Statement for the Record of

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before

U.S. House Judiciary Antitrust Subcommittee on *Proposals to Strengthen the Antitrust Laws and Restore Competition Online*

October 1, 2020

About NetChoice

NetChoice[1] is a trade association of leading e-commerce and online companies promoting the value, convenience, and choice of internet business models. Our mission is to make the internet safe for free enterprise and for free expression.

We work to promote the integrity and availability of the global internet and are engaged on issues in the states, in Washington, and in international internet governance organizations.

Introduction

When Congress passed the Sherman Act in 1890, it enshrined in law the country's "national values of free enterprise and economic competition."[2] Although those values usually go hand in hand, they sometimes seem to conflict with each other. Consider a supermarket that opens in a new town: Even if its prices are lower than all its competitors' prices, should we care that its mere existence put those competitors out of business? For many decades, the answer was *it depends*.

Depends on what? The government's discretion and business's size. From 1890 through the early 1970s, the Supreme Court and federal government relied on "confused doctrines that pursued populist notions" that mistook big for bad.[3] By following these populist appeals, antitrust laws "led to contradictory results that purported to advance a variety of social and political goals at the expense of American consumers."[4] In the Sherman Act's first decade, for example, the Supreme Court held that the law was meant to protect "small dealers and worthy men."[5] Decades later, the Court reaffirmed that interpretation, holding that antitrust laws are meant to protect "viable, small, locally owned business" even when that protection means "higher costs and prices."[6]

As former Federal Trade Commissioner Joshua Wright put it, "[t]he result of this approach was that consumers were made worse off by preventing the very competition from which they would benefit and which the competition laws were supposed to promote."[7] Instead of producing consumer benefits, antitrust enforcement based on size frequently led to higher prices and fewer goods, damaging consumers.[8] And, Commissioner Wright added, "preserving inefficient firms with higher prices and lower output," which was the result of such antitrust enforcement, had the perverse effect of favoring "corporate welfare over consumer welfare."[9]

By the 1970s, a decade marked by increasing global competition and sluggish U.S. economic growth, leading antitrust scholars and economists sensed the urgency of rationalizing the purposes

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[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org The views expressed here do not necessarily represent the views of every NetChoice member company.
[2] *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1110 (2015) (citation omitted).
[3] Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise & Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294, 299 (May 2019), http://arizonastatelawjournal.org/wp-content/uploads/2019/05/Wright-et-al.-Final.pdf.
[4] *Id.* at 294.
[5] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897).
[6] Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962).
[7] *Id.*
[8] *Id.* at 300.
[9] *Id.*

and methods of enforcement policy. Under the leadership of economist Alfred Kahn, the Carter administration launched a major regulatory reform initiative focusing administration policies on consumer welfare. The result was to bring competition to industries across the U.S. economy including railroads, airlines, and trucking. This turn toward consumer welfare was supported by antitrust experts across the ideological spectrum,[10] who recognized that by attacking large companies regardless of the impact on consumer welfare, antitrust enforcement had produced legal uncertainty that deterred firms from innovating, boosting productivity, and offering consumers better products and services at lower cost.

Under the consumer-welfare model, on the other hand, antitrust uses economic learning and evidence to assess whether a business's actions benefit or harm consumers.[11] Business decisions that benefit consumer welfare are allowed; those that harm consumer welfare are blocked. Economists, antitrust scholars,[12] and U.S. courts[13] agree that the consumer-welfare model has succeeded in protecting consumers. That success came only once the government abandoned its big-is-inherently-bad gut instinct and aligned its legal theories of harm with economic theories of anticompetitive harms.[14]

The replacement of antitrust-by-gut-instinct with the consumer welfare standard that took place nearly a half century ago enjoys broad, bipartisan support still today.[15] It is buttressed now by the empirical evidence of two generations of enforcement policy and case law. But as this hearing demonstrates, that support isn't universal.

But the consumer-welfare model is under attack. Concern about corporate power, income inequality, wage stagnation, and other social ills has sparked calls to "solve" social problems through populist antitrust.[16] This thinking would have the United States abandon, or at least weaken, the consumer-welfare model.

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Antitrust enforcement is an extraordinary remedy for an extraordinary problem. Today's hearing provides a good opportunity for Congress to dig deep into the consumer welfare standard's continued relevance and success. Using Google's advertising business as an example, we expect lawmakers will see firsthand both the benefits of the current antitrust approach and the pitfalls of upending it, which would turn back the clock to days when "big" meant "guilty until proven innocent."

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[10] Chris Marchese, *Debunking the Big is Bad Boogyman: How Facebook Benefits Consumers*, 28 Geo. Mason L. Rev. 1, 10 (2020), http://georgemasonlawreview.org/wp-content/uploads/2020/08/Marchese_Final_Web3.pdf. *See, e.g.*, Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978).
[11] *Id.*
[12] Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405, 2406 (2013).
[13] *See, e.g.*, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438 (2009).
[14] Wright, *supra* note 6, at 305.
[15] *See* John Kwoka, *Mergers, Merger Control, And Remedies* 1 (2015); Michael Vita & F. David Osinski, John Kwoka's *Mergers, Merger Control, and Remedies: A Critical Review*, 82 Antitrust L.J. 361, 362–63 (2018).
[16] *Id.* at 294.

What is Past is Prologue: Big-is-Bad Gut Instincts

By abandoning the consumer-welfare model, the United States would be following Europe's lead. European courts have held that the E.U.'s main antitrust law, the Treaty on the Functioning of the European Union (TFEU), "is designed to prevent competition from being distorted to the detriment of the ***public interest***, individual undertakings and consumers" so that "the well-being of the European Union" is protected.[17] The broad concept of "the public interest" refers to yet another broad concept, "fairness." Answering whether something is fair relies on subjective instincts, which is in part why the European Union focuses far less on economic analysis than the United States does.[18]

It is also why the European Union has far more government intervention in the market.[19] Most recently, that intervention has been in policing "self-preferencing" among U.S.-based technology firms like Google, Amazon, and Facebook.[20] According to the European Commission, "dominant tech companies have a special responsibility to avoid favoring their own in-house products and services over competitors."[21] So even though consumers may benefit, and even though E.U. competition law does not address self-preferencing directly, the argument goes, self-preferencing is "unfair" and therefore illegal.[22]

Similar thinking about self-preferencing is on the rise in the United States. If accepted, it will blow apart the U.S.'s consumer-welfare approach to antitrust and turn the clock back to the 1960s, when the courts and federal government put their gut instincts about "fairness" ahead of economic evidence of consumer well-being.

America's Tech Companies Benefit Americans.

The HJC Report targets "Big Tech"—companies like Amazon, Apple, Facebook, and Google. But in an effort to punish these companies for supposedly having too much power, the populist antitrust proposals actually end up hurting consumers. Indeed, one suspects that the reason the report is even considering Europe's approach is because these companies have obeyed U.S. law.

Tech has benefitted Americans in untold ways. To give but a few examples:

Facebook

- During Hurricane Sandy and its aftermath, government officials used Facebook to communicate with the public and dispel false rumors.[23] Americans used the platform to check on loved ones and fundraise for relief efforts.

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[17] Case C-52/09, 2011 E.C.R. I-00527, ¶¶ 22–23 (emphasis added).
[18] Roger D. Blair & D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 FORDHAM L. REV. 2497, 2514 (2013), https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4889&context=flr.
[19] *See generally* Francesco Russo et al., EUROPEAN COMMISSION DECISIONS ON COMPETITION 113–97 (2010).
[20] Valentina Pop & Sam Schechner, *Google Appeals Against EU Antitrust*, WALL ST. J. (last updated Feb. 12, 2020), https://www.wsj.com/articles/google-starts-appeal-against-eu-antitrust-decisions-11581516872.
[21] *Id.*
[22] *Id.*
[23] Sara Cohen, *Sandy Marked a Shift for Social Media Use in Disasters*, Government Technology (Mar. 7, 2013) https://www.govtech.com/em/disaster/Sandy-Social-Media-Use-in-Disasters.html.

- Small businesses, including local restaurants and boutique stores, use Instagram to showcase their offerings and connect with thousands of consumers across the country and globe.
- School districts, including my own, use the platform to communicate with students and parents, and to share videos and photos that foster community.

Google

- Students and teachers use Google's digital office products—which are free for all to use.
- YouTube houses millions of free educational videos that thousands of New Yorkers use to learn about everything from the quadratic equation to filing taxes for the first time.

Amazon

- Thanks to Amazon's marketplace, rural Americans have access to the same products as New Yorkers living in the city. No longer are their choices limited by geography or density.

Apple

- Apple's App Store provides a safe and trusted place for customers to find apps and for developers, especially startups, to access a robust marketplace - all building on the brand promise of Apple.
- App developers, large and small, enjoy the fruits of Apple's continued investment in growing the app store and APIs and SDKs for developers
- The App Store created more than $138 billion in economic activity.[24]

Populist Antitrust Proposals Diminish Innovation

"Competition is a ruthless process." It spares no business, not even big ones. In our own time, it has reduced to ruins former market giants like Blockbuster, Borders, Circuit City, and Radio Shack. Once ever-present, these companies have since closed up shop or filed for bankruptcy. And competition seems poised to shutter shopping mall staples like Victoria's Secret, GameStop, GNC, and JC Penny next.

But America stomachs—even cheers—this ruthless competition because "[a]ggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers." Harder to digest, however, is "[a]ggressive, exclusionary conduct [that] is deleterious to consumers." This is the sort of conduct that softens the market's sharp edges and relieves pressure on a company to innovate. This behavior often signals that the offending company is shielded from "competition on the merits."

[24] Borck, Caminade, & von Wartburg, Apple's App Store and Other Digital Marketplaces, Analysis Group (July 22, 2020)

But procompetitive and exclusionary conduct are often brewed in the same barrel: conduct that benefits consumers also tends to exclude competitors. In Europe, it's enough to show simply that a business's actions hurt its competitors. Here, under current law, a plaintiff must show that a business's actions hurt consumers.

If America follows the European approach, competition will indeed be less ruthless. But that will come at the cost of innovation. Innovative businesses like Google and Facebook may be forced to withhold innovative services from New Yorkers out of fear of litigation. When Illinois passed a law banning the use of facial recognition technology, businesses ranging from Facebook to Shutterfly had to disable photo-tagging services that Americans in the rest of the country use and love. In fact, even as Google has moved toward an integrated search model that consumers love and appreciate, that model would likely be illegal if the US follows Europe. That is so because it integrates in ways similar to the *Google Shopping* case.

"Self-Preferencing": Slogan in Search of Consumer Harm

"Self-preferencing" is the latest buzzword that alleges that large digital marketplaces and platforms favor their own products and services over those of competitors – or as Chairman Cicilline proudly calls it, "Glass-Stiegel for the internet."[25] In other words, self-preferencing rebrands standard vertical-integration practices,[26] which are widely accepted as good for consumers, to suggest something unseemly is at work. The term reflects a "general hostility to firm size regardless of its actual impact on competition or consumer welfare."[27]

But that hostility is about more than just firm size; it is primarily about firm type. Today's calls to ban or restrict self-preferencing are targeted almost exclusively at digital platforms like Google and digital marketplaces like Amazon.[28] Indeed, despite brick-and-mortar marketplaces engaging in vertical-integration practices for decades, those practices became a problem only once certain politicians and competitors began turning against the technology industry—***even though consumers' ability to switch digital providers is vastly easier than switching to a different physical store.*** In fact, similar vertical integrations occur throughout the American economy, such as Gillette "preferring" to include its own replacement blades with its razors or Coca-Cola "preferring" its own beverages in its vending machines. Now, though, vertical-integration practices are a problem only when digital platforms and marketplaces follow them.

Vertical integration involves the same practices in online marketplaces as it does in brick-and-mortar marketplaces. But critics of Big Tech want antitrust to be enforced only against Big Tech. So to get around the problem of enforcing antitrust policies equally, critics have invented a new term: self-preferencing. This term allows critics to discriminate against Big Tech discreetly: Brick-and-mortar

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[25] *See*, *TechTank Podcast Episode 3: Why Rep. David Cicilline thinks we need a Glass-Steagall Act for the internet*, Brookings (Sept. 2, 2020) where Chairman Cicilline outlines his intent to make it illegal for stores to sell their own and competitor's products.

[26] Maurits Dolmans & Tobias Pesch, *Should We Disrupt Antitrust Law?*, Cleary Gottlieb Steen & Hamilton LLP 10 (July 15, 2019), https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf.

[27] Wright, *supra* note 12, at 341.

[28] *See, e.g.*, Lina M. Khan, Amazon's Antitrust Paradox, 126 YALE L.J. 710, 792-97 (2017).

marketplaces engage in good "vertical integration"; online marketplaces engage in bad "self-preferencing."

Discrimination Against Digital Platforms & Marketplaces

This dichotomy of vertical integration versus self-preferencing is intellectually dishonest. To understand why, start by considering big-box stores like Costco and Walmart. Costco is the second-largest retailer in the United States, operates 543 stores here, boasts over 98 million cardholders, and had net sales of over $149 billion last year.[29] Even more impressive, Walmart is the largest retailer in the United States, operates 4,769 stores here, and netted over $510 billion last year.[30]

Both Costco and Walmart own and sell their own brands, too. Costco's Kirkland Signature brought in sales of nearly $40 billion—about a third of its business—in 2018.[31] That $40 billion was more than JCPenney's and Macy's sales combined, and more than Kellogg's, Hershey's, and Campbell Soup's sales combined.[32] Kirkland is so popular among consumers that analysts credit the brand for drawing consumers to Costco's stores, and for convincing them to pay Costco's annual $60 or $120 membership fee.[33] Walmart's brand, Sam's Choice, is sold in Walmart's brick-and-mortar stores, online, and in Walmart's subsidiary, Sam's Club. Sam's Club is Costco's main competitor.

Now consider Amazon. Like Costco, Amazon launched in its own private brand, AmazonBasics, and uses that brand to entice consumers to become Amazon Prime members for an annual cost.[34] AmazonBasics got its start selling common household products like batteries.[35] With prices around 30% less than other brands, AmazonBasics was a quick success[36] and led to the company's development of more than 140 private brands.[37] Like Costco, Amazon sells its own products alongside its competitors' products on Amazon's website. Nonetheless, AmazonBasics constitute only 1% of Amazon's sales.[38]

Although Amazon went from owning one private brand in 2009 to over 140 today, outside sellers saw their share of Amazon's sales grow to 58% last year.[39] Despite these increased sales, Amazon's decision to sell its own brands has been cast as anticompetitive. Yet this anticompetitive

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[29] Statista, *Number of Costco Warehouses in 2019, by Country* (last accessed Mar. 6, 2020), https://www.statista.com/statistics/284431/number-of-costco-warehouses-2013-by-country/.
[30] Statista, *Total Number of Walmart Stores in the U.S. from 2012 to 2019, by Type* (last accessed Mar. 6, 2020), https://www.statista.com/statistics/269425/total-number-of-walmart-stores-in-the-united-states-by-type/.
[31] Nathaniel Meyersohn, *How Kirkland Signature Powers Costco's Success*, CNN BUSINESS (Jan. 10, 2019), https://www.cnn.com/2019/01/10/business/costco-kirkland-signature-brand/index.html.
[32] *Id.*
[33] *Id.*
[34] Julie Creswell, *How Amazon Steers Shoppers to Its Own Products*, N.Y. TIMES (June 23, 2018), https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html.
[35] *Id.*
[36] *Id.*
[37] Jack Nicas, Karen Weise, and Mike Isaac, *How Each Big Tech Company May Be Targeted by Regulators*, N.Y. TIMES (Sept. 8, 2019), https://www.nytimes.com/2019/09/08/technology/antitrust-amazon-apple-facebook-google.html.
[38] Jack House, *The Biggest Winner on Amazon Prime Day? Amazon's Own Brands*., Barron's, (July 12, 2019).
[39] *Id.*

narrative is contradictory on its face: Amazon's products increase competition by giving consumers more choices.

But, critics claim, Amazon uses its marketplace to favor its own products over those of its competitors.[40] These critics allege that Amazon: (1) uses data collected from its marketplace—consumer search terms, customer reviews; (2) product placement; (3) tags like "best seller" and "Amazon's Choice"; and (4) Amazon's Alexa to favor its own brands.[41] Even if all this is true, critics have not pointed to any actual consumer harm. Indeed, Amazon's marketplace is more competitive than ever before, and consumers have more options than ever.

Digital Platforms & Marketplaces Benefit All Consumers

Amazon's vertical-integration practices have, in other words, benefitted Amazon's competitors. Amazon's not alone: Google's, Apple's, Facebook's, and others' vertical integration have benefitted both competitors and consumers. This result is because, as Senator Mike Lee explained, "platforms, by virtue of their own vertical integration, create an economic ecosystem that enables other businesses to avoid having to vertically integrate themselves."[42] The upshot of this ecosystem is that small businesses can use "the various services these platforms provide so that they can focus on their core business."[43]

Another reason: Digital platforms and marketplaces have to compete on quality.[44] Take Google Search, for example. Launched in the internet's early years, Google Search originally returned a list of just 10 links—all to external websites.[45] These days, Google Search returns lists of countless external links and often answers consumers' questions itself.[46]

Critics have not explained why Google's success in answering consumers' questions is a problem, let alone an antitrust problem. Google Search competes against Microsoft's search engine, Bing, against Yahoo!'s search engine, and against newcomer DuckDuckGo's search engine. Google also competes with many vertical search providers, such as Yelp, Expedia, Amazon, and many others. And consumers can now find answers from a growing number of innovations, such as competing digital assistants. So if Google Search's preference for answering questions directly was not useful, consumers would turn elsewhere. And given the continued user growth for companies like Amazon and Yelp, many users do turn to rivals for their search needs.

That Google Search is most consumers' go-to choice for many online searches reflects the platform's quality and most consumers' preferences. But that success does not mean Google Search is without competition—far from it. Yelp's user numbers have steadily increased despite its complaints to regulators, most recently boasting that it serves almost 100 million local search users.[47] In a July 2019

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[40] Creswell, *supra* note 34.
[41] *Id.*
[42] Competition Policy International, *CPI Talks With Senator Mike Lee* (Mar. 1, 2020), https://www.competitionpolicyinternational.com/cpi-talks-with-senator-mike-lee/.
[43] *Id.*
[44] Dolmans, *supra* note 26.
[45] Nicas, *supra* note 37.
[46] *Id.*
[47] Yelp, *Investor Presentation* (Feb. 2020), https://s24.q4cdn.com/521204325/files/doc_financials/2019/q4/Yelp-Investor-Presentation_February-2020.pdf.

interview, when asked about his company's complaints about Google, Yelp's Senior Vice President of National Sales stated that:

> On the sales side, I feel we can fight the fair fight and compete on our merits. I'm not an expert in public policy.
>
> **We grew 22% from Q1 2018 to Q1 2019.** As an example, we've identified 250 strategic accounts we're really focused on and have entered in 60 of them. We're seeing growth, and we have years of runway ahead of us in terms of enterprise opportunity. We hold our own performance-wise.[48]

Although analysis of vertical integration analysis focuses on benefits or harms to consumers, not competitors, the lack of harm by Google Search's results to even Yelp is a telling sign of robust digital competition.

Apple, too, has been accused of self-preferencing at competitors' and consumers' expense.[49] But like Amazon's and Google's practices, Apple's vertical integration benefits both groups. First, consider the allegation: Because Apple makes the iPhone, and because the iPhone's App Store is tightly controlled by Apple, and because Apple offers its own apps and services on the App Store, this must mean that Apple kneecaps its competitors.[50] Spotify, a digital music platform, for example, advanced this argument in the European Union, claiming that Apple's 30% commission fee to use the App Store harms competition because Apple Music, a competing music platform, is available on the App Store and Apple does not have to pay a fee to use its own App Store.[51]

Common sense undercuts this argument. First, Apple's development of Apple Music gives consumers another choice for streaming music. Second, Apple owns the App Store, which means Apple pays for the platform's employees and funds its research and development. Third, Apple charges a 30% commission ***only if*** a developer uses the App Store to gain user subscriptions. So if a consumer subscribes to Spotify on Spotify's own website, Spotify pays nothing when that consumer then downloads its app from Apple. With this in mind, Spotify's argument is that it should benefit from Apple's development of the App Store, which reaches millions, for free, even when it gains subscribers through the App Store and even though Apple Music is a competitor.

What common sense suggests, empirical evidence confirms: Apple's vertical integration benefits competitors and consumers. Over 84% of those who use the App Store pay nothing and share *none* of the revenue generated by the App Store with Apple.[52] And, like Amazon and Google, the App Store allows developers to reach millions of consumers that they otherwise would not be able to reach without creating their own device, platform, service—or all three. So for a 30% fee, Spotify is able to access the 45% of smartphone users—over 100 million people—in the United States who use an

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[48] Sarah Sluis, *After Conquering Local Ads, Yelp Eyes National Sales* (July 10, 2019), https://www.adexchanger.com/the-sell-sider/after-conquering-local-ads-yelp-eyes-national-sales/#more-124407.
[49] Nicas, *supra* note 37.
[50] *Id.*
[51] Thomas Ricker, *Apple to be Formally Investigated Over Spotify's Antitrust Complaint, says Report*, The Verge (May 6, 2019), https://www.theverge.com/2019/5/6/18530894/apple-music-monopoly-spotify-app-store-europe.
[52] Apple, *App Store: Dedicated to the Best Store Experience for Everyone* (last accessed Mar. 6, 2020), https://www.apple.com/ios/app-store/principles-practices/.

iPhone.[53] Even for those who pay the 30% fee, Apple's App Store still benefits competitors. Apple reinvests the fee into improving its App Store and developing free tools for developers to use.[54]

To date, Apple's App Store has generated over $120 billion for other businesses.[55] Another benefit: Consumers who use Apple's App Store also spend more on average than do consumers who use other app platforms.[56] And for Spotify in particular, Apple received a commission on just 680,000 of Spotify's 100 million subscriptions.[57]

"Self-Preferencing": A Backdoor to a Duty to Deal

Critics of "self-preferencing" want to impose a duty to deal on technology firms—a radical departure from antitrust precedent.[58] Over a century ago, the Supreme Court held that "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."[59] Nearly nine decades later, the Court reaffirmed that principle.[60]

But this principle is not absolute. As the Court explained: "Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate §2" of the Sherman Act.[61] Even in these "certain circumstances," however, there must be some "anticompetitive conduct" that harms consumers. To date, critics of self-preferencing have not shown that it harms consumers—indeed, as this testimony explains below, self-preferencing benefits both competitors and consumers.

Despite the lack of harm and ample evidence of consumer benefit, critics of self-preferencing still want to impose a duty to deal on tech firms. They want these firms to treat their competitors' businesses the same way they treat their own business. The critics' argument can be summed up as: because tech firms are large and because they are digital, they should not be able to prefer their own products or services, even if doing so benefits competitors, consumers, and the economy more broadly.

Bottom Line

Whether a business operates brick-and-mortar stores, digital marketplaces, or both, vertical integration benefits consumers. But digital platforms like Google Search and Apple's App Store

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[53] Statista, *Share of Smartphone Users that Use an Apple iPhone in the U.S. from 2014 to 2021* (last accessed Mar. 6, 2020), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone/.
[54] Apple, *supra* note 50.
[55] *Id.*
[56] Sarah Perez, *App Store Generated 93% More Revenue than Google Play in Q3*, TECHCRUNCH (Oct. 11, 2018), https://techcrunch.com/2018/10/11/app-store-generated-93-more-revenue-than-google-play-in-q3/.
[57] Chris Crooke, *Apple Says Spotify has Exaggerated the Impact of its App Store Fees*, COMPLETE MUSIC UPDATE (June 25, 2019), https://completemusicupdate.com/article/apple-says-spotify-has-exaggerated-the-impact-of-its-app-store-fees/.
[58] Dolmans, *supra* note 23.
[59] *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).
[60] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).
[61] *Id.*

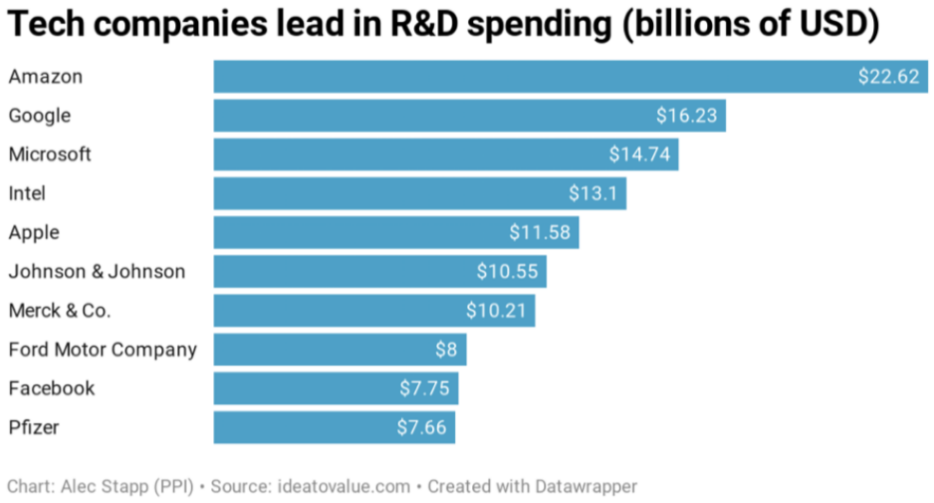
benefit both consumers *and* their competitors. Today, consumers use digital app platforms and marketplaces with increasingly regularity—and those platforms support entrepreneurship like never before. Thanks to these platforms, small businesses can opt to own brick-and-mortar stores, sell online, or do both. This means local businesses can reach beyond their local communities. It also means consumers are not limited to their geographic region.

Digital platforms and marketplaces are also driving investment in the U.S. economy and its workers. The Progressive Policy Institute's U.S. Investment Heroes Report, for example, cites the top three industries for investment as technology-related.[62] What's more: firms like Alphabet (Google), Amazon, Microsoft, and Facebook are among the top ten companies investing in the United States.[63] Their investments totaled more than $60 billion last year alone.[64]

All these benefits—lower prices, higher-quality products and services, greater competition, more entrepreneurship—are made possible by the consumer-welfare model. Tweaking antitrust doctrine to cast self-preferencing as an anticompetitive practice will return the United States to its 1960s' understanding of antitrust. And it'll ensure these benefits are reduced.

New and Innovative Business Practices

Technology companies based in the United States lead the world, setting the standard for increased productivity, consumer satisfaction, and innovation. There is no comparable flagship industry that is winning the global competition to this degree. A large part of the reason for this is that the U.S. tech industry spends more on research and development than any other U.S. industry.



The U.S. tech industry also leads in capital investment:

[62] Michael Mandel & Elliott Long, *Investment Heroes 2020* (July 24, 2020), https://www.progressivepolicy.org/blogs/investment-heroes-2020/.
[63] *Id.* at P8.
[64] *Id.*

TABLE 5: NON-ENERGY U.S. INVESTMENT HEROES: TOP 25 NONFINANCIAL COMPANIES BY ESTIMATED U.S. CAPITAL EXPENDITURE*

	COMPANY	ESTIMATED 2018 U.S. CAPITAL EXPENDITURES (MILLIONS USD)
1	ALPHABET	20,188
2	AT&T	19,209
3	AMAZON.COM	15,577
4	VERIZON COMMUNICATIONS	14,912
5	MICROSOFT	11469
6	COMCAST	10,890
7	FACEBOOK	10,763
8	CHARTER COMMUNICATIONS	9,125
9	WALMART	7,683
10	INTEL	7,426
11	APPLE	7,129
12	FORD MOTOR	6,513
13	GENERAL MOTORS	5,756
14	FEDEX	5,255
15	DELTA AIR LINES	5,168

What's more, the technology industry innovations that flow from these investments are not restricted to semiconductors and electromagnetic waves. The digital economy has produced remarkable benefits for consumers worldwide, and innovation in business models is a big reason. It continues to provide a competitive edge for U.S. industry.

Because tech's business strategies, models, and practices benefit both consumers and the entire economy, much is at stake in ensuring that innovation can continue. As new business methods are perfected, other industries, too, will likely adopt them in order to enhance their own competitiveness in markets that are becoming ever-more integrated with the digital economy each day. To use but one example, the financial services industry, typified by banks with large marble columns and physical retail branches everywhere, is not only moving online but becoming an entirely digital market for some consumers.

Caution and circumspection are required in evaluating new and innovative business practices in the tech arena, in large measure because the pace of change is so rapid. When a new technology proves successful with consumers, the migration to that product or service can be instantaneous. This produces lopsided "market share" for the successful technology, particularly if the "market" is defined as the one dominated by that very tech innovation. The ill-wisdom of viewing the marketplace in this way should be obvious.

Failing to recognize the difference between a "better mousetrap" and anticompetitive business practices would likely inflict significant harm on consumers and the economy. Product innovation would suffer; lacking the opportunity for constant improvement in business models, efficiencies would be lost and prices to consumers would rise; and the consequent losses in productivity and employment would ripple across the entire U.S. economy. It is therefore of vital importance that antitrust enforcement distinguishes between business conduct that is actually procompetitive and

yields consumer benefits, on the one hand, and conduct that is actually anticompetitive and exclusionary, on the other hand.

The two are often brewed in the same barrel. Conduct that benefits consumers also tends to increase market share, which can be viewed as circumstantial evidence of excluding competitors. So even with an eye toward consumer welfare, spotting the difference can be difficult. This is especially true in multi-sided markets—such as those in which Amazon, Apple, Facebook, and Google compete—where a platform's conduct that benefits consumers inevitably takes business away from a competitor.

Antitrust, Consumer Welfare, & Digital Platforms

- **New developments in markets and in business-to-business and business-to-consumer relationships show robust competition and innovation**

The online environment is robust and healthy, and market players are numerous. For consumers, prices are low; for small businesses, opportunity and entrepreneurship are growing. And these results are because competition is robust.

Today, American consumers have more choices and more information than ever. Historically, consumers had to rely upon only a handful of nearby businesses from which to buy products or services. These businesses could set prices higher than competitors located farther away, and customers had a difficult time researching the comparative value and quality of options.

Today, thanks to the internet, consumers have access to an every-expanding list of products, businesses, and information about pricing. With a couple of clicks customers can find the lowest prices for goods they want. No longer limited to just nearby stores, customers can buy from hundreds of thousands of stores across the country.

Online services have evolved to help consumers find the lowest prices. Websites such as Slickdeals[65] help consumers find active discounts. Services such as Honey[66] enable real-time price comparison and coupon testing at checkout. Customers can easily find the products they want at the lowest prices.

For businesses, the internet has reduced barriers to entry and increased their potential marketplace. Now an art student can easily sell paintings from her studio to anyone around the world, without first obtaining access to dealers and conceding markups to galleries. A parent can sell her children's old toys in a large market rather than relying on a one-day neighborhood yard sale. Put simply: Anyone can compete with any business, big or small, because of the internet.

- **Large platforms help small businesses**

Anti-business advocates claim that "big is bad." But for America's small and mid-size businesses, the bigger the platform the better for reaching larger audiences.

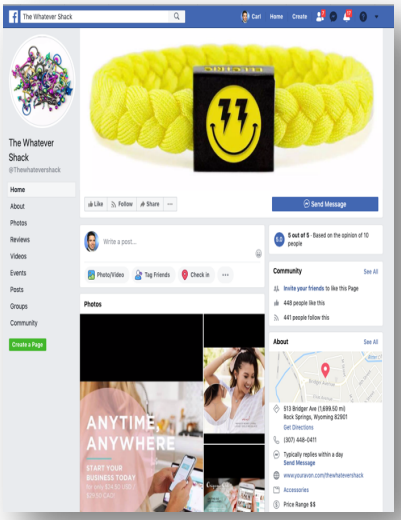
Consider a local custom furniture store. Just fifteen years ago businesses like this could barely afford to place an ad in a local newspaper, let alone on TV or radio. ***But thanks to large online***

[65] Slickdeals.net.
[66] JoinHoney.com.

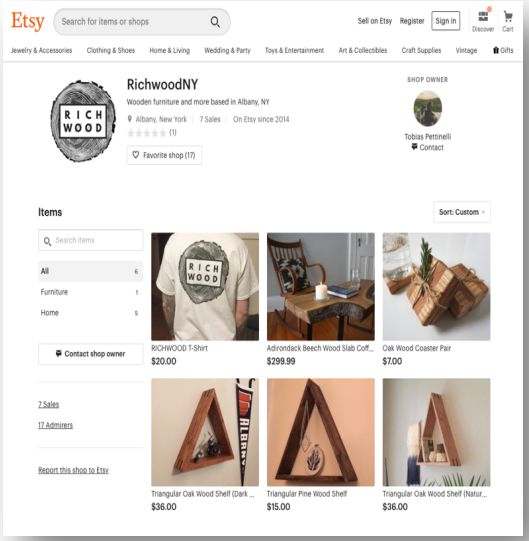
platforms, for less than ten dollars a small business can reach thousands of potential customers and target them more accurately than ever before.

Large online platforms have given new growth opportunities to America's small businesses. Consider the app stores on the Apple and Android platforms. Developers can reach markets of millions of customers. And the costs for a developer to distribute an app are intentionally low; this empowers small developers to compete against larger ones. Fifteen years ago, this was possible only through significant outlays for advertising, distribution, and logistics to move software to customers. And even if developers decide to not publish their apps in the Android or Apple marketplaces, they can make their services available through device websites.

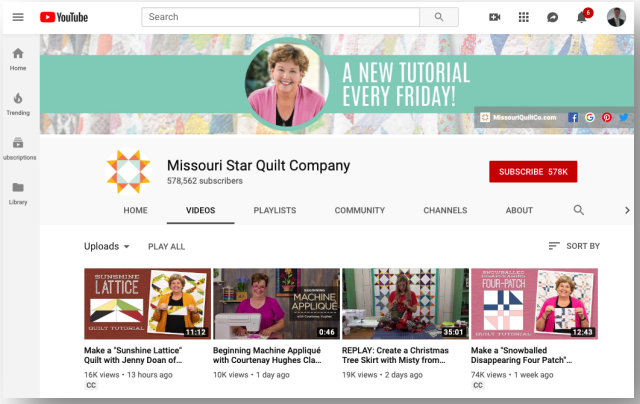
Or consider how the platforms like Etsy and eBay enable small sellers to find customers across the country and even around the world. These benefits are the result of allowing online platforms to grow and flourish because America's antitrust law has relied upon the consumer-welfare standard to regulate that growth.



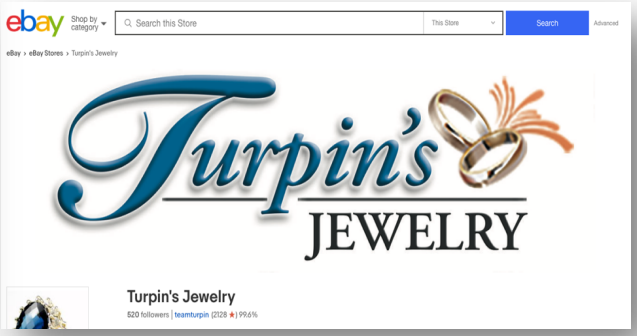
The Whatever Shack in Rock Springs, WY uses Facebook Marketplace to find customers from across the country.



In Albany, NY, woodworker Richwood,NY uses Etsy to find customers from across the country



Missouri Star Quilt Company in Hamilton, MO uses YouTube to advertise to customers across the country.



Turpin's Jewelry in Dillard, GA uses eBay to find customers from across the country

- **Polling shows that Americans oppose government limitations on business acquisitions and Americans do not see consumers as the chief beneficiaries of big-tech breakups**

Polling of Americans conducted by Zogby Analytics and commissioned by NetChoice found overwhelming opposition to limitations on acquisitions by large online platforms.[67] And the polling found overwhelming concern with breaking-up large online platforms.

Question: *Some groups are calling for the break-up of large tech businesses. Who do you believe would most benefit from a break-up?*

- 28% of those with an opinion said, "Consumers" would most benefit.
- 53% of those with an opinion said, "Traditional industries competing with tech businesses" and "Anti-business groups" would most benefit.

Question: *If an online business becomes successful, should the government prevent them from acquiring any tech startups that seek to be acquired?*

- 86% of those with an opinion said "No."

That same polling shows that:

- Only 10% of Americans think the government should prevent successful online businesses from acquiring other companies.

[67] *See* NetChoice.org/TechlashPoll.

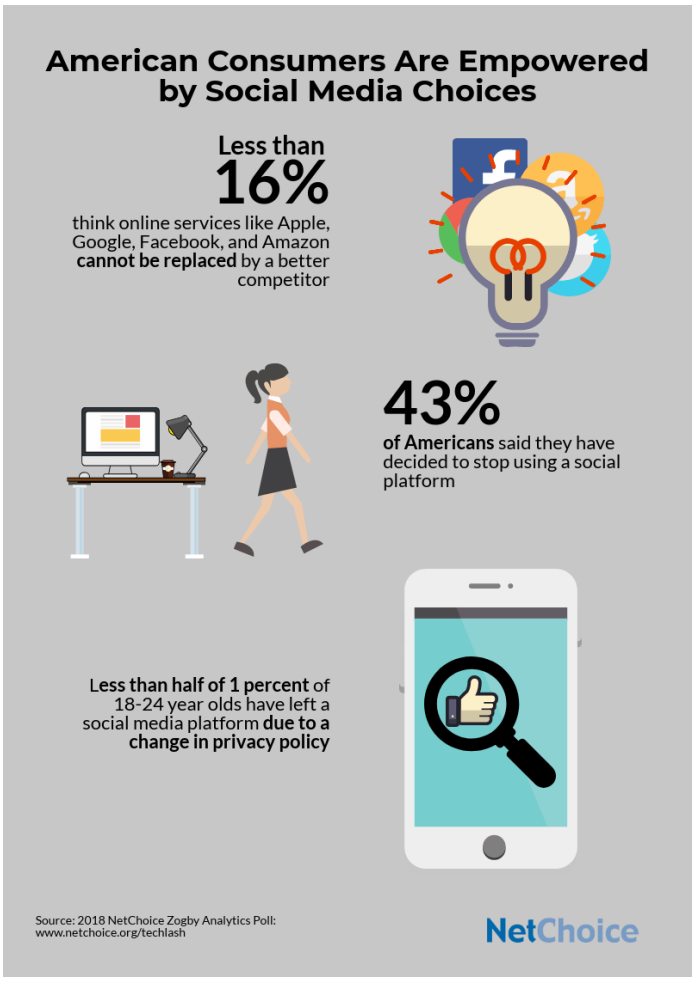
Americans said that the government should most focus its anticompetitive resources on sectors *other than tech*.

When asked:

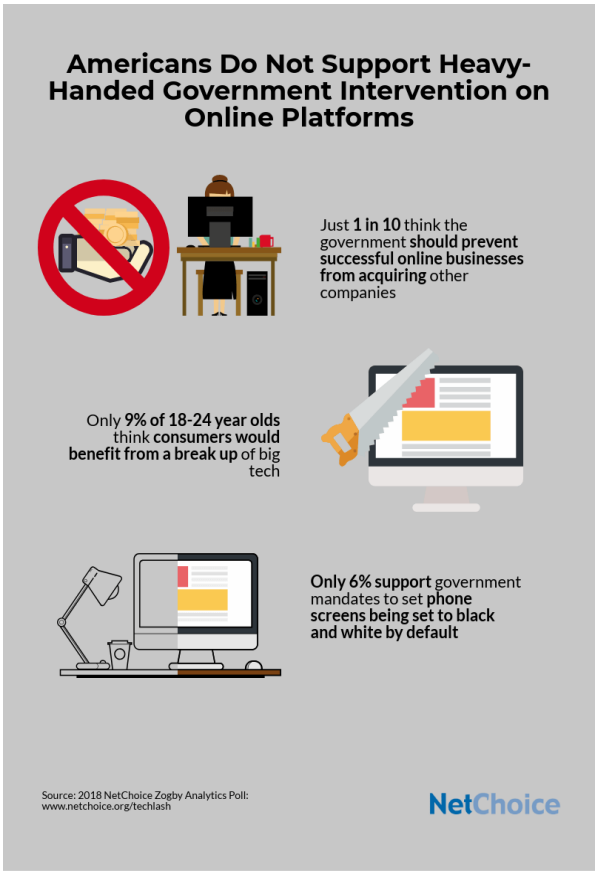
- Only 5% of Americans say the government should most focus its anticompetitive enforcement on tech platforms.[68]

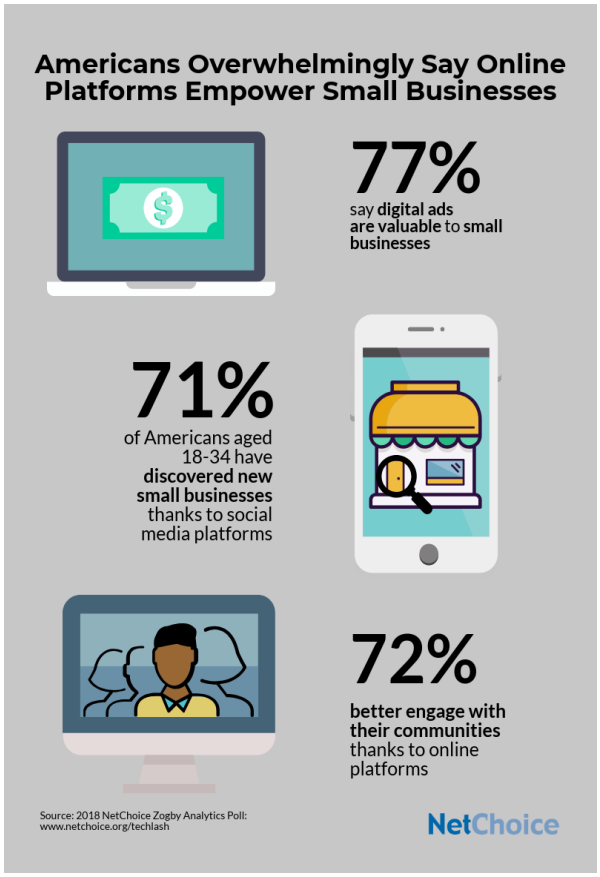
To compare:

- 29% of Americans say the government should most focus its anticompetitive enforcement on pharmaceutical companies; and
- 11% of Americans say the government should most focus on the electricity and gas industry.



[68] *Id.*





These findings are also seen in an NBC poll: "***By a more emphatic 68% to 28%, respondents said such decisions [about big-tech breakups] should be left to the free market rather than government***."[69]

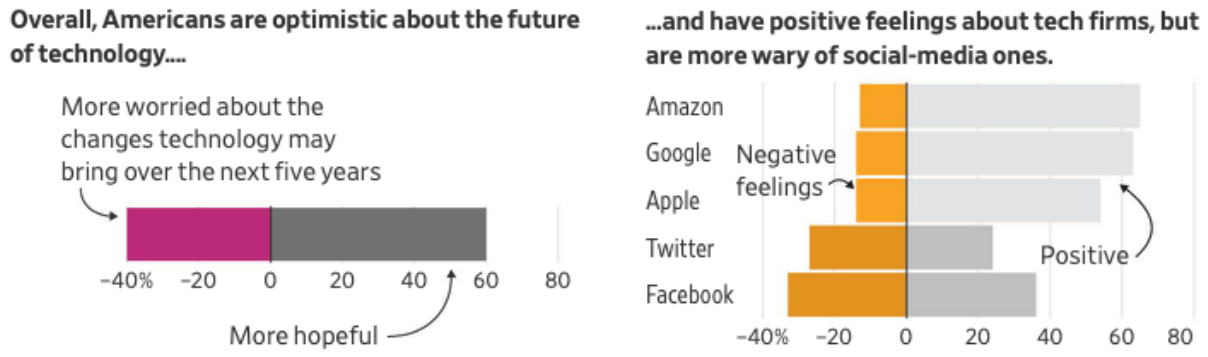
Although a *Wall Street Journal* - NBC poll shows that a majority of users have privacy concerns, there are other findings that are far more relevant to today's hearing. For example, their polling shows that Americans have very positive feelings about the large platforms (see image below).[70]

- **Disruptive and generational changes in technology provide new avenues for competition**

With rapid innovation and growth of online platforms, we've seen a breakdown of barriers into established markets for new entrants, which forces existing businesses to innovate and compete.

Despite claims that "consumers are locked into large platforms," public opinion and consumer behavior shows just the opposite. Think back to 20 years ago, when Fortune Magazine featured this article:

[69] John Harwood, *Americans Don't Support Sen. Elizabeth Warren's Plan to Break Up Big Tech: Poll*, CNBC (Apr. 5, 2019).
[70] John D. McKinnon and Danny Dougherty, *Americans Hate Social Media but Can't Give It Up, WSJ/NBC News Poll Finds*, WALL ST. JO. (Apr. 5, 2019).



How Yahoo! Won the Search Wars[71]

Once upon a time, Yahoo! was an Internet search site with mediocre technology. Now it has a market cap of $2.8 billion. Some people say it's the next America Online.

Let's leave aside, for now, questions of whether Yahoo! will be around in ten years or whether there's any way its stock might be a good investment. This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things.

According to a survey by Mediamark Research last year, in a typical month more than 25 million people use Yahoo!. Some months, 40 million people visit. More people go to Yahoo! than to Netscape or AOL. More people search at Yahoo! than watch MTV, Nickelodeon, or Showtime in any given week. More people check out Yahoo! than read the typical issue of Time, Newsweek, or Life. Simply put, that's why some people think Yahoo! may make wads and wads of money in the future by selling ads. Observes Oppenheimer & Co. analyst Henry Blodget: "I have yet to find a flat surface attractive enough to grab the attention of 40 million pairs of eyeballs but not attractive enough to spend big money advertising on."

Gathering eyeballs has been the company plan since its inception. It turns out that this pack of Net-besotted, Yahoo!ing-their-brains-out, twenty- and thirty-something Web surfers have real business savvy, and **their near-flawless execution and brilliant marketing have eviscerated the competition.** (emphasis added)

It's hard to believe now, but online search was once dominated by Yahoo! when Google arrived as the 8th search competitor in the late 1990s.

In 2006, MySpace had more daily visitors than Google – but was later overtaken by Facebook. As stated by Ryan Bourne in Cato Policy Analysis:

"Will Myspace ever lose its monopoly?" asked Victor Keegan in the *Guardian*'s technology section in early 2007. The journalist was riffing off a TechNewsWorld article by John Barrett that claimed Myspace was not just a monopoly, but a natural one.

[71] Stross, Randall, *How Yahoo! Won the Search Wars*, in FORTUNE MAGAZINE (Mar 2, 1998), https://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

> The arguments for such claims were similar to those made about Facebook today
>
> Importantly, the Myspace history shows that the very network effects that lead to massive growth can also lead to a rapid demise when a superior product comes along. All social networks face a difficult balancing act between providing an attractive and innovative user experience, on the one hand, and monetizing the platform by competing for the real "customers"—digital advertisers—on the other. The Myspace example shows the degree of interdependence between the two. Getting the balance wrong can have significant consequences.[72]

Truth is, nobody can predict what the tech landscape will look like in five or ten years, and today's leaders must adapt—or risk the same fate as MySpace.

When looking online for products, ***more online shoppers start their product searches on Amazon than on Google***.[73] For general searches, we've seen rapid growth of new search engines like DuckDuckGo.[74] For travel searches, we have Expedia, Travelocity, Orbitz, and Kayak. And when searching for local restaurants and vendors, Americans choose from TripAdvisor, UrbanSpoon, Angie's List, and Yelp.

Despite Yelp's present leadership in this search category, the company says in its latest earnings report, "***We compete in rapidly evolving and intensely competitive markets, and we expect competition to intensify further in the future with the emergence of new technologies and market entrants***."[75]

Innovative new features easily attract consumer attention, and competition is truly only a click away. Nationwide polling conducted by Zogby Analytics and commissioned by NetChoice[76] showed consumers can and do leave platforms when better options are available.

> ***Question: Do you think that the services offered by online platforms like Apple, Google, Facebook, and Amazon can be replaced if a better competitor comes along?***
>
> - 70% of those with an opinion said "Yes."

- **Big Tech critics have failed to make their case**

Proponents of breaking-up tech companies via new theories of antitrust have failed to substantiate their allegations—even though the burden of proof rests with these accusers. Consider Sen. Elizabeth Warren's *Medium* post,[77] where she proclaims Facebook and Google as "monopolies" while ignoring their actual market share and growing competition in every market they serve.

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[72] Bourne, Ryan, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, in CATO POLICY ANALYSIS (Jun 17, 2019), https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism.
[73] Krista Garcia, *More Product Searches Start on Amazon*, EMARKETER (Sept. 7, 2018) ("Nearly half (46.7%) of US internet users started product searches on Amazon compared with 34.6% who went to Google first, according.").
[74] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, SEARCH ENGINE JOURNAL (Oct. 11, 2018).
[75] Yelp Inc., 10-Q, May 2019.
[76] *See* Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.
[77] Elizabeth Warren, Senator, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019).

With fewer than 20 million U.S. users, Facebook's messaging tool WhatsApp is much smaller than Apple's iMessage, which connects over 90 million American consumers. TikTok, a fairly new competitor in the social media market, has over half a billion users worldwide.

And in search, as described above, Google's competition is a click away as we see the rapid ascent of new general search engines like DuckDuckGo[78] and Google competes with tailored search like Yelp for restaurants and AngiesList for services.

These American businesses are not consumer-harming monopolies as some claim; instead, they are social networking services that have earned global success in a competitive marketplace.

American success stories, such as Google, Apple, Amazon, and Facebook, empower small businesses to reach new customers all over the world like never before. From online marketplaces, to app stores, to photo sharing services, these platforms allow individuals to connect with the world in ways only dreamed of twenty years ago.

The consumer welfare standard looks to overall consumer welfare and economic efficiency as the main factors when engaging in antitrust analysis.

We thank you for your time and consideration.

[78] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, SEARCH ENGINE JOURNAL (Oct. 11, 2018).

Addendum 1[79]

Say Goodbye to Costco's Kirkland Brands if Rep. Cicilline Gets His Way

Today, we expect every store we walk into to have both their own branded products. Costco has Kirkland. Safeway has O Organics. Even CVS has its own line of Band-Aids. And most consumers like having these generic brands as options because they're cheaper, force prices down of name brands, and can even push companies to improve their quality.

Unfortunately, though, these generic brands are now on the antitrust chopping block. Congressman David Cicilline (D-RI) now wants to make it illegal for marketplaces to sell their own products.

To Cicilline, this age-old process of selling both name brand items and a lower-cost in-house alternative is a conflict of interest so great that it should be illegal. Of course the Chairman ignores the fact that if Band-Aids were so opposed to competing with CVS's brand, Band-Aids could just stop selling to CVS. But rather than letting the businesses or customers decide this, Rep Cicilline wants to make the decision for them.

Today, antitrust law centers on one key question: Does the business activity benefit or harm consumers? Current antitrust law protects consumers, not businesses. And when businesses compete, prices fall, innovation happens, and consumers reap the benefits.

Take Costco's Kirkland brand. By producing its own coffee beans for a fraction of the cost, Costco slashes its prices and forces its competitors to do the same. So, the average shopper in the aisle can get lower-cost coffee regardless of what brand they buy. But Rep. Cicilline's actions and statement show that he wants to change antitrust law's primary mission to protecting businesses, and make harm to consumers is a secondary consideration if not irrelevant altogether.

Under his anti-Kirkland approach, Rep. Cicilline says, "you can be one or the other. You can't set all the rules, control the marketplace, and also sell on it." What he forgets is that vertical integration benefits consumers and businesses alike. If America followed Cicilline's way, this new law would drive up the prices of everyday goods. In fact, it would be illegal for CVS to sell generic over-the-counter medications, leaving low-income Americans with fewer options and higher prices.

Why do Costco customers buy Kirkland brand products? Because they are lower priced and of similar quality. The introduction of much needed competition that leads name-brand products to either increase their quality or lower their prices.

But to Rep. Cicilline, such competition should be illegal. So what does his proposal mean for brands we love, like Costco's massively popular Kirkland product line? At its core, American companies like

[79] This article originally ran on Townhall.com. *See* Carl Szabo, *Say Goodbye Costco Kirkland Brands if Rep. Cicilline Gets His Way*, Townhall (Sept. 12, 2020), https://townhall.com/columnists/carlszabo/2020/09/12/say-goodbye-to-costcos-kirkland-brands-if-rep-cicilline-gets-his-way-n2576071.

Costco would need to eliminate or selloff their own brands. So rather than choosing to buy Kirkland coffee, customers could only select from legacy businesses. Rather than being able to purchase Safeway's O Organics, customers could only choose legacy packaged foods. In essence, Cicilline's proposal means that less competition in stores and by outlawing in-house competitors, Cicilline can protect legacy name-brand companies like Energizer -- allowing them to continue charging Americans premium prices for batteries.

This move is less about American companies overall and more about one in particular – Amazon. In fact, Rep. Cicilline wants to attack the Amazon marketplace, even if it's at the expense of both the hundreds of stores that sell their own brands at lower prices and the millions of consumers who benefit from cheaper, better products.

But Amazon is just the poster child for bad behavior as Rep. Cicilline attacks businesses and the consumers they serve. Antitrust activists like Rep. Cicilline say Amazon's sale of its own batteries are "unfair" as it hurts Energizer's profits (note that Energizer and Duracell still control close to 80% of the U.S. alkaline-battery market and their prices for batteries are rising). So is this latest action about protecting consumers or protecting big-battery companies?

At the end of the day, Representative Cicilline and his House Judiciary report have lost sight of the main goal of antitrust law– protecting the American consumer. Instead, this antitrust report misguidedly protects billionaire competitors over protecting the average American family. As it turns out, Democrats support Big Business after all--just so long as those businesses stay in their lane and charge high prices.