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How To Think About Breaking Up Big Tech

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Sen. Elizabeth Warren's plan to break up tech giantsAmazon, Google, Facebook, and Apple has given concentrated corporate power its most prominent political platform since the 1912 presidential election — and we're still nearly a year away from the first round of primary voting. This tracks with the rising awareness of the corrosiveness of monopoly power generally and those tech giants specifically.

Whether such policy boldness means anything in a brand-obsessed political landscape will be determined when ballots are cast. But it is undeniably driving a policy discussion that the next Democratic presidential nominee, no matter who it is, will likely take up. In that context, the debate over Warren's plan is critical, as it prefigures the trajectory of each and every challenge to corporate dominance.

First, many critiques will come from those with a direct stake in the outcome — in this case, Big Tech-funded individuals or organizations, which are so ubiquitous as to create an echo chamber. Second, the critiques will highlight the "radical" nature of the changes, setting them at odds with American history, even though Warren's central proposal — to structurally separate business lines in an effort to eliminate anti-competitive conduct and foster competition — has a century-old pedigree. And third, we'll be assured that the cure is worse than the disease, that Warren's ideas would destroy everything from online shopping to the smartphone, a perspective that relies on deliberate misinterpretation.

This roadmap for discrediting policy solutions that confront power should be easy enough to spot by now, and will be employed long into the future. So it's worth breaking down how it works.

The Manufacturing of Dissent

"The issue is not the size and current market dominance of these [tech] companies," wrote the American Enterprise Institute's Michael Strain for Bloomberg, in response to the Warren plan. "If anything, politicians should be celebrating these companies as crown jewels of the U.S. economy."

Strain's employer, AEI, is funded in part by Google, according to the company's transparency page. This is not noted in Strain's Bloomberg op-ed. But AEI and its writers have done several critical pieces about Warren's proposal, as well a California privacy regulation that also imposes stricter rules on Big Tech. All of these opinion articles indirectly benefit one of AEI's donors.

The episode points to a significant trend of writers and scholars opining on the Warren plan while conflicted by the overwhelming amounts of Big Tech cash that have infested Washington. Google's list of organizations to whom it has donated is massive, and combined

with Facebook and Amazon's dominance of Washington, it's hard to find anyone with a critical eye toward Big Tech regulation who doesn't have something to disclose.

Rich Lowry of National Review unleashed a pack of industry talking points to explain how Big Tech "helps create a strong American society." National Review takes Google money. Here's a similar sentiment dragging the Warren plan on the pages of National Review, from a senior fellow at the Competitive Enterprise Institute, which also takes Google money. The American Action Forum seems to dislike the Warren plan; the group, well, takes Google money.

Geoffrey Manne and Alec Stapp condemn Warren for "wanting to turn the Internet into a sewer." Manne's organization, the International Center for Law and Economics, has taken a boatloadof Google money; as of 2015, he had contributed to at least eight white papers commissioned or funded by Google that endorsed Google's policy positions, in addition to being a frequent pro-Google commentator in news articles and congressional testimony. Stapp, before hooking up with Manne at ICLE, worked at the Mercatus Center at George Mason University, another recipient of Google funds. A former Manne co-author, Joshua Wright, worked at George Mason University and has been periodically on and off the Google payroll in between government work.

Manne and Stapp's piece got the pile-on treatment on Twitter from representatives of the Google-funded Cato Institute and Niskanen Center; Stapp previously worked at Niskanen. Severalventure capitalists who currently rely on Big Tech for exit strategies for their companies also gave the thumbs-up to the piece.

The Computer and Communications Industry Association, a trade group that includes Amazon, Facebook, and Google among its members, uses a subsidiary named Springboard to hurl critiquesat regulatory tech policies. In addition to the aforementioned articles from AEI and National Review, Springboard points to the opinions of a partner at Andreessen Horowitz, an early investor in Facebook, and the CCIA's own vice president for Law an Policy — which amounts to CCIA linking to itself as outside confirmation of its beliefs.

These linkages are virtually endless and show an incestuous network of academics, think-tankers, advocacy organizations, and trade groups, all of which happen to agree on every issue important to Big Tech. The money supports extending the prominence and megaphone of these organizations, and with nearly unlimited pocketbooks, it creates the impression of a tsunami of support for the industry.

A "Radical" Idea That's Been Around for Over a Century

The core of Warren's plan, which for now is just a proposal on Medium rather than legislation, involves what is known as "structural separation." Companies with over $25 billion in annual global revenue that operate platforms — connectors between people, people and advertisers, or people and merchants — would not be allowed to both own the platform and also participate as a seller on that platform. The classic example would be Amazon's marketplace, where Amazon also operates its own line of Amazon Basics, competing with its third-party sellers. Google's ad exchange also competes on Google with ad tech companies, and would need to be spun off. The same would go for Google's local search, which routinely deprioritizesrecommendation sites like Yelp.

The idea is that these entities get preferential treatment from the platform they own, giving Basics, Google ad tech, and Google Search an unfair advantage and extending the platform's

dominance. Only the biggest companies would have to structurally separate; smaller platforms would still have to meet a standard of fair, reasonable, and nondiscriminatory treatment for participants on the platform and its users.

This forced divestiture of tech platforms' other business lines has been described as radical. Manne and Stapp claim it will turn the internet into your sewer service — mainly because Warren uses the word "utility" to describe regulated platforms.

Jeff Bezos didn't come up with the idea of owning a marketplace and using it to sell your own stuff at an unfair advantage against rivals. Reading Railroad, for example, became the largest company in the world by owning the rails that carried anthracite coal, as well as the coal mines along the route. Rival coal producers that wanted to use the lines got less favorable rates, fell behind, and got swallowed up by Reading Railroad.

Congress put a stop to it in 1906 by adopting the Hepburn Act, which prevented the railroads from carrying products that they owned. This forced the Reading Railroad to divest the P&R Coal and Iron Company, the subsidiary that owned the coal mines. Warren is merely following a long history of structural separation that began when Teddy Roosevelt was president.

Theater owners were not allowed to also produce and distribute films after the Supreme Court's Paramount decision in 1948. Television networks were prevented from owning the programming they ran in prime time, under the Financial Interest and Syndication, or "fin-syn," rules imposed by the Federal Communications Commission in 1970. In telecom, AT&T was heavily circumscribed and restricted to common-carrier telephone service, banning the company from capitalizing on innovations from Bell Labs and forcing compulsory licensing of those patents in 1956, which created the modern electronics industry. Banks were structurally separated between investment and deposit-taking commercial lines after the Glass-Steagall reforms. Rep. David Cicilline, D-R.I., the chair of the House Judiciary's antitrust subcommittee, has analogized a structural separation in tech as a Glass-Steagall type of rule.

These structural separations have widespread goals: diversity, financial stability, decentralization of power, and innovation. "We owe the internet to structural separation," said Harold Feld, a senior vice president with Public Knowledge, referring to the Carterfone decisions, where the FCC allowed people to connect their own devices, like a modem, to the telephone network. "Clearly this has a long and successful history in telecom."

Some of these restrictions, like those on banks or television stations, have been dismantled. And there are cases of companies selling products in a store while also owning the store: Kirkland products at Costco are ubiquitous, for example. But as Lina Khan, scholar and staffer for Cicilline's antitrust subcommittee, has pointed out, the key question is whether the platform, be it brick and mortar or digital, is creating a bottleneck by privileging its own products over rivals. And there's a lot of evidence that Amazon in particular does just that, reacting to high-selling products by creating a generic version, and down-ranking the competitor in its search. Because half of all e-commerce is sold on Amazon, competitors have few alternatives but to sell in what feels like a rigged marketplace.

India has already instituted a Warren-like rule to prevent e-commerce platforms from selling their own products on the platform. "We should go back and understand the wisdom of that kind of separation," said Peter Carstensen, a professor emeritus at the University of Wisconsin Law

School. “We would never want the interstate highway system to be owned by Walmart. It simplifies the market functions if you separate them out.”

Another benefit to structural separation is the relative ease of regulation. Instead of well-paid economists fighting it out over what constitutes anti-competitive conduct or restraint of trade, large companies simply can’t compete with rivals on their own platform, because of the threat of market power.

The Warren plan sets a rather arbitrary number of $25 billion in annual revenue as the dividing line for that power, a kind of substitute for the technocratic determination. This has angered critics: Andy Kessler at the Wall Street Journal denied that antitrust law has anything to do with bigness.

The idea that John Sherman, author of the Sherman Antitrust Act, was not concerned with bigness would come as news to Sherman, who once said, “If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life.” Warren’s campaign sees the $25 billion figure as a clean way to assist regulators with pinpointing market dominance. “It has the benefit of a clear rule,” said one senior campaign adviser, who was not authorized to speak on the record. “We should presume if a company with over $25 billion in revenue is operating a marketplace, it has power and leverage.”

While agnostic on the specific dividing number, Feld gave Warren’s team credit “for trying to come up with something that makes sense.” Others are not as thrilled about it. But their arguments often misconstrue the Warren plan.

Assuming the Worst

Ben Thompson, a former Apple and Microsoft analyst who writes about the business of technology, had one of the sharpest critiques of the Warren proposal, and it starts with denying Warren’s claim on the history of technology. Warren has credited the Microsoft trial for creating space for the modern tech giants to emerge, something Thompson mocks. “Bing was not even launched until 2009, eight years after the Microsoft case was settled. MSN Search, its predecessor, did launch in 1998, but with licensed search results from Inktomi and AltaVista; Microsoft didn’t launch its own web crawler until 2005.”

This view neglects the politics of the U.S. trial against Microsoft, which put a dominant company under pressure and wary of extending that dominance into the then-emerging web services arena. As Gary Reback, who represented Netscape against Microsoft in the 1990s, has often said, including to me in a 2017 interview, “The trial is the remedy.” By exposing Microsoft’s machinations to the nation, it made the company gun-shy to choke off competition, Reback argues.

“The only way to get to Google was the Microsoft browser,” he said. “Microsoft could have put up a big red sign saying this site is unsafe. It could have killed Google in the cradle, but didn’t. The reason why, and this is from Microsoft people, is they had this public trial. It wasn’t worth it as a company.”

Feld concurred that Microsoft’s behavior changed after the public spotlight of the trial, and the kind of aggressive actions to shut down competitors largely stopped. You can apply this to IBM’s antitrust issues in the 1970s and ’80s opening space for Apple, and AOL’s forced

interoperability of Instant Messenger in 2001 giving room to social media. “Big companies are sensitive to this stuff; after they’ve been burned, they do generally play it safe,” Feld said, noting that big cable hasn’t had such a spotlight and they managed to crush TiVo swiftly and completely. So while Thompson focuses on specific Microsoft business decisions, he ignores the political context.

Thompson also warns that applying the structural separation standard to Apple, as Warren confirmed in an interview at South by Southwest, would lead to smartphones shipped without any applications. “Was Apple breaking the law when they shipped the first iPhone with only first-party apps?” Thompson asks. “At what point did delivering an acceptable consumer experience out-of-the-box cross the line into abusing a dominant position? This argument may make sense in theory but it makes zero sense in reality.”

This argument also has zero bearing on what Warren’s talking about. Whether Apple is unfairly tying or bundling its own apps onto its phones at purchase is a question for existing antitrust laws — it was the question in the Microsoft case, in fact. “The ordinary rules apply in that case,” said the senior Warren adviser. “The key thing we’re talking about is the marketplace.”

Contrary to what critics have claimed, Apple would not have to divest from the App Store completely under Warren’s plan, nor would the security benefits of Apple managing what goes onto its phone wither away. Apple would merely be disallowed from selling its own apps next to competing ones. This would hardly destroy Apple, largely a phone and hardware manufacturer and not primarily an app-maker. It would allow competition on the platform.

Apple does have a legitimate antitrust problem with the App Store, as Thompson acknowledges. Spotify has complained to the European Union that Apple takes a 30 percent cut from all revenues from its iPhone app, while preventing it from emailing users directly or allowing upgrades. This indirectly benefits Apple Music, Spotify says. Apple has accused Spotify of using “misleading rhetoric” in its complaint.

Spotify wants changes to Apple’s conduct on the App Store — which is not only fair game for traditional antitrust that can identify anti-competitive impositions of market power, but is also part of Warren’s plan, which mandates fair and nondiscriminatory treatment to marketplace participants. And it shows how Warren is highlighting a consumer welfare issue: If Spotify has to absorb a 30 percent transfer of revenues to Apple for use of its iPhone customers, it likely has to raise prices, and it cannot offer services like upgrades directly.

Thompson and others run through all sorts of reasons why Warren’s proposal would degrade the consumer tech experience. This isn’t warranted from a proposal that simply says platform monopolies shouldn’t suck up all the benefits of every adjacent money stream related to the platform. The idea that a Google shorn of its advertising platform would revert to a nonfunctional “10 blue links” website, instead of a model where it can charge for supplier access but not control it entirely, is simply fearmongering.

The argument also suffers from a lack of imagination. Is Apple Music really the best the world can do? With a fair market, let’s see what innovation is possible.

THE UPSHOT OF these familiar points of attack is a kind of denialism, where the plain facts — a set of entrenched companies swallowing competition and profits — get pushed to the side.

Any effort to deal with this reality is termed the flip side of Trumpism, as the outlet owned by Amazon CEO Jeff Bezos put it recently.

What Warren's plan does is target the denialism. The vast majority of internet traffic flows through Amazon, Google, Facebook, or sites they control. The five biggest firms have acquired 436 companies in the past decade, nearly all without antitrust review. (Warren's plan, incidentally, would unwind several of these mergers.) The remaining holdouts, like Yelp, find themselves in the "kill zone," attacked by Big Tech to the point of irrelevance. Facebook has a subsidiary app that hunts for rivals gaining market share, so it can either purchase or crush them. The impact on competition, innovation, entrepreneurship, wages, and inequality is real.

There are certainly reasonable concerns to express about a short presidential campaign proposal, without legislative language, intended to start a discussion about the power and influence of one industry. What's unreasonable is outsourcing opinions on the matter to self-interested parties, distorting history, or leaping to unverifiable conclusions about the horrors of a post-regulatory world.

Warren's plan is the first to actually propose regulation that's specific to the tech sector. "This is why it's great to kickstart the debate," said Feld. "You couldn't write the piece of legislation tomorrow; real homework has to be done. But these are really the right lines of the debate."