

Written Testimony of Matt Stoller, Director of Research at the American Economic Liberties Project Before the Senate Standing Committee on Consumer Protection of the Legislature of the State of New York on the Twenty-First Century Antitrust Act (S-8700-A)

Thank you for inviting me to testify on this critical topic. My name is Matt Stoller, and I'm the Director of Research at the American Economic Liberties Project, and the author of the Simon and Schuster book "Goliath: The Hundred Year War Between Monopoly Power and Democracy."

"The liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself." New Yorker Franklin Delano Roosevelt said that in 1938, in a famous speech on curbing the power of monopolies.¹ Teddy Roosevelt, another New Yorker, once called the battle over corporate power the third crisis in American history, after the Revolution and the Civil War.²

Today, we are once again in a moment of crisis. The signs are unmistakable. For example, Jeff Bezos is now worth \$200 billion, even as 20% of small business have closed since the start of the pandemic.³ There are lab testing delays even as the CEO of one of America's largest lab testing companies announced more focus on mergers and acquisitions.⁴ In March, the New York Times reported on a possible shortage of ventilators, a result of a medical device giant buying a small nimble ventilator maker and killing its product line.⁵ Mark Zuckerberg, whose algorithms tear us apart by promoting conspiracy theories so he can sell more advertising, has decided he will not allow political ads the week before the election.⁶ Once again he makes it clear that the Federal Election Commission is irrelevant next to the Facebook Election Commission.

62% of Americans believe there needs to be significant changes in the fundamental design and structure of American government. 71% of Americans believe that big corporations have too

¹ "Message to Congress on Curbing Monopolies," Franklin Delano Roosevelt, April 29, 1938.

<https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies>

² "From the Archives: President Teddy Roosevelt's New Nationalism Speech," August 31, 1910. Obama White House website archive: <https://obamawhitehouse.archives.gov/blog/2011/12/06/archives-president-teddy-roosevelts-new-nationalism-speech#:~:text=From%20the%20Archives%3A%20President%20Teddy%20Roosevelt's%20New%20Nationalism%20Speech,December%206%2C%202011&text=On%20August%2031%2C%201910%2C%20President,protections%20for%20businesses%20in%20government>.

³ Ben Casselman, "Small-Business Failures Loom as Federal Aid Dries Up," *The New York Times*, September 1, 2020 <https://www.nytimes.com/2020/09/01/business/economy/small-businesses-coronavirus.html>

⁴ Olivia Webb, "Quest, LabCorp, and slow COVID-19 results," *Acute Condition*, August 19, 2020, <https://acute.substack.com/p/quest-labcorp-and-slow-covid-19-results>

⁵ Nicholas Kulish, Sarah Kliff and Jessica Silver-Greenberg, "The U.S. Tried to Build a New Fleet of Ventilators. The Mission Failed." *The New York Times*, April 20, 2020. <https://www.nytimes.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html>

⁶ Jeff Horwitz, "Facebook to Limit Political Ads Week Before Election, Label Premature Calls," *The Wall Street Journal*, September 3, 2020 <https://www.wsj.com/articles/facebook-to-limit-political-ads-week-before-election-label-premature-calls-11599130800>

much power over their families and communities, while 88% believe that big corporations have too much power over politicians.⁷

The root of this problem is not in capitalism or disagreements over creed, but in monopoly.

Over the last two decades, 75% of U.S. industries have experienced an increase in concentration levels. Monopolization is happening in big markets, like search engines, online commerce, airlines, seeds and chemicals, and social networks. It's happening in small markets as well, in hospitals, in syringes, portable toilets, prison phone services, mixed martial arts, mail sorting software, in web registration, in mobile homes, and even in cheerleading, where Bain Capital's Varsity Brands organizes nearly all competitions for amateur athletes and controls apparel sales. There are aspiring monopolists in every nook and cranny of the health care system.

Still, why should we care about monopolization?

The way we structure markets largely determines how wealth and power move through society. Most of the products and services we buy, sell, or make are bought or sold through markets and corporations. When we concentrate our corporations into a small number of powerful institutions and close off our markets, it creates a dysfunctional society.

Corporation concentration is upstream from a whole host of social problems that we ordinarily look at in isolation. Some of these include income inequality, low wage growth, wealth inequality, regional inequality, political corruption, overpriced and shoddy health care, geographic inequality, reduced small business formation, less innovation, less productivity, less social resilience in the face of shocks like pandemics and natural disasters, weaker communities, and the death of the free press.

Over the last five years, researchers have begun identifying and measuring some of these problems. Here's some of what they found:

- Corporate consolidation costs the average American household \$5,000 a year in lost purchasing power (Philippon, 2019).⁸
- Median annual compensation—now only \$33,000—would be more than \$10,000 higher if employers were less concentrated (Harvard Law Review, 2018).⁹
- The more concentrated the industry, the smaller share of the profits workers receive (Journal of Finance, 2020; Quarterly Journal of Economics, 2019).¹⁰

⁷ "In Views of U.S. Democracy, Widening Partisan Divides Over Freedom to Peacefully Protest" Pew Research Center, September 2, 2020. <https://www.pewresearch.org/politics/2020/09/02/in-views-of-u-s-democracy-widening-partisan-divides-over-freedom-to-peacefully-protest/>

Dave Dayen, "Attacking Monopoly Power Can Be Stunningly Good Politics, Survey Finds," *The Intercept* November 28, 2018. <https://theintercept.com/2018/11/28/monopoly-power-corporate-concentration/>

⁸ Thomas Philippon, *The Great Reversal How America Gave Up on Free Markets*, Belknap Press. 2019.

⁹ Eric A. Posner, Glen Weyl & Suresh Naidu, "Antitrust Remedies for Labor Market Power," 132 *Harvard Law Review* 536, <https://harvardlawreview.org/2018/12/antitrust-remedies-for-labor-market-power/>

¹⁰ Simcha Barkai, "Declining Labor and Capital Shares," *The Journal of Finance*, Volume 75, Issue 5 October 2020: <https://onlinelibrary.wiley.com/doi/full/10.1111/jofi.12909>

- During the 2010 to 2014 recovery, the creation of net new businesses in [just five metro areas](#) was equal to that in the rest of America combined. This concentration of new investment is likely a function of concentrations of economic power (Economic Innovation Group, 2017).¹¹
- America's start-up rate [has collapsed, falling by half](#) since the 1970s (Economic Innovation Group, 2017; Brookings Institution, 2014).¹²
- Concentrated hospital markets—which face less competition on quality and innovation—have been associated with significantly [higher mortality rates](#) and [substantially worse](#) patient outcomes (Martin Gaynor before the House Energy and Commerce Committee, 2018; Health Affairs, 2017).¹³
- Google and Facebook have monopolized digital advertising, harvesting [nearly 60 percent](#) of U.S. advertising revenue, decimating newspapers, magazines, and other outlets even before the coronavirus pandemic (PwC, 2019). Roughly [1,800 local newspapers](#) have disappeared in America since 2004 (UNC, 2018).¹⁴
- There are [fewer](#) startups in states where a smaller number of companies dominate (Brookings Institution, 2014).

What happened? How did we allow such a crisis to emerge? And what can we do about it?

From the Revolutionary War until the 1970s, Americans kept a tight lid on monopolies. New York state and New Yorkers often led the way. The New York Banking Act of 1838 limited the special privileges that lawmakers lavished on their friends by allowing freer bank chartering. The New York Telegraph Act in 1848 was designed to foster competition in telecommunications by allowing free chartering of telegraph corporations; it also allowed journalists special rights to transmit “intelligence” of “general and public interest,” thus showing the importance New York officials placed on a free and educated citizenry.¹⁵

As President, New Yorker Teddy Roosevelt pioneered an aggressive use of the Sherman Act. As Governor of New York, Franklin Delano Roosevelt fought the Morgan utility monopolies by ensuring the waters of the St. Lawrence river would be used for the public. As President, he worked with New Yorker Robert Jackson, who resurrected the Department of Justice Antitrust

David Autor & David Dorn & Lawrence F Katz & Christina Patterson & John Van Reenen, 2020. "The Fall of the Labor Share and the Rise of Superstar Firms*," *The Quarterly Journal of Economics*, vol 135(2), pages 645-709

¹¹ Dynamism in Retreat Consequences for Regions, Markets, and Workers, Economic Innovation Group, 2017

¹² Ian Hathaway and Robert E. Litan. “Declining Business Dynamism in the United States: A Look at States and Metros.” The Brookings Institution, May 2014. Dynamism in Retreat Consequences for Regions, Markets, and Workers, Economic Innovation Group, 2017

¹³ Fulton B. (2017). Healthcare market concentration trends in the United States: Evidence and policy responses. *Health Affairs*, 36(9), 1530–1538.

Martin Gaynor, “Examining the Impact of Health Care Consolidation,” Statement before the *Committee on Energy and Commerce Oversight and Investigations Subcommittee U.S. House of Representatives* February 14, 2018

¹⁴ Sheila Dang, “Google, Facebook have tight grip on growing U.S. online ad market: report,” *Reuters*, June 5, 2019

Penelope Muse Abernathy, “The Expanding News Desert” *The Center for Innovation and Sustainability in Local Media, School of Media and Journalism University of North Carolina at Chapel Hill*. 2018.

<https://www.usnewsdeserts.com/reports/expanding-news-desert/>

¹⁵ Richard John, *Network Nation: Inventing American Telecommunications*. Cambridge: Belknap Press of Harvard University Press. 2010

Division in 1938. The great New York Congressman Emanuel Celler led the anti-monopoly subcommittee in Congress in the 1950s and fought to hold back banking power in New York state.¹⁶

Americans controlled monopolies because we understood how dangerous they are. In fact, the European competition authorities drew their legal framework from the New Dealers after World War II. In a sense, the abuse of dominance standard is an American notion, making a roundtrip tour through Europe and landing back home in New York.¹⁷

But in the 1970s, we changed our philosophy of competition. A group of conservative scholars from the law and economics movement, centered around Robert Bork, made the case that efficiency in the form of low consumer prices, as opposed to actual competition in the market, was what mattered. While statute didn't change, the courts and enforcers accepted this ludicrous premise. Big was no longer bad, and economists warped our understanding such that dominance and bullying were no longer violations of the law, but efficiencies.

From the 1980s onward, corporations consolidated in nearly every area of commerce, in manufacturing, agriculture, media, banks, chain stores, technology, telecommunications, and defense. Today monopolization is now simply a business model. Here's a quote from a Wharton blog on private equity: "A consolidation play looks like an easy winner in the private equity world. Roll up a number of companies in the same industry and you've got scale and pricing power, among other good things." Nearly seven out of ten acquisitions made by a private equity firm are add-ons to something they already bought in the same industry, which is to say, the business model is to monopolization.¹⁸

All of this behavior should be illegal, but today, antitrust is almost a dead letter. To be sure, there are some important victories. The New York AG's win over Allergan prevented the company from withdrawing its Alzheimer drug Namenda from the market so it could overcharge patients. Attorney General James is investigating Google and Facebook. She is also continuing to press her case against Martin Shkreli for blocking competitors from selling medicine comparable to Daraprin to treat diseases from parasites. Shkreli raised the price of the life-saving drug by 4000% in 2015 after buying the product line.

And yet, while it's good there is a case against Shkreli, it is instructive to look at what has happened. Such a case should be easy and quick. Shkreli himself is in jail, and he is obviously engaged in predatory behavior. But the case has dragged out for years.

¹⁶ *Goliath: The 100-Year War Between Monopoly Power and Democracy*. Matt Stoller. Simon + Schuster Incorporated, 2019

¹⁷ Wyatt Wells, *Antitrust and the Formation of the Postwar World* Wyatt Wells Columbia University Press, 2003.

¹⁸ Statement of Commissioner Rohit Chopra, Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress Commission File No. P110014 July 8, 2020

https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf The Consolidation Play and the Need for Due Diligence, March 29, 2010, *Knowledge @ Wharton*.

<https://kw.wharton.upenn.edu/private-equity/seminar/the-consolidation-play-and-the-need-for-due-diligence/>

Problems with monopolization are even more important considering the weak status of Federal antitrust enforcement. The Trump administration has overseen a merger wave without much action, and Trump's Department of Justice has not brought a meaningful monopolization claim. The Obama administration Antitrust Division, similarly, did not bring an important monopolization claim. Such inaction is partially a result of law, and partially a result of will. By way of contrast, in the late 1930s, Antitrust Division head Thurman Arnold systemically restructure American industry with 1,375 complaints in 40 different industries.

Regardless, it falls to the states to act, as it often does in American history. And this legislation is the second great initiative that New York has undertaken to stop the modern wave of monopolization. The first great act was 19 months ago, when courageous political leaders blocked Amazon's attempt to extract unfair subsidies out of New York City and New York state. Amazon didn't need the money, and it certainly doesn't need the money now. You said no to Jeff Bezos quest for monopoly power, and that is a start.

The Twenty-First Century Antitrust tightens standards around the abuse of corporate power, making it clear New Yorkers are no longer trapped by bad Sherman Act precedent. Right now, to the extent there are standards, enforcers must show both that a company is a monopoly, and that it is unfairly using its position to maintain its monopoly with anti-competitive conduct. Merely showing abuse with direct evidence is not enough. They must often hire expensive economics experts proving a company is a monopoly, through indirect market definitions and market shares.

To make an analogy, it is as if to prove a current monopolization case, you have to show that not only is the mob boss stealing from people in the neighborhood, but also that he is the only mob boss stealing in the neighborhood, and that he is burning down the offices of his competitors. It's a much higher burden of proof, and beside the point.

Behaviors that are difficult to tackle under current case law might be reachable through an abuse of dominance standard. These include self-preferencing, predatory pricing, leveraging dominance from one market into another, exclusionary conduct, refusals to deal, excessive pricing, predatory surveillance, and bundling. The bill could be clarified with a statement that existing Sherman Act precedent no longer applies. To give guidance to judges, legislators could define what constitutes an abuse through statutory language or a delegation of regulatory authority. I would also encourage more assertive authority to block mergers.

Regardless, this bill is an important statement that New York's legislature rejects Bork-inspired antitrust case law that has crippled Sherman Act enforcement and expects action against monopolies under the Donnelly Act. It is furthermore a model for other states and Congress to follow. This bill also authorizes class action lawsuits pursuant to New York's antitrust statute, which is critical because it means that the people themselves can take action. And it increases criminal penalties for abusive anti-competitive activities.

The last time our markets were this concentrated, officials all over the country acted. We created administrative agencies at a state, local, and Federal level, everything from securities regulators to public utility boards. Most importantly, legislatures passed new laws and enforcers enforced. We will need this level of energy and commitment once again. I encourage you to pass this bill.