HANDOUT: The Anti-Trust Case Against Tech Giants

Reading One: The History of Antitrust Action in the U.S.

How big is too big? Since the late 1800s, organizers and lawyers have argued that the government has a role in curtailing the size and impact of corporations in the United States. The belief that corporate monopolies could unfairly tip the scales against competitors, consumers, and workers was a rallying cry of the early Progressive movement.

The first legislative effort to curb concentrations of capital that interfered with competition came with the Sherman Antitrust Act, passed in 1890. Along with later laws that created the Federal Trade Commission, the Act gave the government power to investigate possible monopolies and block unfair competition practices. Ultimately, it used this power to break up monopolies such as the American Tobacco Company and Standard Oil Company. In a December 15, 2017, article in the *Harvard Business Review*, Maurice Stucke, a law professor at the University of Tennessee - Knoxville, and Ariel Exrachi, a law professor at the University of Oxford, described how antitrust measures were deployed in the early 1900s:

> [R]obust antitrust policy was a central condition necessary for effective competition. To create those conditions regulators relied on the tools given to them during the first era of antitrust, from 1900-1920. In that era... the Clayton Act of 1914, as amended in 1950, gave the agencies and courts "the power to brake this force at its outset and before it gathered momentum." The Sherman Act enabled the Department of Justice to criminally and civilly prosecute unreasonable restraints of trade and monopolistic abuses. This 1890 statute "was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," noted the Supreme Court in 1958. "It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions."

However, by the late 1900s, aggressive antitrust action had long since fallen out of favor. While government had previously seen the concentration of commerce into a small number of large businesses to be a negative trend, the Reagan administration viewed corporate mergers with approval—provided that these mergers resulted in lower costs for consumers. In a July 2018 article published in *The Atlantic,* staff writer Robinson Meyer explained this shift:

> From the progressive era onward, the U.S. government enacted a powerful set of antitrust laws to curb "the Curse of Bigness," as Supreme Court Justice Louis Brandeis put it. The scope of these laws was remarkable: The Court once used them to block a shoe company from acquiring 2 percent of the national footwear market.
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> But antitrust laws could be unwieldy. Judges sometimes struggled to know whether they were enforcing the law or capriciously blocking a merger. And then, in 1978, a Yale Law professor

> named Robert Bork promoted a clean new theory of antitrust law, inspired by the libertarian Chicago school of economics.
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> Bork decreed that all antitrust suits should be judged by one question: What will most lower prices for consumers? The answer, he said, was almost always more mergers. When companies merge, they get rid of redundant business units, lower their operating costs, and become more efficient, ultimately passing this efficiency on to consumers as lower prices.
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> Within a decade, the Reagan administration turned Bork's theory into official Department of Justice policy. The business world noticed. In 1985, there were about 2,300 corporate mergers in the United States, according to the Institute for Mergers, Acquisitions and Alliances. In 2017, there were more than 15,300, a new record.

Today, although a small number of increasingly large corporations dominate in their respective industries, anti-trust action is at a low. There are a few exceptions—such as government challenges to Microsoft in the early 2000s, as well as recent lawsuits objecting to the merger of telecommunications companies AT&T and Time Warner. However, moves to split potential monopolies have been few and far between. The question for the future is whether this should change.

For Discussion:

1. How much of the material in this reading was new to you, and how much was already familiar? Do you have any questions about what you read?

2. When the government was pursuing aggressive antitrust actions in the early 1900s, what were some of the arguments for breaking up monopolies?

3. According to the reading, how did the government's position on monopolies change during the Reagan era?

4. What do you think? Should the government be concerned about monopolies? When should a big business be considered too big?

Reading Two: Will a New Antitrust Movement Take on the Tech Giants?

Today, huge tech corporations such as Amazon and Google seem to have infiltrated more and more parts of our lives. And yet, the government has not stepped in to modernize, apply, or enforce the anti-monopoly laws that are still on the books from the era of steel magnates and robber barons. Should the government take action to challenge powerful tech companies? Would such antitrust action be in the public interest?

When online retail giant Amazon announced in 2017 that it would be purchasing brick-and-mortar grocery chain Whole Foods, critics raised the cry of "monopoly." In a June 19, 2017, article published on *Slate,* Chris Sagers, a Professor of Law at Cleveland State University, described the argument for using antitrust law to contain the company:

> Amazon is now the most interesting and important problem in American antitrust law. While it was hardly the first step in the firm's competitive evolution, Friday's breathtaking news that the e-commerce giant will acquire Whole Foods brings into sharp focus one of the deepest tensions in our antitrust law as it has evolved under 40 years of conservative orthodoxy. Amazon is enormous, and it is apparently rapacious and remorseless. But at least superficially, it has done nothing in its 20-year life but sell things more cheaply and innovatively than its competitors. That is to say that it's done just the thing that antitrust law says firms are supposed to do: It has competed on price and quality. The law has therefore proven persistently uninterested in its conduct….
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> Up until now, the mainstream antitrust establishment has been pretty quiet about Amazon, no doubt because its visible conduct fits awkwardly with current ideas of what should be illegal. The Whole Foods acquisition could change that, if for no better reason that it represents a new level of audacity. Though Amazon has acquired hundreds of other firms in the past, some big and many controversial, never before has it bought a significant brick-and-mortar operation. Over the years, as its critics have raised increasingly urgent alarms and elaborated on the firm's history of fairly nasty aggression, what's angered them most have been Amazon's tentative forays into terrestrial stores of its own. They seem to confirm a deliberately predatory, monopolizing strategy: Amazon kills off brick-and-mortar retail competition through desperation prices, only to take over those rivals' physical presence as soon as they are gone. This new deal is also a big one in absolute dollars. While Whole Foods is by no means the largest American grocer, and the deal's $14 billion purchase price is not the biggest by any stretch, Whole Foods is among the larger chains in an industry worth upward of a trillion dollars per year.

Lina Khan, a young jurist who published a very influential article while she was still in law school, argues that antitrust law needed to move into the 21st century and take into account more than cheap prices for consumers. In a September 7, 2018, article in the *New York Times,* technology writer David Streitfeld, summarized her argument this way:

> In early 2017, when she was an unknown law student, Ms. Khan published "Amazon's Antitrust Paradox" in the Yale Law Journal. Her argument went against a consensus in antitrust circles that dates back to the 1970s — the moment when regulation was redefined to focus on consumer welfare, which is to say price. Since Amazon is renowned for its cut-rate deals, it would seem safe from federal intervention.
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> Ms. Khan disagreed. Over 93 heavily footnoted pages, she presented the case that the company should not get a pass on anticompetitive behavior just because it makes customers happy. Once-robust monopoly laws have been marginalized, Ms. Khan wrote, and consequently Amazon is amassing structural power that lets it exert increasing control over many parts of the economy.
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> Amazon has so much data on so many customers, it is so willing to forgo profits, it is so aggressive and has so many advantages from its shipping and warehouse infrastructure that it exerts an influence much broader than its market share. It resembles the all-powerful railroads of the Progressive Era, Ms. Khan wrote: "The thousands of retailers and independent businesses that must ride Amazon's rails to reach market are increasingly dependent on their biggest competitor."
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> The paper got 146,255 hits, a runaway best-seller in the world of legal treatises. That popularity has rocked the antitrust establishment, and is making an unlikely celebrity of Ms. Khan in the corridors of Washington.

Other critics point to a litany of bad behaviors by tech giants—from data breaches to tax-avoidance—and see antitrust action as an effective means of forcing changes in this behavior. In an March 25, 2018, article in *The Guardian,* economics editor Larry Elliott summarized the position in favor of breaking up the these companies:

> The argument goes like this. Data is as vital to the modern digital economy as oil was a century ago. The tech giants have the same sort of monopoly power that Standard Oil once had (Google and Facebook accounted for two-thirds of online advertising spending in the US last year and Amazon was responsible for 75% of online book sales). Mark Zuckerberg might wear chinos rather than the top hat sported by Rockefeller, but a robber baron is a robber baron. It is time for anti-trust legislation to be used to break up Facebook, Google and Amazon.
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> The charge sheet is a long one: the tech giants are exploiting their monopoly power to stifle competition; they are spreading fake news; their fantastically rich owners portray themselves as right-on yet go to a great deal of trouble to minimize their corporate tax bills; they are ripping the heart out of communities through the closure of bricks-and-mortar retailers. To the list can now be added (in Facebook's case) the harvesting of the personal data of 50 million Americans and its use for political purposes….
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> Those who have Facebook, Google and Amazon in their sights can draw on Adam Smith for support. In the bible of modern capitalism, the Wealth of Nations, Smith said: "To widen the market may frequently be agreeable enough to the interest of the public; but to narrow the competition must always be against it." Excessive market power, in other words, is bad because it thwarts progress. Old established businesses can see off potential rivals even though the new entrants might have new and better ways of doing things.

> This concept, that Facebook et al are anti-capitalist, explains why the pressure for anti-trust action against them is coming from both right and left – from Steve Bannon, Donald Trump's former chief strategist, as well as from the leading Democrat Elizabeth Warren.

Public interest advocates contend that even if government action fell short of breaking up the tech giants, the threat of anti-monopoly could be sufficient to compel these companies to improve transparency, data security, and tax-avoidance practices. Defenders of the tech giants believe that such action would unduly inhibit business innovation. Ultimately, how vocal workers and consumers are in voicing their concerns may determine whether elected officials are moved to take action.

For Discussion:

1. How much of the material in this reading was new to you, and how much was already familiar? Do you have any questions about what you read?

2. According to the reading, what is Lina Khan's argument for why a "company should not get a pass on anticompetitive behavior just because it makes customers happy"?

3. Should the government use antitrust action as a threat to make tech companies change their practices on issues such as user privacy, tax-avoidance, and corporate transparency? Why or why not?

4. Do you think the government should have a strong role in guiding and regulating the economy to protect the public interest, or are there areas of the economy that should be left entirely up to the free market? What are some arguments for and against government intervention in the technology sector?