill makes it more challenging for small businesses to access online marketplaces, such as Amazon, which are essential for their continued development and success.<sup>126</sup> Without access to such marketplaces, small businesses will be forced to establish their own platforms for selling products.<sup>127</sup> This additional cost threatens the survival of small businesses, startups, and entrepreneurs, who, at present, have access to large numbers of customers on existing marketplaces at a low cost.<sup>128</sup> Currently, this bill does very little to address anticompetitive behavior and instead classifies “commonplace business practices as antitrust violations.”<sup>129</sup> In fact, rather than protecting competition and consumer wellbeing, this bill seems to target only the largest tech companies while simultaneously sabotaging the consumer welfare standard.<sup>130</sup>

As noted in Mark MacCarthy’s *Two Ways to Improve Senator Klobuchar’s Needed Antitrust Legislation*, “Several senators who voted to send the bill to the floor made plain that they could not vote for final passage in its present form. Their reservations and those of some outside groups should be addressed before this transformative bill moves forward.”<sup>131</sup> With regard to balancing privacy and competition, this bill, as well as many others, must ensure they do not tilt too strongly in favor of one or the other. The best solution would be for privacy and competition to “accommodate each other rather than being arranged hierarchically,” although this will require major changes to these bills, including the elimination of the terms such as “narrowly-tailored” and “less discriminatory.”<sup>132</sup> Removing this language enhances these bills and allows enforcing agencies to approve potentially discriminatory data only if it is “reasonably necessary” to protect user privacy, a much stricter standard that encourages competition while also protecting consumer privacy.<sup>133</sup>

In the future, legislators, and American consumers in general, should push for the development of federal antitrust legislation that better addresses the management of Big Tech. Rather than discouraging, and potentially stifling, competition through the enactment of current proposed legislation, policymakers need to place a large emphasis on generating more effective antitrust legislation. To do so, legislators will need to consider the long-term effects of proposed antitrust legislation, including potential unintended consequences and the interests of American

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Mark MacCarthy, *Two Ways to Improve Senator Klobuchar’s Needed Antitrust Legislation*, BROOKINGS (Feb. 8, 2022), <https://www.brookings.edu/blog/techtank/2022/02/08/two-ways-to-improve-senator-klobuchars-needed-antitrust-legislation>.

132. *Id.*

133. *Id.*

consumers more generally. Rather than allowing current bills to move forward, legislators should consider revising their legislation to promote competition and free market principles, while also encouraging large tech companies to continue innovating.