Bust the Conservative “Trust Busters”

When right-wing leader Sen. Josh Hawley (R-MO) recently declared that “liberty and monopoly do not go together,” I fantasized that he had become a free-market anarchist. When I hear *monopoly*, I think *government* because what’s the most literal of monopolies (or source of monopoly power) than the state?

Imagine my disappointment when I realized that, quite the contrary, he was embracing expanded government power over consensual interaction in the marketplace. He was introducing his aggressively named Trust-Busting for the Twenty-First Century Act. Hawley wants to be the our day’s Theodore Roosevelt, also a Republican but no friend of individual liberty and free-market interaction.

Hawley says would like to break up Major League Baseball, Big Tech, Big Telecom, Big Banks, and Big Pharma, as well as limit or prohibit what other big companies can do, such as merge with or acquire other companies. It’s quite a comprehensive serving of government powers from a guy who probably tells himself he favors limited government. That’s how things are. Conservatives have long had higher priorities than defending peaceful interaction in all spheres. Hawley is no friend of liberty.

Like any good conservative, for Hawley many things outrank individual liberty: protection of the culture from the left, for example. In other words, when the left proposes government power as a solution to a real or imagined problem, Hawleyites propose some other expansion of government power, for example, regulation of social media and search engines on behalf of conservative groups. Mentions of liberty are mostly lip-service intended to keep some imagined coalition together.

Hawley’s news release says his “new legislation [is designed] to take back control from big business and return it to the American people. Senator Hawley’s bill will crack down on mergers and acquisitions by mega-corporations and strengthen antitrust enforcement to pursue the breakup of dominant, anticompetitive firms.”

As we’ll see, this approach assumes that the anticompetitive power of business is an independent variable, rather than something derived from political power in countless ways. If all the intended and unintended anticompetitive laws and regulations were repealed, the Federal Register would be considerably thinner and we’d all be considerably freer. Competition would thrive. That’s why I call corporate power “the most dangerous derivative”–it’s generated by the government and wouldn’t exist without it.

The release says, “A small group of woke mega-corporations control the products Americans can buy, the information Americans can receive, and the speech Americans can

engage in. These monopoly powers control our speech, our economy, our country, and their control has only grown because Washington has aided and abetted their quest for endless power."

This is a gross overstatement, even with all the laws on the books. But to the extent Hawley is correct, it's too bad he fails to understand that he is indicting the interventionist state–that is, politicians and bureaucrats–and not of the market process, which when left alone has built-in safeguards against anticonsumer activities. It's called competition, but it must be left unmolested by the state, many of whose interventions enable firms to grow bigger than they would be in a free market. (See Milton and Rose Friedman's chapter "Who Protects the Consumer?" in *Free to Choose*.)

"Woke corporations want to run this country and Washington is happy to let them. It's time to bust up them up and restore competition," the release states.

The word *woke* here indicates that culture is what drives Hawley and his allies. I don't mean that anything labeled "woke" is innocuous (far from it), just that Hawley wants to punish companies that take what in his view is the wrong side of today's raging political-cultural issues. He is incensed that Major League Baseball pulled its all-state game out of Atlanta because it disapproves of Republican-favored election-rule changes in Georgia. For Hawley, moving the game is an illegitimate attempt to influence public policy. His solution? Subject MLB to antitrust law. (He's joined by fellow Republicans Sen. Ted Cruz of Texas and Mike Lee of Utah.) That doesn't sound like the proposal of a small-government man.

Here are some things Hawley's bill would do:

- Ban all mergers and acquisitions by companies with market capitalization exceeding $100 billion;
- Empower the FTC to designate "dominant digital firms" exercising dominant market power in particular internet markets, which will be prohibited from buying out potential competitors;
- Prohibit dominant digital firms from privileging their own search results over those of competitors without explicit disclosure;
- Reform the Sherman and Clayton Acts to make clear that direct evidence of anticompetitive conduct is sufficient to support an antitrust claim, which will allow enforcers to effectively pursue the breakup of dominant firms and prevent antitrust cases from devolving into battles between economists;
- Replace the outdated numerically-focused standard for evaluating antitrust cases, which allows giant conglomerates to escape scrutiny by focusing on short-term considerations, with a standard emphasizing the protection of competition in the U.S.;
- Clarify that "vertical" mergers are not exempt from antitrust scrutiny;
- Drastically increase antitrust penalties by requiring companies that lose federal

> antitrust suits to forfeit all their profits resulting from monopolistic conduct

That's quite an undertaking (an appropriate word in both senses) for any government, considering that the mortals who would enforce such a law would lack the essential knowledge and incentives needed to do the right thing. The history of antitrust is a history of cronyism and special pleading, but what would you expect?.

The bill would expand the Progressive-era Sherman and Clayton acts in several ominous ways. For example:

> In any case alleging a violation of this section 5 or section 1 in which a plaintiff establishes by a preponderance of the evidence (including direct evidence) the existence of substantial market power or the anticompetitive or otherwise detrimental effects of particular practices, a plaintiff need neither define the scope of a relevant market nor establish the share of such a market controlled by the defendant.

Even if one wrongly grants the legitimacy of antitrust law, it is absurd that the relevant market or market share of the defendant would not need to be defined by the government or other plaintiff. How would one know that a firm was monopolistic? (Years ago the government sued the major ready-to-eat cereal companies for monopolistic activity on the basis of a narrow definition of the breakfast-food market that excluded all the alternatives to cold cereal.)

> No acquisition shall be presumed not to substantially lessen competition or tend to create a monopoly only because the parties to the acquisition do not compete directly against one another at the time of the acquisition.

Again, even many people who favor antitrust distinguish between horizontal acquisitions, in which a firm buys another firm that makes the same product, and a vertical one, in which a firm buys another firm that makes the first firm's inputs or buys its products. Hawley wants to go an extra step to insure that no company valued at more than $100 billion could change a market through an acquisition. That's true conservatism!

The bill would also have new rules for what it calls a "dominant digital firm," which would be any company that is accessible through the internet and "possesses dominant market power in any market related to that website or service." Here conservatives propose to enlist the state to go after the social networks and search engines for real and alleged mistreatment of … conservatives presumably. The Federal Trade Commission (FTC), another creature of the Progressive movement, would be given the power to designate a person, partnership, or corporation as a dominant digital firm," at which time new rules apply. Oddly, this is the one section that acknowledges that government puts its thumb on

the scale in economic matters: in determining a firm's "market power," the FTC would consider "the extent to which the firm benefits from government contracts or other privileges." That is an important point, but the solution is to withdraw the anticompetitive privileges, not to impose new restrictions.

None of this means that big business deserves nothing but praise. With some rare exceptions, many business people, as Friedman often pointed out, have long seen the government as a convenient way to get what they couldn't get through free competition. That's why antitrust was so often used not to protect consumers, but to protect less-efficient firms that fared poorly in the market. (See D. T. Armentano's classic, *Antitrust and Monopoly: Anatomy of a Policy Failure*.)

Moreover, we all should be bothered that the social network owners think it's right to mediate what is true and false in their customers' conversations and feeds. Social networks are private firms, but that doesn't make anything they do a good thing. Besides, we may justifiably wonder how much of what they do in this regard is done to stave off government regulation from progressives. They know the eye of the state is upon them. Further, we may also suspect that the big networks have calculated that when regulation comes, they, the experts, would be called on to write the rules–as long as they are seen as behaving well.

The argument against antitrust law is that it misconstrues the market. When free it is not a static condition but a process in perpetual motion, in which entrepreneurs are always trying to profit by better serving customers. In an unmolested market the threat of *potential* competition would do as much to keep a single firm on the customers' side as actual competition. So quantitative indicators are misleading. As D. T. Armentano says, high profits in an industry with one or two firms is not a barrier to new competition but an engraved invitation. Moreover, even a cartel agreement among a few sellers couldn't prevent "cheating" by parties to increase revenues; nor could it prevent new entrants from taking advantage of the dominant firms' disregard of consumer welfare.

Hawley's bill declares, "It is the policy of the United States that the principal standard for evaluating the permissibility of practices under this Act is the protection of economic competition within the United States.'' But "competition" is too abstract a thing to protect, and history shows that such a goal opens the gates to complaints from inefficient firms (or their advocates in the regulatory bureaucracy) that claim they are victims of efficient firms' "anticompetitive" actions when in fact they are victims of their own inefficiency.

Instead of protecting competition (aka weak firms), let's protect individual liberty for everyone.

The bill's chances of passing a Congress controlled by the Democratic Party are

nonexistent of course. But this isn’t because it would grant new controls over peaceful activities. Rather, it’s because Hawley’s motive is to rein in “woke” corporations. No doubt the Democrats will have their own antitrust bill before long.