Will Breaking Up Big Tech Restore Competition?

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The growing size and power of certain major technology platforms has created a robust ongoing debate over whether the current U.S. antitrust laws are up to dealing with big technology companies and what approach antitrust laws should take in protecting competition. Certain big tech companies are accused of limiting competition, widening income inequality, stifling innovation and threatening democracy, and they are facing intense scrutiny by antitrust authorities. Congress and state and federal agencies are pushing for a broad antitrust review. Prominent individuals are calling on the government to break up or restructure big tech firms. There is nothing wrong with antitrust agencies devoting resources and deploying antitrust for the purposes for which it is intended: to protect competition. This article looks into the reasons behind a calling for a breakup and examines, from the standpoint of Section 2 of the Sherman Act, whether a breakup is indeed a proper remedy in addressing the concerns of alleged bad conduct in digital technology markets.

Being big is not in itself bad

Breakup proponents have advocated using antitrust law as a tool to solve economic, social and political problems allegedly raised by large tech companies. Senator and Presidential candidate Elizabeth Warren has argued that America’s big tech companies have too much power “over our economy, our society, and our democracy.” Legal scholar Tim Wu has stated that the current excessive corporate concentration poses a serious threat to democracy and gives rise to fascism. The proponents also have argued that large tech companies aggravate income inequality by concentrating enormous wealth in the hands of a small number of private individuals.

In the book The Antitrust Paradox, Robert Bork contended that the main goal of antitrust enforcement should be to promote “consumer welfare” and that the main way to achieve that goal was to promote “business efficiency.” For decades, courts and regulators have evaluated corporate practices by considering whether they would result in enough market power to harm one or more sides of the market, including consumers, suppliers, and workers. A harm to competition and consumers is assessed largely by the potential harm to economic efficiency, such as a limitation on output, higher barriers to entry or price increases.

Recently, certain leading scholars and practitioners have challenged this view. So-called “antitrust hipsters” or “Neo-Brandeisians” have advocated that antitrust law should broaden its scope to include social and even political goals when scrutinizing big technology companies because antitrust law was “meant fundamentally as a kind of constitutional safeguard, a check against the political dangers of unaccountable private power.” They contend that the current consumer welfare standard is at odds with the original legislative intent of the Sherman Act.

It is true that the legislative history of the Sherman Act shows that other than economic concerns, Congress may be motivated to forbid a monopoly for broader social missions. In a speech defending his bill, Senator John Sherman, author of the 1890 Act, said that the goal of an antimonopoly law is to promote independence and a rough equality of every man’s right “to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances.” Judge Hand appears to have shared this view, writing that in condemning monopolists, Congress “was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in

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1 Kelly Fan is a law student at the University of Washington School of Law.
4 Warren, supra note 3.
8 Daniel A. Crane, Antitrust (2014).
which the great mass of those engaged must accept the direction of a few.”12

However, if Congress actually intended to protect small enterprise, the plurality of firms and dispersion of market power, why did Congress not simply prohibit monopoly in the Sherman Act and subject big companies to regulation and size limits? The Supreme Court noted in the Trinko decision that the mere possession of monopoly power is not only not unlawful, but is also an important element of the free-market system.13 The whole concept of a competitive market is premised on the idea that if a company is the most efficient player in the marketplace, it will have an opportunity to scale its business and be awarded by capturing a significant share of the value that its innovations generate. It is not the job of antitrust to punish success. It is the job of antitrust to remedy anti-competitive conduct. Furthermore, being large can create significant efficiencies that reduce cost of supply, drive down product price, make products and services more accessible for consumers, and ultimately benefit consumers by offering better products at lower prices. The long jurisprudence under Section 2 of the Sherman Act makes it clear that the mere fact that a company is big is not in itself an antitrust violation. What the law prohibits is any anticompetitive acquisition or maintenance of monopoly power.

Another major social concern with the big tech companies relates to data privacy. Since many tech companies collect and process large amounts of consumer data, many have raised concerns that data can be subject to abusive use if the company’s power is left unchecked. Also, as customers do not necessarily pay for digital market products, some have argued that instead of looking at the price charged by a company, privacy protection should be taken into account in determining consumer welfare. There have been cases of consumer harm that result from either inappropriate use of data or inadequate security of technology companies. But being able to process user data one way or another is essential to all digital technology companies. Is there any change in incentives in terms of privacy protections if we have several more social media platforms as a result of breakups than just having a few?14 Privacy law such as the European Union General Data Protection Regulation and the California Consumer Privacy Act, which takes effect on January 1, 2020, likely provides a better solution to solve data privacy issues, as antitrust law is poorly equipped to handle the problem. Adding non-antitrust factors to the consumer welfare standard would effectively mean there are no standards at all.15 As Judge Ginsburg argued, “[e]xperience prior to adoption of the consumer welfare standard teaches that an antitrust regime with severe and often conflicting goals creates unpredictable results; that can only chill the business innovations that improve the lives of consumers.”16

**Big is bad only when it behaves badly**

Breakup proponents have also suggested that because the internet giants possess monopoly power, they can easily create barriers to entry, raise prices, exclude rivals, and leave users with fewer choices or places to go. These are all legitimate concerns; however, the underlying concern described here seems to be how a big company with alleged monopoly power can improperly use its power to commit anticompetitive conduct. In other words, the question is not how big a company is, but whether or not big companies have improperly used their size to harm competition.

Senator and Presidential candidate Elizabeth Warren has proposed legislation that would restructure designated “platform utilities.”17 Companies with revenue of $25 billion or more that provide an online marketplace would be designated as “platform utilities” and would not be allowed to both own the platform and participate on it.18 For example, Amazon’s online marketplace would be separated from the rest of Amazon, and Google’s advertising business and its search business would be split apart. For companies with annual global revenue between $90 million and $25 billion, their platform utilities would be required to share data with third parties and meet a standard of fair, reasonable, and non-discriminatory dealing (FRAND).19

A major issue with the proposal is its use of firm size thresholds as the sole factor in deciding whether a platform company will be subject to being split up or not. The size threshold is fundamentally in conflict with antitrust principles. The U.S. antitrust laws were enacted for “the protection of competition not competitors.”20 The underlying goal is to promote consumer welfare, using price as a proxy measured by the potential effects of corporate conduct on product price, quality, quantity and innovation. In contrast, in legislative breakup proposals, firm size becomes the only factor for determining which platform companies are restructured and regulated. This approach does not distinguish between legal

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12 United States v. Alum. Co. of America, 148 F.2d 416, 427 (2d Cir. 1945) [hereinafter Alcoa].
17 Warren, supra note 3.
18 Id.
19 Id.
and illegal exercise of market power. The assumption seems to be that as a matter of law, whenever platform companies reach a certain size, then whatever they do is a violation of antitrust law.

To be sure, the law concerns itself with how a company acquires and maintains market power. A company that achieves success engaging in unlawful practices such as tying or predatory pricing will run afoul of the Sherman Act scrutiny. However, here, even assuming the big tech companies violated Section 2 of the Sherman Act, is a breakup the appropriate remedy? First of all, antitrust breakup remedies are rarely ordered by courts against a single company. In fact, there are only two instances of a breakup remedy being used: Standard Oil and the AT&T antitrust cases. Furthermore, we do not even need to speculate whether a breakup should be an antitrust go-to remedy. The Microsoft case already proved to us that a breakup is not only unnecessary but inappropriate. In U.S. v. Microsoft, the Court of Appeals reversed the district court’s divestiture order because the district court failed to explain why it ordered divestiture. Twenty years later, Apple has been able to capture a significant share of computer users that Microsoft used to possess. Windows faces fierce competition in the desktop computing market and Microsoft has been largely left out of the emerging mobile computing market, lagging behind Android and iOS.

Sears used to be the largest retailer in the world. By the end of the 1960s, Sears’s annual sales were just shy of 1% of the nation’s gross domestic product with the breadth of Amazon. We used to have Nokia, Sears, and AOL. Now we have Apple, Amazon, and Google and we will continue to see new generations of tech giants replace the ones who fail to innovate and stop growing and serving consumers’ needs. This is the “essential fact” about our economy, as Joseph Schumpeter described: “The opening up of new markets, foreign or domestic, and the organizational development from the craft shop to such concerns as U.S. Steel illustrate the same process of industrial mutation—if I may use that biological term—that incessantly revolutionizes the economic structure from within, incessantly destroying the old one, incessantly creating a new one. This process of Creative Destruction is the essential fact about capitalism.” At the end of the day, antitrust law’s job is to remedy anticompetitive conduct and preserve robust competition in the marketplace. The forces of competition will do the work. In this sense, our society will not benefit from an antitrust remedy that aims to protect less efficient competitors from competing with the bigger, more efficient ones.

More fundamentally, blunt breakup remedies are in conflict with the role of antitrust because they fail to distinguish a legal possession of market power from anticompetitive conduct that illegally exercises market power. A company may achieve monopoly status as a natural consequence of competition. The law is clear that mere possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct. If a company became the first stop for more than a third of U.S. customers shopping online because it provides the most varieties of products at a lower price, do we have any legitimate reason to breakup this company simply because it is big? What is the wrongdoing we are punishing?

When businesses have to compete, they want to win. In order to win, the company must offer something compelling to consumers, such as lower prices or better products. A successful competitor, having been urged to compete, must not be turned upon when he wins. However, breakup proposals do not appear to consider the chilling effects they will have on investment, competition and innovation in the marketplace. At best, the business owner of an online platform will have fewer incentives to invest in the growth and expansion of the company since if the company passes the threshold, the company will have to be split up. At worst, the policy will effectively discourage companies from developing better products and becoming more competitive over time. The revenue threshold simply is detrimental to business reinvestment, innovation and marketing integration, which almost always improves the lives of consumers. In this sense, a blunt breakup would defeat the very goals that antitrust law was designed to achieve. Consumers will have to pay more for less, or even worse, they will be left without the goods and services that, with a more enlightened policy, they could afford.

**Conclusion**

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22 Moss, supra note 13.
24 Court of Appeals quoting Judge Wyzanski in United Shoe machinery: “United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labor force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.”
27 Joseph Schumpeter, Capitalism, Socialism, and Democracy (1942).
28 Trinko at 407.
29 Alcoa at 430.
Big technology companies have raised new challenges to the antitrust laws. However, a loosely defined breakup proposal is probably not the answer. Such a policy essentially sets a mandatory cap on a company’s growth. If there are no additional benefits from the growth of business and a mandatory breakup waiting for a market player, then why would any business owner invest money and time to further develop his business? If all businesses are settled at a certain stage with no incentive to grow, this will curtail the robust competition in the marketplace that breakup advocates claim to be trying to restore. Merely being big is not bad; only when big companies behave badly will they cause harm to competition and consumers. Companies should not be punished for successes achieved through legitimate competition, but this is what a breakup remedy would do, in conflict with the underlying principles of antitrust law.