

## ***The Face of Facebook***

The Face of Facebook is monopoly power, restraint of trade, with an enormous market and harm to both consumers and to competition. Yet, only vaguely do we hear about the invocation of the anti-trust laws against the media giant. A host of new legislation is discussed, some of which will undoubtedly provide a safe harbor for Facebook to operate, but breaking up the multi-headed hydra does not seem to be receiving serious consideration.

In the 1890's Ida Tarbell was a household name. She wrote about the Standard Oil conspiracy to dominate the new oil industry by conspiratorial trust arrangements between producers, transporters, refiners and others. She was born in 1857 in a real log cabin in Hatch Hollow, Pennsylvania. She was known as the woman who took on Standard Oil. She was America's best-known muckraker.

The consequence of the work of the muckrakers, with the hard work of Republican Theodore Roosevelt, were Sherman 1 and 2. Those two sections of the anti-trust laws prohibit combinations, conspiracy and contracts in restraint of trade as well as monopoly. The Clayton Act passed a few years later provided private causes of action.

For many years, the anti-trust laws were applied in a robust form. There is no doubt that application of the anti-trust laws in a straightforward fashion kept America capitalist. They helped to repel the growing attraction of socialism and other movements that were initiated to fight back against the corporate giants seeking ultimate control over the consumer.

Then something strange started to happen in the 70s. The courts began to interpret the anti-trust laws much more strictly. A host of non-legislative hurdles were utilized to make it virtually impossible to bring consumer anti-trust cases or to prove elements of the offense. One of the factors in proving a monopoly is monopoly power. The definition of monopoly power became so strict that almost no one would have it. Likewise, the combination and conspiracy had to be specifically "anti-competitive" which involved a set of tests that were rarely met.

In a matter of a few years, the anti-trust laws were defanged and the only time they were ever brought was in connection with some very complex corporate tyrant questioning the competitive activities of one of its rivals. The cost of bringing anti-trust cases and proving them became insurmountable.

The big anti-trust firms in Washington, D.C. controlled the playing field, dragged the cases out over many years and were able to financially bleed their opponents. When some thought was being considered with respect to breaking up Microsoft, the computer giant not only waged war in the courts, but also utilized its effective lobbying skill in the halls of Congress.

The anti-trust laws made sense in the 1890s and make sense today. The problem with Facebook is not merely that it attempts to manipulate users into buying products and using Facebook more often, but in the fact that it has no effective

competition. Facebook controls the market and it has learned how to keep out competitors. The “relevant market” for Facebook is the world, except for those few countries that restrict the behemoth. Facebook certainly has monopoly power and does in fact possess a monopoly in many quarters. Without question, Facebook would also fail the restraint of trade test.

While this opinion piece is not intended to review the entire complexity of anti-trust laws, something even a several semester course in law school cannot do, it is time to rethink why our anti-trust laws are not viable and what can be done to make them more effective. One of the common complaints against the anti-trust laws which surfaced in the wake of World War II is that big, dominating corporations are needed to protect America against foreign competition. If we do not have the biggest, toughest, most controlling organizations, then the Chinese or the Russians will. However, the anti-trust laws may also be applied, at least in the United States, as against foreign entities that would seek to dominate our commercial life. Foreign corporations should certainly not get a free pass.

The argument that we need to have tyrannical, “black hole” corporate giants running the American commercial markets in order to protect us from foreign competition is both naïve, untrue and poor economics. An open market has always been the best bet for America. Facebook and other internet giants, along with Amazon, are able to build their monopoly on prior monopoly power. In other words, control leads to more control, not less control. We cannot depend upon the Facebooks and Amazons of the world to be self-disciplining in the face of the fantastic profits which they are able to produce for their shareholders.

It is time for our leaders and thinkers in Washington, Republican and Democrat, to sit down and to develop an anti-trust simplification law which will restore the anti-trust laws to their original purpose and intent. The antitrust laws should be utilized to protect the consumer from anti-competitive markets which have the effect of raising prices and delaying entry of competitors into the marketplace.

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