Introduction

In 2010, Facebook ran an experiment in which it selectively “nudged” 61 million users with political mobilization messages. The company’s intervention changed the voting patterns of millions and increased voter turnout by 340,000 people in the 2010 U.S. congressional election. Facebook reached the anodyne conclusion that their effort had been “effective.” But what it really proved is that the world’s large technology companies are not just a hypothetical threat to democratic government; should they so choose, they have the power to directly control the political process.

Antitrust law and the regulation of competition has always been a question of freedom. As historian Richard Hofstadter wrote of the Progressive Era antitrust movement, “nothing less was at stake than the entire organization of American business and American politics, the very question of who was to control the country.” The original antitrust laws were written to balance the freedom of firms to compete and profit with the need to protect the political process from corporate power, what Justice Louis Brandeis called the “curse of bigness.” Proponents of stronger antitrust laws even pointed to monopolies in Germany as a factor in Hitler’s ascension to power. Defenders of large firms pushed back, arguing that such laws were inimical to economic freedom. On their view, monopolists achieved their positions through efficiency, and attempts to reign them in were an assault on free exchange.

But even the original anti-monopolists could hardly have envisioned the business titans of today, like Google and Facebook, which control not just commodity markets but vital platforms for political speech and vast troves of personal data. In 2016, that power was weaponized by Russia to target vulnerable voters with disinformation, which helped tip the balance of the American presidential election. “Big tech” isn’t all bad—even their opponents admit these firms create hundreds of thousands of jobs and are responsible for breakthrough innovations. Approaches that would simply break them up are throwing the baby out with the bathwater. Something more nuanced is needed.

This essay argues that our approach toward competition law and economic freedom must be recalibrated to prevent concentration where
it cannot be justified by economies of scale and consumer surplus, while preserving incentives to invest and innovate. I propose a new antitrust framework to govern this reimagined approach to economic freedom and a set of four policy interventions to bring it to life.

The Challenge of Economic Concentration

For the last fifty years, antitrust law has laid dormant as the economy has been remade. The merger wave of the 1980s and Internet revolution of the 1990s restructured the global economy and gave birth to entirely new industries and forms of economic power. But in the shadow of innovation, the problem of monopolization has reasserted itself. Below, I outline three components of this challenge.

A. Three Problems

Economic concentration in the U.S. is on the rise across industries. In 1954, the 60 largest companies in the U.S. accounted for under 20% of GDP; today, the largest 20 firms alone account for more than 20%. From 1997 to 2012, two-thirds of industries became more concentrated.9 Some industries are even more extreme. The top four airlines collect 65% of the industry’s revenue, while just four companies account for 90% of the U.S. beer market.10

1. Rising Concentration, Declining Competition

This rise in concentration corresponds with a concurrent decline in competition. US corporate profits as a share of GDP have tripled since 1980,11 a result unlikely in a competitive market. An even surer indicator of low competition is the persistency of profit for individual firms. A profitable American firm in the 1990s had a roughly 50% chance of still being profitable ten years later, due to competition; today, that chance stands at 83%.12

The deleterious effects of rising concentration have already begun to materialize. The formation of new businesses has declined, which many experts attribute to corporate concentration.13 Many in Silicon Valley argue that big tech firms have created a “kill zone” around their core businesses, using their economic might to squash would-be competitors before they get off the ground.14 On this view, American markets are hardly “free.” Others argue that increasing prices15 and low U.S. business investment—a key contributor to slow growth and lagging productivity—are the result of low competition.16

2. Digital Power

The problems of concentration are magnified in the context of technology firms. Google and Facebook account for 60% of all mobile ad revenue and 51% of digital ad revenue, while Amazon controls 47% of all e-commerce sales.17 There are particular reasons that digital markets are prone to concentration. First, many online businesses are organized as “platforms,” online infrastructure that aggregates access to various goods from retail (Amazon) to videos (YouTube) to social interaction (Facebook). A single platform is more user-friendly and offers greater value as at scales—the more people join a social network, the more fun it becomes—encouraging concentration. Second, the need for “portals” to access the disparate contents of the Internet gives special power to the keepers of those entry points. Google is so powerful precisely because it is the doorway through which we enter the rest of the consumer-facing Internet.

But the business models of the digital giants present a unique threat to the functioning of democratic government and free society. Platforms like Facebook and Google that curate and distribute information to billions of people hold the power to alter perceptions of truth, promoting some narratives and suppressing others. Facebook’s 2010 experiment and the 2016 U.S. presidential election are case in point. The same applies to Google, which by one estimate could use its search algorithm to shift the votes of up to 2.6 million voters.18
3. An Impoverished Intellectual Framework

Concentration has been left unchecked in large part because of the Chicago School revolution in economic thought. Led by Milton Friedman and Robert Bork, these thinkers argued that monopolies were often more efficient than competition and that government interventions generally did more harm than good. Freedom required a light touch. They advocated for a “consumer welfare” standard as the sole test for antitrust enforcement: Unless prices went up, government should stay out. In the U.S., and to a lesser extent abroad, this has become the dominant approach to antitrust enforcement and core to Western conceptions of economic freedom.

But this theory is an impoverished one. At the very least, it neglects non-price economic harms. Companies that abuse their lack of competition to lower the quality of the products (without increasing price) still harm consumers. And if these companies decline to make new investments because they have no need to compete, innovation will stagnate. And this is to say nothing of the non-economic harms of economic dominance, like the ability to undermine democracy and capture regulators, that were always part of antitrust law but erased by the Chicago School. In order to tackle rising concentration and the new challenges of digital dominance, we need a new framework for economic freedom.

Protecting Competition and Economic Freedom in the 21st Century

A. The New Framework

The current aperture of antitrust enforcement is too narrow. Instead, I propose the following framework to better protect economic freedom and facilitate growth:

- Excessive market concentration and low competition should be permitted only where (1) the relevant efficiencies in the industry can only be sustained at a scale that necessitates concentration and (2) the majority of the gains from those efficiencies are captured by consumers.

- Non-economic harms should be explicitly accounted for in antitrust enforcement, but must be weighed against economic efficiency, especially investment and innovation. Large firms that innovate should not be punished for their “bigness,” while those that rest on their laurels to capture surplus should be incentivized to change.

- Remedies (i.e., fines, consent decrees, or breakups) should be selected to achieve the intended end with minimal economic disruption to company and industry structure.

This approach is intended to protect large firms whose size makes economic sense and creates social benefit while punishing monopolists that use their “bigness” only for private gain. To illustrate this concept, take the cases against Facebook and Amazon. Facebook’s combination of Facebook, Instagram, and WhatsApp does not permit greater efficiency for consumers; the user experience on Instagram is not made better because the company owns a separate messaging platform. Rather, the combination of these platforms benefits the parent company alone by enabling it to aggregate personal data across them and sell advertisements more easily. On the other hand, Amazon’s dominance is less suspect. Amazon’s exceptionally low prices are only possible because of its scale—its nearly fifty-percent share of online retail sales enables it to operate with exceedingly low margins, to the benefit of consumers. And it famously eschews taking out profits, instead plowing cash back into new investments and opportunities.

B. Policy Proposals

Today’s competition law is stagnant. Below, I propose four policy proposals—two that are
“low-hanging fruit” and two that are more ambitious—to remedy the problems outlined above.

Low-Hanging Fruit

1. Block and Undo Anticompetitive Mergers

American and European antitrust law already permits regulators to block anticompetitive mergers (those motivated by eliminating competition rather than achieving economies of scale) and demand companies undo anticompetitive acquisitions mistakenly permitted to go through. These powers have long been under-utilized. For example, one former American antitrust official has already issued a *mea culpa* calling it a mistake to allow Facebook to purchase Instagram and WhatsApp, and calling for their divestiture. Reversing that under-enforcement is an obvious first step.

2. “Policeman at the Elbow” Enforcement

Likewise, antitrust law already empowers regulators to fine or otherwise punish specific instances of anticompetitive behavior. For example, the EU has already fined Google $5 billion for illegally bundling its products on the Android platform, to the exclusion of competitors. The U.S. has not been so aggressive; it should be. Deterrence through what Tim Wu calls the “policeman at the elbow” approach—selective investigation and enforcement—is essential to keeping companies’ worst impulses in check.

A More Ambitious Agenda

3. Industrial Tax Policy

Developed countries could use tax policy to incentivize dominant firms to invest and create jobs while arresting their dominance. Corporate tax rules could be altered to impose higher marginal rates as profits rise, paired with aggressive tax breaks for R&D spending in certain areas (e.g., artificial intelligence or clean energy). The logic of such a policy pairing would be to make “bigness” expensive absent high investment spending in targeted areas, or at least to make companies indifferent between being less dominant and being dominant but with high investment spending.

Similarly, companies above a certain size or industry concentration could be subjected to increasing marginal tax rates as the share of gross income spent on labor relative to dividends and buybacks or profits declines. Here, too, the logic would be to condition society’s tolerance for size on high employment and job creation. Concentration, on this view, is acceptable only if the surplus it creates is distributed beyond just the boardroom.

4. Public Utility Regulation

Finally, an extreme measure would be to revive the public utility-style regulations of the New Deal period. Public utilities are companies that provide essential services and must be big in order to do so (natural monopolies for goods like electricity and water are canonical examples). In exchange for this privilege, they are subjected to regulations that ensure universal access and prevent them from taking excessive profits.

As access to Google’s search engine and ownership of a smart phone become more essential to participation in modern economic and social life, conceiving of these dominant firms as public utilities no longer seems farfetched. If blocking mergers and punishing individual anticompetitive acts fails to rein them in, regulating these dominant firms as public utilities is another means to preserve their capacity to provide goods at scale and innovate while taming their worst tendencies, whether economic or political.

Conclusion

The shocking rise of corporate concentration is a threat to freedom. Firms that control online platforms have the power to directly alter electoral outcomes. Economically, the right to free exchange and open markets is under siege
by dominant companies that quash any threat to their incumbency, while individuals are subjected to high prices and low wages. At the same time, however, these firms are among the most crucial to employment and growth. We need a new approach to competition law that balances these concerns, rewarding companies that use their size for social benefit while breaking down the moats protecting those deleterious to markets and self-government. The approach outlined in this essay seeks to do just that.

Footnotes

5 THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS 16 (1940).
8 Joshua P. Zoffer, Short-Termism and Antitrust’s Innovation Paradox, 71 STAN. L. REV. ONLINE 308 (2019).


24 Zoffer, supra note 8.