

Antitrust in the Tech Sector

Consumer Welfare v. The Progressive Standard (or ‘Hipster Antitrust !)

This speech was delivered in August 2017 by US Senator Orrin Hatch

Mr. President, I rise to speak today on a policy matter that has been generating substantial attention recently: modern antitrust law. It’s a critical issue, and in the perennial debate over the proper role of government in economic affairs, it will grow all the more critical in the years to come. New technologies, creating markets not even imaginable only a decade ago, are spurring fundamental shifts in the economic landscape. In the national news, we hear daily of a new merger between corporate giants or a new fine imposed by foreign regulators. And here in the Senate, we increasingly see antitrust law dragged into larger economic arguments that are heavier in inflammatory rhetoric than in careful deliberation. Allow me, then, to offer a few thoughts on the matter, and to directly address the rising controversy.

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Now, let me be clear: antitrust doctrine in this country has not always gotten it right. As we all know, early antitrust policy tended to confuse protection of market participants for protection of the market itself; it was quick to micromanage particular industries, to choose ad hoc intervention over predictable systems of incentives, and to cast suspicion on any market too concentrated or business too big.

Fortunately, antitrust doctrine grows and adapts. It develops in the same wonderful tradition and manner as the common law. Just as the common law historically gave us property, contract, and commercial rights, so too upon their basis does antitrust seek, year by year, to give us markets that are competitive and free.

And thus, the modern era of antitrust has produced a fundamental improvement in our competitive doctrine. We have steadily adopted the consumer welfare standard, which judges the conduct of firms and the arrangement of markets by what will maximize efficiency, and therein serve consumers most completely. There will always be market failures to account for, and non-economic concerns to keep in mind. But when it comes to the core, basic functioning of the market – how to deliver the most goods, to the most people, at the highest quality and lowest cost – consumer welfare still works best. In most industries, most of the time, we ought to think a little less about how best to regulate the market, and a little more about how best to set the market upon regulating itself. The disciplining effects of competition, and the limitless store of American ingenuity, do far more for consumers than the well-intentioned intervention of government authorities. The consumer welfare standard has, consistently over the years, proven an absolute boon to our economy and society.

Of course, a legal standard means little unless handled with care. We’ve chosen the right standard; now we must keep choosing the right officials to implement it. You see, under the consumer welfare standard, good antitrust enforcement is a lot like good sports officiating: It harnesses, rather than stems, the flow of the action; It lays out limited, predictable, and reliably enforced rules; It gets the most out of the players and the competition itself, regardless of which team is in the lead. Most importantly, as any sports fan could tell you, when officiating is done right, we hardly notice the refs at all. With the right antitrust officials, cognizant of their role, we can expect a spirited contest in which American

entrepreneurs keep putting points on the board, and American consumers keep reaping the reward.

Now, as I mentioned earlier, Mr. President, antitrust has been increasingly drawn into the broader public debate on economic and innovation policy, and not for the better. With each passing day, it seems the consumer welfare standard finds itself besieged from the left. Their rhetoric may not yet have made its way into judicial precedent, but it certainly has made itself known.

Some in academia insist that recent market concentration and technological progress compel a return to bold, persistent experimentation. Many in the media call for antitrust to pursue everything from industrial democracy to campaign finance reform to material levelling. Above all else, we hear again the old, lazy mantras that big is bad, disruption is suspect, and public utility designation is welcome.

Professor and former FTC Commissioner Joshua Wright has referred to this peculiar set of proposals as “hipster antitrust.” Well, as you might imagine, Mr. President, nobody would mistake me for a hipster. So for my part, and for ease, I’ll go ahead and call it the progressive standard. And, truth be told, as a proposed replacement for the consumer welfare standard, the progressive standard leaves me deeply unimpressed. From what I can tell, it amounts to little more than pseudo-economic demagoguery and anti-corporate paranoia.

Nevertheless, it must not be dismissed out of hand. Over the last eight years, policymakers laid the groundwork for it by routinely disregarding some of the most basic elements of the consumer welfare standard. And now, we see the same stirrings of this radical approach in many speeches of my colleagues on the other side of the aisle, as well as in their recently released platform titled “A Better Deal.”

As such, I believe a response is in order. In defense of the consumer welfare standard, we could, of course, run through the more technical deficiencies of the progressive standard. We could mention that, as doctrine, it lacks manageable standards, dispensing with intellectual rigor and inviting political mischief. We could mention that, as theory, it accounts for neither tradeoffs nor scarcity. And we could mention that, as aspiration, it subordinates the productive incentives of the entrepreneur to the fanciful designs of the bureaucrat.

But, truth be told, the real trouble for the progressive standard is that it fails grasp the bigger picture of our history, economy, and national character. It fails to appreciate that our time is not so distinct from times past, and that our present, momentary insights are not so superior to the lessons learned over generations prior.

Of course, anyone can see that changes are afoot. As Chairman of the Senate Republican High-Tech Task Force, I have seen it first-hand. The new technological age, having dawned in the late 20th century, continues to ripen into the 21st. New innovation is relentlessly spurring transformation across the economy, and many markets are concentrating as a result.

Yet, supporters of the progressive standard seem to think this presents historically unique problems. They rely, as academics are wont to do, on sleek new jargon to argue that today’s antitrust challenges are not only tangibly, but conceptually, distinct from those of the past. They argue, in other words, that things really are different this time around. But, at the end of the day, terms like “platform economics” and “network effects”—commonly used to attack

the consumer welfare standard—do less to define new economic concepts than to explain how old economic concepts are manifesting themselves in modern markets. Through history, we've seen this time and time again. As the saying goes, the more things change, the more they stay the same. Markets concentrate, and then disperse. Dominant firms rise, and then fall. With innovation comes creation in one sector, and destruction in another.

Anxiety over this evolution is very real, and the strident calls we hear to do something about it, whatever that may be, are on some level understandable. But this lurch toward the progressive standard is not. Change, sometimes furious change, is a constant in our system. For all its rancor, for all its chaos and uncertainty, it is, alas, what propels us forward. We hope, not fear, that each age looks better than the last.

Now, in anticipation of an objection from my friends across the aisle, nobody is suggesting that no enforcement is necessary. Genuinely anticompetitive conduct must be stopped, and mergers prone to abet such conduct must be heavily scrutinized. That's all a part of keeping markets fair and free, in the best tradition of American capitalism. Again, as I mentioned earlier, we should aim to regulate markets, such that in their basic, core functioning, they regulate themselves. Market discipline imposed by competition and driven by innovation should be our aim.

And to that end, nobody doubts that new developments in the market will require a fresh look at doctrine. Nobody questions that the consumer welfare standard will have to adapt. For example, categories of anticompetitive conduct may need to be tweaked, refashioned, or even expanded, in light of technological advancement and market evolution. Merger review, never an exact science, will seize upon new econo-metric tools for measuring ancient economic concepts like quality, preference, and efficiency. And the rule of reason, I'm sure, will continue to bedevil judges, practitioners, and law students alike. But that's just fine, Mr. President. Antitrust, as I keep saying, is ultimately a common law exercise. I am here to argue merely that the consumer welfare standard, when handled prudently, is a far better steward of our economy than the progressive standard, which is deeply misguided and potentially quite destructive.

Take, for instance, the proposed Amazon-Whole Foods merger, which has generated so much interest lately. It would, of course, be inappropriate for me, on the floor of the Senate, to pass judgment. I would caution my colleagues the same. There is an established process for review. But the question should be asked: upon what basis should antitrust authorities evaluate a proposed merger like this? What we need is the consumer welfare standard. It carefully examines the basic and critical question of whether such a deal helps consumers, or whether it hurts consumers. It relies on a coherent doctrine to strike a balance between the merger's pro-competitive effects—such as integrative efficiencies and innovation—and the anticompetitive potential—such as market domination by one firm or facilitated price coordination by the few that remain.

What we absolutely do not need, on the other hand, is the progressive standard. Under no doctrinal limitations to cabin discretion, antitrust officials would be left to follow vague intuitions and shifting inclinations. And with a broad mandate to pursue aims far grander than mere market efficiency, officials would be free to engage in ad hoc theorizing about whether corporate consolidation, writ large, can be squared with universal justice, common fairness, community values, or of whatever else their creativity recommends.

To take another example, across the Atlantic our friends in the European Union have levied a massive fine against Google for anticompetitive conduct. Again, it is not for me to say, here on the floor, whether those fines are justified. But, once more, what we need is the framework provided by the consumer welfare standard. We must weigh the procompetitive aspects of Google's conduct with its anticompetitive potential. The ultimate inquiry should be whether consumers are better off as a result of Google's actions. Under the progressive standard, however, instead of asking what lowers prices and increases quality—instead of considering actual proof of harm to consumers—we'd be asking what best serves the social goals in vogue at the moment. The result would be an open invitation to market intervention that's more politically motivated than economically sound.

In conclusion, Mr. President, for all the intellectual pretension, for all the claims that a new age requires a new doctrine, the ideas behind the progressive standard are not new; they're terribly old. They may be adorned with original terminology, or aimed at novel markets, but it's the same old collectivist impulse that we've seen time and again. And in that sense, these ideas are not unique to American leftwing political thought. Every day we receive concerning reports from around the world that foreign governments are increasingly turning to antitrust for industrial policy.

Whether domestically, or abroad, the stakes are simply too high, the consequences too grievous, for the consumer welfare standard to be swept away in an instant merely because a new breed of central planners—falsely conceiving themselves different from their predecessors—imagine they know best. In America, we've always opted for the invisible hand of the free market over the heavy hand of government intervention. Let's keep it that way.

I yield the floor.