

Issue Brief

FEBRUARY 22, 2022
BY WILL YEPEZ

Populist Antitrust Push Won't Help Consumers or Conservatives

The topic of Big Tech, generally meaning Meta (formerly Facebook), Google, Apple, Amazon, and sometimes Microsoft, has spurred a flurry of hearings, markups, and antitrust legislation aimed at curbing the growth and size of these technology companies. In response to this activity, the Heritage Foundation recently published a paper titled, "[Combating Big Tech's Totalitarianism: A Road Map](#)." This paper lays out several recommendations that cover antitrust overhaul, Section 230 changes, and changes to online privacy. While we appreciate our friends at Heritage's input on this pertinent topic, we have several concerns with the implications of their proposals.

Protecting consumers and promoting competition are laudable goals — goals NTU supports. Unfortunately, calls to depart from the [consumer welfare standard](#), which ties antitrust enforcement to consumer harms, opens the door to partisan or result-driven government intervention. Antitrust laws should be used to holistically reduce barriers to entry and anticompetitive conduct, not to target just a handful of companies based on arbitrary metrics. In our shared interest in furthering the antitrust debate, NTU has put together our views and considerations as they relate to some of the recommendations included in the Heritage paper.

We also have concerns about the recommendations to gut Section 230. This could lead to less speech online and negatively impact e-commerce. Similarly, utility-style regulations on online platforms are not what consumers want and risk stagnating a dynamic industry.

Key Facts:



Congress should work constructively and collaboratively on a reasonable federal data privacy standard to address the emerging and unworkable patchwork of state privacy laws.



Preserving the substance and spirit of the consumer welfare standard is critical to protecting consumers and restraining ideologically-driven government intervention.



Utility-style regulations are wholly unsuited for social media and would make America's most dynamic companies stagnant.

We believe common ground can be found on issues that encourage competition, promote economic growth and U.S. global competitiveness, and above all, protect consumers. These considerations are below.

Privacy legislation

First, there is some common ground that a data privacy framework is necessary. Congress should work with consumer advocates, privacy experts, the private sector, and other relevant parties to craft a reasonable federal data privacy standard. The current patchwork of state data privacy laws is untenable and this should be a top priority for federal lawmakers.

However, this privacy standard should be crafted to ensure it does not follow the heavy-handed European-style approach. Protecting consumers' data and privacy is important, and it should be done in a manner that is not unduly burdensome. Hopefully, this is a process that gains more traction than the more aggressive "break up Big Tech" proposals.

Importantly, this is an area where Congress needs to lead. Federal agencies have a role in enforcing data security protections, but Congress should legislate this issue. Elected lawmakers are more accountable to taxpayers and consumers than bureaucrats in Washington. This would also help ensure the process is more transparent. Creating a workable framework is sure to be a long process, but this is an area where, if done correctly, consumers can benefit from enhanced protections and online companies can work under clear rules of the road.

Defining "Big Tech" and targeting certain companies based on arbitrary metrics (market cap, user base, etc)

"This report refers to "Big Tech" as a loose compilation of companies that include the "Big Five" tech companies—Alphabet (Google), Amazon, Apple, Meta (Facebook), and Microsoft—along with other tech companies like Twitter, TikTok, Snap, and Netflix whose cultural and political impacts on public debate are significant." - [Heritage](#) (references)

Most major antitrust legislation, including several of the [antitrust bills](#) that moved out the House Committee on the Judiciary last year, as well as recent Senate [antitrust legislation](#), would create separate antitrust rules for Big Tech companies based on their market cap, user base, or other criteria, like being labeled as a "critical trading partner." The Heritage paper echoes these calls, stating that, "unless specifically delineated, the following recommendations have been formulated with Big Tech companies and their outsized capability and willingness to shape the public square in mind."

Unfortunately, this approach is a departure from the consumer welfare standard. Conduct does not suddenly harm consumers or competition once some invisible line is crossed, like a market cap. Instead, this approach singles out specific American companies for targeted mandates, creating a separate set of rules for some companies than for their competitors. As a principle of good tax policy, NTU believes using the tax code to punish select companies or distort consumer choice through preferential or prejudicial laws is bad policy. We hold this same view for competition policy.

For example, legislation passed out of the [House](#) and [Senate](#) Judiciary Committees would place restrictions on "covered platforms" ability to "self-preference" their own products, lines of business, or services. Both bills target companies based on market cap, user base, and the designation of a "critical trading partner." However, self-preferencing is a common practice used in grocery stores and other retail establishments. Consumers regularly benefit from competition between name brands and private labels, which are generally more affordable. Big companies, like Walmart or Costco have successful private labels. Costco's private label, Kirkland Signature, earned Costco \$58 billion in sales last year, making it America's [biggest](#) consumer packaged goods brand by sales. However, these antitrust proposals would target only Big Tech by banning this [pro-consumer practice](#) for just a handful of technology companies, while leaving their competitors untouched. This is not a pro-consumer approach to competition policy.

Another issue with the “big is bad” approach to targeting Big Tech is the volatility of the market. Meta, the parent company of Facebook, saw a dramatic stock market [drop](#), leaving it below the \$600 billion threshold put forth in several antitrust bills. While some bills require that companies stay below this threshold for some period of time (12-24 months), this points to these companies not being untouchable monopolists. Illustrating this point is the meteoric rise of short-form video company TikTok. Competition is not lacking in the digital space, and companies and products that have historically not kept up with the rapid pace of innovation have fallen by the wayside (MySpace, Internet Explorer, etc).

In a broader sense, there is also the issue of who is “Big Tech”? In the Heritage paper, “Big Tech” supposedly includes not only the “Big Five” companies, but also other tech companies like Netflix and Twitter. President Donald Trump’s preference for Twitter and the removal of his personal account has, for some, reinforced the claim that tech companies are hostile to conservative viewpoints. Heritage’s paper makes frequent mention of Twitter, including claims that Twitter is disproportionately moderating conservatives and suppressing stories that are unfavorable to the Left. While Twitter has [217 million users](#), it is much smaller in terms of market capitalization. Market caps and user base are poor measurements to utilize for antitrust legislation. A company can have a large user base but lack the ability to monetize, while other platforms may be more efficient in monetizing a comparably smaller user base. Other platforms like Clubhouse or TikTok also illustrate the volatility of how quickly these measurements can change.

Other anecdotal examples of perceived censorship or bias include Spotify, Shopify, GoFundMe, MailChimp, and other technology or online companies. While this supposedly supports the thesis of the paper — that government forces are already controlling technology companies — this is not the case. As Cato correctly [points out](#), “conservatives and libertarians should be reassured by the fact that those working for the most powerful person in the world can only ask Facebook to make specific content moderation decisions. The First Amendment ensures that the government cannot force Facebook to post or remove legal content (such as COVID-19 misinformation).”

This is exactly why protecting the consumer welfare standard is critical. Without requirements for robust economic analysis and the need to establish ties to consumer harm, government actors are able to regulate by raised eyebrow. The consumer welfare standard is the antidote to the perceived problem in Heritage’s paper. Otherwise, any company that steps out of line with the ruling party’s value could face the sword. Abandoning the consumer welfare standard won’t create competition or benefit consumers, and is unlikely to aid conservatives.

Section 230

“In terms of scale and reach, Big Tech companies, aided by Section 230’s liability shield, flourished in the late 1990s and early 2000s. They cemented first-mover advantage in a technical sense—for example, by accruing data, refining their algorithms, and building network effects over decades—to enhance the products Americans use today.” - [Heritage](#)

These companies that many claim are unassailable monopolies were not long ago competing against other so-called monopolies. In 1998, the Department of Justice (DOJ) filed its antitrust suit against Microsoft claiming they were using their dominance to pre-load Internet Explorer as part of their operating system. Also in 1998, Amazon was selling books and CDs online. In 2000, Netflix executives met with Blockbuster in an attempt to sell Netflix for \$50 million. In the early 2000s, MySpace was the premier social media platform.

Heritage also goes on to recommend stripping Section 230 protections for companies who restrict content based on viewpoint, association, or otherwise favor or disfavor certain speech. However, Section 230 of the Communications Decency Act of 1996 is a critical [pro-speech](#) tool for smaller competitors. Section 230 essentially states that an interactive computer service will not be treated as the speaker or publisher of third-party content. That has enabled *more speech* online by shielding companies small and large from meritless lawsuits, which can cost [six-figures](#) to litigate through discovery.

Many of these lawsuits would likely be struck down on First Amendment grounds, but that would not stop a flurry of lawsuits from placing enormous strain on startups and smaller businesses that lack the capital and high-powered legal team of their larger competitors. Repealing or significantly altering Section 230 would more likely lead to entrenched incumbents and less speech online. While trial lawyers would benefit from gutting Section 230, consumers would not.

As Heritage correctly argued in a 2019 [paper](#), “even if systemic bias were conclusive, the fact is that these private companies have the right to moderate content according to standards of their own choosing. That does not mean that conservatives have no recourse. Indeed, conservatives have countered left-wing media privilege in the past without regulation. Deregulation, in fact, benefits the underdogs.”

Following testimony from Frances Haugen, the Facebook whistleblower, lawmakers have introduced several bills to create a Section 230 carveout for algorithms. One [bill](#) from Senator Amy Klobuchar (D-MN) would strip Section 230 liability protections if an online company promotes health misinformation, a term that would be defined by the Secretary of Health and Human Services. Platforms use algorithms in a variety of ways, and in many cases, algorithms can help consumers or prevent harmful content from being shown. An algorithm carveout to Section 230 is a [clumsy and ineffective](#) way to address valid concerns about harmful or unsavory online content.

Some conservatives have argued that Section 230 is too broad. Heritage argues that if a company should be held accountable to their terms and service and mission statements by the public, violations should be treated as fraud and/or breach of contract. This would likely not have the intended results conservatives hope for. Instead, a company would more likely simply pack their terms of service with every catchall to avoid being sued, making an already complex and underread document even less user friendly. Additionally, it could also lead to less speech online, as companies would have to perform a risk-benefit analysis on allowing certain third-party content if it opens them up to legal liability.

In addition to the pro-speech benefits of Section 230, there are also many [economic benefits](#), both for consumers and businesses. Large platforms enable small businesses and provide additional avenues for entrepreneurial Americans. In a recent paper, NTU Foundation [lays out](#) how large online retail platforms reduce barriers for small market entrants. User-generated reviews are a critical component for selling products online, especially for smaller sellers. Section 230’s broad immunity for companies small and large also promotes competition by encouraging diverging ways to approach content moderation. Reddit, Wikipedia, and Facebook all taking very different approaches to content moderation is a feature not a bug.

Many propose gutting or repealing Section 230 as a simple answer to the complex issues that exist online. However, this would have enormous implications, both in reducing free speech online and stifling the digital economy. Conservatives may have valid disagreements with the content moderation practices on certain platforms. However, conservatives are also consumers and while many may cheer as the boomerang is hurled at this free speech protection, the consequences for these same consumers would likely be greeted with much less enthusiasm.

Common carrier regulations

“If social media conduits fail to be more transparent about their algorithms and practices, consider regulating them as common carriers by applying anti-discrimination laws, including viewpoint discrimination, to them. Consider exemptions for smaller companies.” - [Heritage](#)

In response to the perceived bias of online platforms, some conservatives have called for utility-style regulations to be put in place. However, much of the argument for this radical proposal rests on the false pretext that online platforms are supposed to be neutral platforms. Enforcing common carrier regulations on platforms would generally make the online services consumers enjoy worse.

First, it should be addressed that “neutrality” is not a requirement for an online platform, and the definition of a “neutral platform” is so ambiguous it would likely lead to more harmful, unwanted content proliferating online. Being viewpoint-neutral sounds fine in theory, but it is not compatible with consumers’ use of the

internet. What is considered viewpoint neutrality? One interpretation is leaving user-generated content untouched. However, consumers do not want to see certain content and platforms should not be forced to host content in the same way a business should not be compelled to serve customers that violate store policies.

Parler, billed as a free speech alternative to Twitter, initially signaled they would avoid the moderation practices of their rivals. However, after users flooded posts with pictures of feces, they changed course. Lawmakers have expressed concerns about what children can see online should also be worried about this hands off approach. Platforms acting as a bulletin board is not what consumers want.

Common carrier regulations [prohibit](#) discrimination against lawful goods or communications. While common carrier regulations exist for telecommunication, railroads, and other industries, they are wholly unsuited for social media. First, there is no monopoly or duopoly (as [some](#) have claimed with Facebook and Twitter) over social media. TikTok, and other smaller platforms, should have dispelled the faulty premise that the current large platforms are free from competitive forces.

Also, as the American Enterprise Institute's Dr. Mark Jamison notes, common carrier regulations come with significant [government intervention](#). If there is a growing "symbiosis" between Big Tech and government, as Heritage's paper states, this would create significantly *more* government control over these platforms. Creating an unwieldy government bureaucracy would not benefit conservatives or consumers.

The practical implications of common carrier regulations are also divorced from consumer demand. American technology companies are constantly innovating. Common carrier regulations would make these dynamic companies [stagnant](#). This could also force legal but generally unwanted speech like racist or anti-Semitic speech to be hosted on the internet. Common carrier regulations would make the internet a cesspool.

Consumer welfare standard

"Develop arguments that the limitation of access to legitimate political speech and the exploitation of user data constitute harm to consumers. Clarify that the consumer welfare standard, which should be codified into law, applies to zero price markets that consist of "free" services in terms of fees for the use of social media platforms, search functions, etc. Clarify for all stakeholders (legislatures, the courts, etc.) that antitrust law must be applied to Big Tech firms, which often leverage and hide behind their zero price practices as a justification for behavior that would otherwise be constrained by the proper application of existing antitrust rules." - [Heritage](#)

At first, the recommendation for codifying the consumer welfare standard may seem like a positive inclusion in the Heritage paper. However, much of the recommendations are not in line with the consumer welfare framework. Expanding the consumer welfare standard would undermine the core value of this long agreed upon standard — restraining unwarranted government intervention.

Also NTU Foundation [points out](#), the recommendations for increased scrutiny of Big Tech mergers past, present, and future undermines the spirit and substance of the consumer welfare standard by shifting the burden of proof to companies and forcing them to prove a merger is not anticompetitive. Similarly, proposals to limit self-preferencing only for a handful of companies are recommendations aimed more at limiting a company's growth rather than protecting consumers or competition.

Expanding the consumer welfare standard to include access to political speech is similar to recommendations that have been floated by progressives. Federal Trade Commission (FTC) Commissioner Rebecca Slaughter has stated she would use antitrust enforcement for an [antiracism](#) agenda. Expanding consumer welfare to include social goals would give antitrust enforcers broad authority to pursue an ideological agenda.

Heritage correctly pointed to the dangers of radically undermining the consumer welfare standard in a 2020 paper, [stating](#) that, "for conservatives, the last thing they should want to do is undermine the consumer welfare standard, one of the most important developments in decades that promotes free enterprise and economic freedom. They should also reject other sweeping antitrust changes that would

flip antitrust on its head, such as shifting burdens of proof that would make it more difficult for private parties to engage in commerce, and anything that would expand the purpose of antitrust from being focused solely on economic welfare.”

Subjective, unrestrained antitrust enforcement could wreak havoc on the free market. It would also create substantial uncertainty for businesses. Regulatory uncertainty, while bad for all businesses and consumers, disproportionately hurts small businesses that lack the high-powered legal teams and regulatory expertise to navigate complex bureaucracies.

Heritage states in their paper that these recommendations are specifically for tech companies and should not be construed as supporting broader economic intervention. However, undermining this long-agreed upon standard and focus on consumer harm would give antitrust enforcers more powers to do just that. While it may not be the intention, giving the government more power and trusting their restraint rarely works out for consumers or conservatives.

Establish executive liability

“Hold Big Tech CEOs, C-suite leadership, and vice presidents accountable for business fraud and breach of contract either through action by federal or state authorities or through private right of action.” - [Heritage](#)

The recommendation to establish executive liability was one of the most shocking inclusions. This is certainly not the first attempt to use executive liability as an endaround for the government exercising greater control over free markets. However, Heritage’s history as a leader of free enterprise on the Right made this recommendation stand out.

Senator Elizabeth Warren (D-MA) has recommended this approach. Two of her [bills](#), the Corporate Executive Accountability Act and the Too Big to Jail Act, would expand criminal liability to banking executives. She also called for the Department of Education to hold college executives and owners personally liable.

Unfortunately, the recommendation to hold tech executives liable, especially based on subjective content like their platform’s moderation practices, appears to be an attempt to force private sector compliance. Federal or state authorities suing a private sector actor for perceived wrongs would undoubtedly be abused and lead to more collaboration between the government and tech companies as platforms attempt to avoid any perceived missteps.

A private right of action for supposed biases would be welcome news to trial attorneys, but it wouldn’t benefit consumers. Instead, a flurry of lawsuits would appear every time an account or content was removed, meritless or not. Similarly, claims of being “shadow banned” could lead to endless waves of litigation. This should not be conservative’s solution to unfair or biased content moderation decisions.

Conclusion

Free market advocates should be wary of embracing big government as a fix to issues on the internet. There is common ground among the Left and Right on issues like privacy that can yield positive results for consumers. However, embracing a radical overhaul of antitrust laws, gutting Section 230, or substantially increasing the powers of the government in the day-to-day operations of technology companies is the wrong approach to take.

About the Author

Will Yopez is a Policy and Government Affairs Manager with National Taxpayers Union.



2022 National Taxpayers Union
122 C Street NW, Suite 650, Washington, DC
20001
ntu@ntu.org