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Foreword: A Tipping Point for Antitrust Law

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To state the obvious, so-called Big Tech has literally transformed our lives since the turn of the century. Companies like Facebook (now Meta), Amazon, Apple, and Google have created new markets, enhanced communication, and achieved efficiencies previously unknown in information technology and consumer access to goods. These changes to our daily lives have come rapidly; one need only watch old episodes of *Seinfeld* or *Friends* from the 1990s, where no one is staring at their phone or sending text messages, to see the difference.

Of course, the emergence of twenty-first century Big Tech is a mixed bag. These companies have unquestionably been innovative, much as Microsoft was, at least initially, when it advanced our use of the personal computer in the 1990s.[1] That innovation, coupled with large amounts of equity capital that enabled a profitless prosperity initially for some companies, has translated into market dominance and high entry barriers for nascent rivals.[2] Those markers have inevitably raised antitrust concerns, primarily about the monopoly maintenance practices of those dominant firms. Until recently, United S (U.S.) antitrust enforcement agencies were slow to the party and lagged far behind the European Union,[3] but the worm has certainly turned in the last three or four years.

Beginning in late 2020, federal and state enforcement agencies have filed several high-profile antitrust lawsuits against Google and Facebook,[4] with the Department of Justice investigating Apple as well. The outcomes of these complex suits have the potential to significantly impact the digital economy moving forward and indeed our day-to-day lives, no matter on which side of the fence one sits with respect to Big Tech. As these cases

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1. *See* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (en banc) where the Circuit Court for the District of Columbia unanimously held that Microsoft had violated Section 2 of the Sherman Act in maintaining its monopoly of the Intel-compatible PC operating systems.

2. *See, e.g.*, Lina Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 713 (2017).

3. C. Paul Rogers III, *Competition Law and the EU and U.S. Approaches to Dominate Markets: Will the Gap Narrow?* in Festschrift For Werner F. Ebke – German, European, and Comparative Business Law 843-54 (C.H. Beck Verlag 2021).

4. *See, e.g.*, United States, et. al v. Google, LLC, No. 1:20-cv-03010 (Oct. 20, 2020); See Fed. Trade Comm'n v. Facebook, Inc., No. 1:20-CV-03590, (Dec. 9, 2020); Amended Complaint, Fed. Trade Comm'n, No: 1:20-cv-3590 (Aug. 19, 2021).

wind their way slowly through the courts, any number of distinctive issues continue to arise.

For starters, Supreme Court case law has made antitrust enforcement efforts, whether public or private, more difficult. Categories of per se offenses have shrunk, effectively expanding the rule of reason. Of course, one would always prefer defending rather than prosecuting a rule of reason case, as the scales tip heavily (as they probably should) toward defendants.[5] It is simply challenging to prove that collaborative conduct constitutes an unreasonable restraint of trade.

Similarly, High Court jurisprudence has raised the bar for establishing that a monopolist engaged in the exclusionary conduct necessary to prove monopolization under Section 2 of the Sherman Act. In *Trinko*, the Court seemingly turned the old Brandeis view that big is necessarily bad on its head by asserting that, at a minimum, the process of obtaining monopoly power is procompetitive because it represents the innovation that enhances competition.[6] That view of the attainment of monopoly power coalesces with the idea that monopolies should have greater freedom to vigorously compete, even to the disadvantage of their rivals. The Supreme Court has more than once expressed its concern about false positives; that is, finding a monopolists' conduct to be exclusionary when to do so "chill[s] the very conduct the antitrust laws are designed to protect."[7] As a result, the standards for proving exclusionary conduct by dominant firms have correspondingly heightened.[8]

All of this is in step with the Chicago School, which rose to ascendancy in the 1970s and asserts that consumer welfare, driven through the prism of price theory and efficiency enhancements, should be the sole focus of antitrust law.[9] Since monopolies often obtain their dominance through innovation and efficiencies, the Chicago School posits that the maintenance of that power is the result of continuing efficiencies. To the extent that it is not true,

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5. *See, e.g.*, Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 22 Loy. Consumer L. Rev. 15, 19 (2009).

6. Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004).

7. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986). *See also* Pacific Bell Telephone Co. v. linkLine Telecommunications, Inc. 555 U.S. 438, 451 (2009); Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 325 (2007); Trinko, 540 U.S. at 414; Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993); Cargill v. Monfort of Colorado, Inc., 479 U.S. 104, 122 n.17 (1986).

8. C. Paul Rogers III, *The Incredible Shrinking Antitrust Law and the Antitrust Gap*, 52 U. Louisville L. Rev. 67 (2013).

9. *See, e.g.*, Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself (1978); Richard A. Posner, *The Chicago School of Antitrust Analysis* 127 U. Pa. L. Rev. 925, 932 (1979) ("The proper lens for viewing antitrust problems is price theory.").

their laissez-faire belief is that markets tend to be self-correcting, thus minimizing the need for antitrust intervention.[10]

Push back from this minimalist antitrust ideology has gathered very real steam in the last several years as so-called New Brandeis scholars have reasserted Justice Brandeis' admonition about "the curse of bigness."[11] They have noted that the American economy is more concentrated with concomitant larger entry barriers than has ever existed in our history. They argue that government enforcement agencies, influenced by the Chicago School, have effectively been asleep at the wheel while the many ills of large concentrations of economic power continued unabated.[12] The Biden administration, with its Executive Order on Promoting Competition in the American Economy,[13] signaled early on its intention to reverse the trend. The order emphasizes the many adverse effects of highly concentrated markets, including lower wages for employees, higher prices for consumers, and barriers for start-ups and small businesses seeking to enter markets and compete.

But all that activity simply raises the question of whether U.S. enforcement agencies can, saddled with existing case law, use the antitrust laws to reign in the suspected competitive abuses of Big Tech. Although there appears to be bi-partisan antipathy toward Big Tech,[14] attempts at significant strengthening or overhaul of our antitrust statutes have mostly stalled thus far.[15]

In addition to unfavorable case law, the antitrust cases against Big Tech have presented a variety of challenges to both government enforcement agencies and private party plaintiffs. This symposium considers two: one largely procedural and one more substantive.

First, Professor Roger Alford's article in this symposium makes note of the fact that Congress has addressed some antitrust concerns. As he points out, the role of State Attorneys General in challenging Big Tech has taken center stage as states have, using their *parens patriae* authority under Section

10. *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

11. Louis D. Brandeis, THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS (Osmond K. Frankel ed., 1934).

12. *See, e.g.*, Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 41 (Columbia Global Reports, 2018).

13. Exec. Order No. 14036, 86 Fed. Reg. 36987 (2021).

14. Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L. J. 893, 928 (2022).

15. *FTC Restores Rigorous Enforcement of Law Banning Unfair Methods of Competition* (Nov. 10, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/11/ftc-restores-rigorous-enforcement-law-banning-unfair-methods-competition [https://perma.cc/GK62-QYSR]. The Federal Trade Commission, under the leadership of Chair Lina Khan, appears to be taking matters into its own hands, issuing a statement in November 2022 intended to make clear that Section 5 of the Federal Trade Commission Act extends beyond the Sherman and Clayton Acts to prohibit various types of unfair conduct that tend to negatively affect competition.

16 of the Clayton Act,[16] taken the lead in lawsuits against Google and Facebook. But defendants have taken advantage of the Multidistrict Litigation Act of 1968[17] to force unfavorable venues on the states and consolidate the state AG actions with private enforcement actions, both delaying and disadvantaging the states. As Professor Alford describes in detail, Congress has hopefully come to the rescue with its passage in December 2022 of the State Antitrust Enforcement Venue Act, which provides states with the same MDL consolidation exemption that the federal government enjoys.[18]

Brad Weber, a noted antitrust practitioner, considers a wholly different issue: the application of hub and spoke conspiracy analysis to so-called big data driven pricing algorithms that are used to determine the prices for goods and services. As he amply illustrates, the question is not hypothetical, as a growing number of class actions suits are alleging Section 1 conspiracies arising from the collective use of big data.

Thus, this symposium issue considers in depth two of the issues arising from the antitrust challenges to Big Tech. There are many others that have or will arise. Their resolution and the ultimate success of government enforcement agencies in reigning in the excesses of Big Tech will be a tipping point[19] for our competition law, now over 130 years old. Antitrust law will either be the principal vehicle to impose competition in the digital age or it will not, in which case it will have marginal utility against Big Tech moving forward. Either way, it is a most exciting time to study our competition law and be an antitrust lawyer.

16. 15 U.S.C. § 26.

17. 28 U.S.C. § 1407.

18. State Antitrust Enforcement Venue Act of 2022, Pub. L. No. 117-494 (2022).

19. Webster's defines tipping point as "the critical point in a situation, process, or system beyond which a significant and often unstoppable effect or change takes place."