Competition and the Small Business Landscape

Fair Competition and a Level Playing Field

Testimony before the:

U.S. House of Representatives

Committee on Small Business

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March 1, 2022

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INDEPENDENT BUSINESS IN AMERICA TODAY

The Declaration of 1776 was not simply about the independence of nation from nation. It was also about the independence of every individual person from all forms of coercive control. From the first, the American people understood that an essential measure of such independence was liberty to work one's own land, one's own ideas, one's own business, ones own labor, without interference from people with more money or more power.

This vision was not foremost an economic vision, as we understand the word today. Nor was it foremost a material vision. Rather it was a vision fundamentally political. It was based on the idea that only someone who is fully independent can be trusted within political debate, that to be fully in control of one's own mind and one's own voice requires being in control of one's own means. As W.E.B Du Bois put it in his foundational work Black Reconstruction, America was a "vision of democratic self-government: the domination of political life by the intelligent decision of free and self sustaining men."[1]

Thus, ever since, the American people have fought two great battles. The first was to establish systems of laws and rules – what we can call The American System of Liberty - to protect the property of the individual from all forms of predation. This meant building and developing systems of open markets where every individual was free to succeed based on their own efforts. The second was to extend the protections of this America System of Liberty to every member of our society, no matter the color of their skin, gender, religious belief, or sexual orientation.[2]

James Madison, in a 1792 essay titled simply "Property," made clear what the System of Liberty had to address. "That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called."

Almost a century later, Senator John Sherman, in a speech defending his bill to establish federal antitrust law, as a main part of this System of Liberty, echoed Madison in even stronger tones. "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty, and lies at the foundation of the equality of all rights and privileges."[3]

In 1980, when the American people elected Ronald Reagan, America was a nation of giant industrial corporations – IBM, Boeing, General Electric, United Technologies, General Motors, Alcoa. And the sophisticated material goods these corporations manufactured – and the mass production techniques they had mastered – made America the most powerful nation in the world. Yet in every sector of the economy where concentration of capital and capacity was not necessary for such forms of production, America remained very much a nation of independent businesses and independent farms, of small businesses and small farms. Two centuries after the founding, almost 100 years after Congress established federal antitrust law, most retail, farming, services, light manufacturing, and publishing remained family enterprises.

But in the first months of his administration, President Reagan introduced a new set of political economic goals. No longer would the aim be to protect and expand human liberty and democracy. Rather the aim was now to be to deliver more material things. And to this end, his administration took steps to overturn all the laws and rules Americans had put in place since the founding to protect individual property and individual liberty within the political economy.

The result? If we are honest, the result has been nothing less than a social and political revolution, which played out in the expropriation of the businesses and farms of millions of American families, and a crushing of individual liberty across vast swaths of our economy and society.

The result, if we are honest, has been the erection of systems of feudal control and private taxation over millions more independent businesspeople who have yet to be driven entirely off their properties. Under the rule of Amazon, the rule of Google, the rule of Facebook, the rule of Uber, millions of America's most energetic and creative citizens wake every day to find themselves living in a company town, forced to borrow from the company bank, forced to buy from the company store, forced to pay tax to the company treasury.[4]

Their only alternative? To walk away, with their debt.

The result is a catastrophe for the American independent businessperson, the American entrepreneur. It is also a catastrophe for economic stability, national security, the free press and free debate, racial and gender equity, innovation, and even our ability to see and process the basic information about how the world works, and the threats we must overcome if we are to survive.

The result is also a catastrophe for democracy. America was founded on the promise of rough equality of opportunity and voice for every human being. What we see today is an ever more extreme concentration of wealth and control, and a pyramiding of power to a point where even many of the strutting plutocrats of a decade ago now look over their shoulders in fear.

In 1913, President Wilson defined domestic tyranny as "the conduct of our affairs and the shaping of our legislation in the interest of special bodies of capital and those who organize their use."[5] By that definition, the American people live today under a "tyranny" of capital. Of no one is this more true than America's entrepreneurs.

In my testimony today, I will make three main points:

First, traditional antimonopoly law and policy is the foundation for all independent business.

Second, the "consumer welfare" competition philosophy, by overturning traditional antimonopoly law, cleared the way for the destruction of America's independent businesses.

Third, the political, social, and economic effects of this concentration of power and control threaten our democracy, individual liberty, prosperity, and security.

I will then conclude by listing a few key actions we can take today to begin to address the crisis.

ANTIMONOPOLY LAW IS THE FOUNDATION OF INDEPENDENT BUSINESS

Our first task is to remember what exactly is antitrust law, or more broadly, what exactly is antimonopoly (or competition) policy. For 40 years, we have been taught that antimonopoly policy is a purely economic issue, and that the main goal is to promote efficiency in the manufacture of goods and delivery of services. We have been taught that the only way to tell whether a particular concentration of corporate power is good or bad is whether it will result in lower prices, as measured by carefully trained economists using scientific methods.

The price we pay for our food, shelter, clothing, transportation, and entertainment are indeed very important. I will get back to that subject shortly. But the idea that the only purpose of antimonopoly policy is to drive prices down is a grotesque myth. It is a myth manufactured for the precise purpose of overthrowing the American System of Liberty, which is the true foundation of all independent business and entrepreneurship.

Antimonopoly policy is the full suite of tools that people use to engineer markets and corporations to structure power within society. The American people developed these tools over the course of more than two centuries. They did so based on an honest recognition of one of the essential truths of human society – that competition itself is inevitable and that political economics is the art of governing how people compete with, and exercise power upon, one another. From the first, the tools were designed to achieve particular political, social, and economic ends, including the liberty and wellbeing of the individual, the ability of citizens to make wise decisions within democratic institutions, and the security and prosperity of the nation.

What kind of society do we want? What kind of communities do we wish to live in? What kind of citizens do we wish to be? What kind of world do we intend to build? Once we have answered those questions, antimonopoly policy provides us with the means to achieve our ends.

In addition to the Declaration, with its essential challenge to ensure the rough equality of every American, two other documents established the foundations for American antimonopolism, or rather the American System of Liberty. One was the Constitution. With its intricate system of checks and balances designed to break all concentrations of power, the Constitution is the single most important antimonopoly document in human history.

The other was the Northwest Ordinance, passed in 1789 to guide the development of the territories held in common by the people of the original 13 states. This document, passed by the first Congress and signed into law by America's first president, George Washington, makes clear exactly the nature of the society Americans intended to build. The Ordinance was designed to break all concentrations of private power in the new society. It did so by carefully dividing the land into family-sized farms, by prohibiting large land holdings and development corporations, by promoting free education, and by outlawing slavery and guaranteeing the vote to every adult male, no matter the color of his skin, no matter whether he had ever been enslaved.[6]

Upon this broad antimonopoly foundation provided by the new federal government, Americans then added a complex body of practical antimonopoly regulation using their state and local governments. This included extensive regulation of the local marketplace.[7] And it included direct regulation of the corporation, through charters approved by the people working through their state legislatures. Indeed, for the first hundred years in America, a time of truly astounding economic growth and innovation, nothing like today's corporations existed. As the historian Henry Adams himself put it in 1879, "The people of the United States have learned… that they hold all corporations at their mercy."[8]

During this early period, the American people also routinely used Congress to establish rules to address the particular challenges posed by the rise of new technologies and new concentrations of capital, passing laws that directly aimed to break the power of big banks and powerful financiers, to protect against the trading power of mercantilist nations like Great Britain and France, and to meet the challenges posed by new communications technologies such as the telegraph.

In the aftermath of the Civil War and Reconstruction, powerful actors in America managed for a period to disrupt large portions of this carefully structured system of power. They did so by exploiting the power of the new railroad monopolies and the wealth that had been concentrated on Wall Street during the Civil War. We called these people Robber Barons, because they were so good at exploiting monopolistic chokepoints in the economy to manipulate, extort, and often simply to take other peoples properties and businesses.

But faced with this new threat, the American people set out once again to establish a rule of law fit for the independent citizen. Most important, in 1887, they passed the Interstate Commerce Act, which banned railways from discriminating between individuals, companies, and towns in the provision of basic services. This act, by requiring the monopolist to provide the same terms and same prices to all comers, ensured that even the most powerful and essential of private network monopolies could not be leveraged to undermine democracy in America.

Three years later, the American people acted again. They did so by passing the Sherman Antitrust Act to address the power of corporations such as the Standard Oil Company and Carnegie Steel, which had exploited the power of the railroad corporations to monopolize control over entire swaths of the American economy.

Neither the Interstate Commerce Act nor the Sherman Antitrust Act proved entirely sufficient to the task. Time and again during these years, those who had captured power and prominence used their money and their sway over the judiciary to rebuild their arbitrary monopolistic powers. But time and again the American people, acting through Congress, acted to update the American System of Liberty for the new era. One way they did so was by passing a long list of additional laws to reinforce America's federal antimonopoly regime. These included the Mann-Elkins Act of 1910, the Federal Reserve Act of 1913, the Revenue Act of 1913, the Clayton Antitrust Act of 1914, the Federal Trade Commission Act of 1914, the Glass-Steagall Act of 1933, the Public Utility Holding Company

Act of 1935, the Robinson-Patman Antitrust Act of 1936, the Miller-Tydings Act of 1937, and the Celler-Kefauver Act of 1950.

And these laws worked, as intended.

Beginning in the early years of the 20th century, Americans succeeded in using these laws to restore the traditional democratic balances of the U.S. political economy. They did so by separating the economy into three distinct realms of antimonopoly policy, each governed by specific limits on the size and behavior of corporations.

In the case of corporations that provide essential goods and services – such as transportation, communications, and power – the core rule was an absolute prohibition against discrimination in pricing and terms of service. The aim was to ensure that the people who controlled these corporations focused on serving their fellow citizens, not on taking advantage of arbitrary power to manipulate and exploit them.

In the case of industrial firms engaged in applying science to manufacturing, the core rule was that there never be fewer than four corporations competing in any industry, be it the manufacturing of chemicals, metals, automobiles, or, later, semiconductors. The aim was to allow corporations to be of a sufficient scale and scope to master the challenges of manufacturing quality goods for every member of society, but also to enforce sufficient competition to drive true efficiency and innovation.

In the case of farming, retail, light manufacturing, and services, the core rule was to protect the independent businessperson and farmer from Wall Street predators armed with chain stores, processing monopolies, and banks.

The result was a phenomenal accomplishment. Even as Americans made their nation the most prosperous, innovative, and powerful in the world, they also made it the most free and equal.

To understand just how effectively Americans had protected their businesses and farms from concentrated power, consider two facts from the years just before Reagan took power. First, that the average working family farm in America was hardly any larger than the 160-acre limit established two centuries earlier, by the Northwest Ordinance.[9] Second, that the Supreme Court held it illegal for any one grocery chain to hold more than about 5% of the market in a single region.[10]

In other words, when Ronald Reagan first walked into the White House in January 1981, the American businessperson was still truly independent.

THE OVERTHROW OF ANTIMONOPOLY LAW IN THE 1980s[11]

In his 1978 book The Antitrust Paradox, Yale law professor Robert Bork made a long, intentionally arcane, often contradictory, and historically erroneous argument. But what would change America, and the world, was a four-point assertion early on in the text.

First, Bork held that "history" teaches that the sole goal of antimonopoly law is to promote the "welfare" of the "consumer."

Second, the one clear means to achieve this end of consumer welfare is to promote "productive efficiency" that results in a lowering of the price of goods and services.

Third, antitrust law, like economics, is "a science."

Fourth, the only way to understand how to enforce the law "with logical rigor" is to use economic "science" to understand the purpose of the law and to judge behaviors.[12]

A more radical restatement of American antimonopoly law, and of the System of Liberty put into place at the founding, is hard to imagine.

For two centuries, Americans had used a vision of the liberty and independence of the citizen to guide their use of antimonopoly law. The result, as we have seen, was a wide and systematic distribution of power where possible, and where concentration was necessary, a reining in and neutralization of power.

Bork's line of reasoning now led in the exact opposite direction. The logic of consumerism, after all, goes like this: What do consumers want? Bigger piles of stuff. How do we get bigger piles of stuff? More efficient production. How do we produce more efficiently? Bigger manufacturers, bigger distributors, and bigger retailers. Who, ultimately, is the best friend of the consumer? The big monopolist.

Bork was anything but alone in promoting such a radical new approach to political economics in the 1970s. Richard Posner, then a professor of law at Stanford, promoted an even more revolutionary rethinking of the entire concept of justice in America, based on the "the application of economics to law." Judges, Posner wrote in his book Law and Economics, would deliver better verdicts if the were "led to use efficiency to guide decision."

During the first two centuries in America, the idea that any legal scholar would attempt to reorient the law away from justice and toward a pursuit of efficiency would have been unthinkable. The most pro-monopolistic and reactionary of judges in the late 19th and early 20th centuries always couched their thinking in terms of competing claims to liberty, to competing forms of rights. But in 1981, President Reagan appointed Posner to the Seventh Circuit Court of Appeals, and in early 1982 he appointed Bork to the DC Circuit. And his Department of Justice used Bork's reasoning in The Antitrust Paradox to reorient America's antimonopoly regime upon the goal of efficiency, as measured by the price of a good or service.

They did so by rewriting the "guidelines" that the DOJ and other antitrust enforcement agencies rely on to evaluate what corporate structures and behaviors to prosecute and what market structures to create.

The most recent guidelines published before Reagan took office dated to 1968, the last year of the administration of President Lyndon Johnson. According to these guidelines, the main goal of antitrust enforcement was the "identification and prevention of those mergers which alter market structure in ways likely now or eventually to encourage or permit non-competitive conduct." And what was acceptable market structure? According to the Justice Department in 1968, it was that the top four companies within a market could together control no more than 75 percent of that market. The 1968 guidelines then made absolutely clear that the U.S. government would challenge any merger whatsoever if pursued by any corporation that already controlled 25 percent of any market. Further, the 1968 guidelines emphasized that this simple rule would hold fast even if the corporations pursuing the merger could absolutely prove that the deal would result in efficiencies in the production and distribution of goods and services. On this issue, the guidelines were blunt. "[T]he Department will not accept" any such efficiency argument "as a justification for an acquisition.

Reagan administration officials published new guidelines in 1982 then again in 1984. At a glance, the guidelines don't read all that differently than those published in 1968. But there were two profound changes. First, the prime goal of enforcement was now the promotion of "efficiencies" within the economy. Or as the 1984 guidelines put it, "The primary benefit of mergers to the economy is their efficiency-enhancing potential." Therefore, the Justice Department would henceforth "allow firms to achieve available efficiencies through mergers without interference."

Second, the Justice Department now intended to measure such efficiencies – and in the case of a proposed merger, potential efficiencies – by looking only at how different structures and behaviors might affect the price of the good or service being produced. In the 1968 guidelines, the words "price" and "pricing" appear eight times. In the 1984 guidelines, Reagan administration officials wrote the words "price" and "pricing" 117 times.

From this moment on, as long as executives could make the most rudimentary case that a merger would result in efficiencies that might eventually lower the price of some good or service, they had a license to consolidate, no matter what the political or social effects of the deal, no matter how much power was concentrated over buyers, sellers, workers, engineers, scientists, communities, or taxpayers.

Bork, Posner, and the other radicals within the Reagan Administration did not stop with overturning America's two-century-old limits on concentration of private power and the size and structure of the private corporation. They also targeted something even more important – namely the ancient requirement that the monopolist treat all people the same, and provide all customers with the same service on the same terms, in ways that prevent all discrimination and manipulation of people, companies, and communities.

Here again, it was Bork, in The Antitrust Paradox, who made the key arguments in favor of changes that would clear the way for the radical concentration not merely of power within the political economy but also of direct control over the lives and livelihoods of individual citizens and businesses. Bork began his attack on the laws designed to prevent price discrimination acknowledging that Americans had always considered the issue to be of fundamental importance. He then proceeded to dismiss the question based on nothing more than personal whim. "[I]t seems to me… that antitrust policy would do well to ignore price discrimination."

A few pages later, Bork went much further and delivered a straightforward defense of price discrimination from the point of view of the seller. "The basic theory of price discrimination is quite simple," he wrote. "When the demand elasticities of customers are different, no single price can extract the maximum return from each. If they can be segregated . . . the monopolist can charge them different prices and so extract the maximum return from each class."

In other words, price discrimination was good precisely because it empowered the monopolist to exploit and manipulate whatever individual person or individual business had fallen under its direct control.

Thus, in a few strokes in the early 1980s, was the rule of law overthrown in American political economics. Thus, in a few strokes in the early 1980s, was the concentration of absolute power and control made possible.

Both Bork and Posner fully understood what they had achieved.

In 1986, Posner wrote of the "outrage" of "traditional legal scholars" who found his ideas to be "repulsive" and who believed that "it is inconceivable that the legal system would… embrace them." Yet by 1986 Posner also understood that he and Bork had won, and that they had given birth to a "movement" that had overturned the basic "methodological" approaches of the American justice system. And indeed, in place of the will of the American people, acting through Congress, control over the most fundamental questions of how to organize our society and democracy had been turned over to a tiny clique of "professional" economists, the most successful of whom were in the direct pay of the corporations they were regulating.

Bork, more simply, in 1996 wrote that "what has happened to antitrust amounts to a revolution."

Yet from 1981 until the election of President Biden, the great majority of Americans have gone along with no idea that such a far-reaching coup had been staged at the very heart of our democracy. And the simple reason is that every administration since Reagan, both Democratic and Republican, have largely or entirely embraced the Bork-Posner ideology of monopoly.

AMERICA'S MONOPOLY CRISIS AND THE DESTRUCTION OF SMALL BUSINESS

Why are there fewer good jobs than 40 years ago? And why do almost all jobs pay less than they did back then, even after the disruptions caused by COVID-19?

Why must Americans drive farther to get to a hospital? And why does routine care cost so much more than a few years ago?

Why do drugs and medical devices cost so much? And why are there so many shortages, even of the most basic forms of drugs and equipment like facemasks?

Why is rent in America so high? And why will your mortgage debt never go away?

Why did the stores on your Main Street close, even before the pandemic? And why are your public schools out of money?

Why are so many American farmers leaving the land? And why are the prices even of the most basic of food items skyrocketing?

Why did so many American factories move to China? And why are the international transportation systems so broken?

Why are our newspapers firing all their reporters? And why is our public debate driven by so much misinformation and disinformation and downright lies?

Why is it so hard to put solar panels on our roofs and why are their no recharging stations for our electric cars?

We are so many of our family members and friends dying from diabetes and heroin and cirrhosis?

Why has it become so hard to make money as a musician, author, filmmaker?

Why is it so hard to get the water utility and gas utility and electrical utility to answer your phone calls or fix your service or adjust your bill?

Why is it so expensive to buy a car or even a door for your garage?

In every instance, the answer is simple. A monopolist has captured control of something you need. And they mean to charge you more for less, to deny you service entirely, and to force you to buy things you don't need, sometimes even what might kill you.

Every one of these crises is the direct result of the overthrow of the American System of Liberty, and of the antimonopoly laws and policies designed to achieve these aims.

No one has suffered more from this extreme concentration of power and control than American independent businesses.

Consider a few facts.

Between 1979 and 2009, the per capita rate at which Americans created new businesses fell by half.[13] And it has continued to fall since.

In the 20 years up to 2007, the number of hog farmers declined some 70 percent, and the number has continued to decline since then.[14] Just since 2003, America has lost more than half its dairy farms.[15]

Walmart now captures more than 50 percent of all grocery sales in at least 43 metropolitan areas in the United States.[16]

Between 1982 and 2017, the number of small retailers fell by half, while their share of overall retail business fell even further.[17] This is true for just about every category of shop. The number of independent pharmacies in America, for instance, declined by half since 1980, even while the U.S. population was growing by almost half.[18]

We can see the effects of this concentration of power over commerce in the concentration of wealth in the hands of a few. For two centuries, Americans aimed to distribute control over farming and business as a way to distribute opportunity and wealth. Today, 40 years after the embrace of the consumer welfare ideology of monopoly, we see the exact opposite. Consider, for instance, the immense amount of power now held by two families –

the Waltons and the Bezos. In 1980, it was all but illegal in America for a chain to own more than 100 stores. Today Walmart alone owns more than 5,000 giant stores. And the Walton family today is richer than 150 million Americans put together. The Bezos family is richer yet, and their wealth is growing faster than the Waltons ever imagined.

The problem affects more than just long established enterprises. The consolidation of power and control is even more dramatic in new sectors of the economy, such as online businesses. Developers of new online apps, for instance, must operate within systems that are almost entirely controlled, and in which every one aspect of their businesses is both monitored and regulated by the corporations that are supposed provide them with the basic services they need.[19]

In a growing number of instances, these corporations use the data they collect on their captive clients to target their clients' businesses. Amazon, for instance, routinely goes into direct competition with companies that depend on it, as this Wall Street Journal article makes clear.[20]

The result is a growing enfeudalization of large proportions of America's population of independent businesses, and the imposition of a regime of fear, in which entrepreneurs dare not speak out in public lest Amazon and the other platforms retaliate, by squeezing them that much harder, or by simply disappearing them from their sites.[21]

As I testified in the Senate last March, what we see today within the political economy of America is the rise of automated, algorithmic-powered autocracy.[22]

In 1935, Du Bois described the concentrated wealth and control of the plutocrats thus: "It was a new rule of associated and federated monarchs of industry and finance wielding a vaster and more despotic power than European kings and nobles ever held."

Indeed. Yet today's bosses control powers that no Gilded Age plutocrat could ever dream of controlling. Google, Amazon, Facebook have harnessed all the power of modern computing and automated intelligence behind business models designed for pure, ruthless, predation.

REBUILDING THE AMERICAN SYSTEM OF LIBERTY AND PROSPERITY

The good news is that the American people have finally awakened to these threats. And they have begun to take steps to deal with the crisis of monopoly in America.

President Joe Biden and his administration have taken especially important steps. This includes naming a set of people who fully understand the problem to run the Federal Trade Commission, the Antitrust Division of the Department of Justice, and other agencies. And it includes a dramatic renunciation of the consumer welfare theory of monopoly, and the restoration the thinking that for two centuries served as the foundation for the American System of Liberty.

Congress too has taken dramatic action, and it has done so in bipartisan fashion, pushing forward important new legislation in both the House and the Senate. So too states across the nation. We see both new legislation, such as an important antitrust reform bill in New York. And we see new enforcement actions, including multi-state bipartisan actions against Google, Facebook, and other corporations.

But all of this is just a start. Given the magnitude of the crisis and the pressing nature of the threats to our democracy, liberty, prosperity, and security, it is vital that Congress move much more swiftly and aggressively. This must include voting a large increase in funding for the law enforcement agencies. And it must include passing new laws that will make it easier for the enforcers to protect the fundamental liberties and rights of the American people.[23]

This hearing is a vitally important demonstration of the fact that Congress has awakened to the moment. As the members of this committee continue with your work, it is essential to keep in mind the questions that must shape all of our decisions about how to shape and use our antimonopoly laws. These are, foremost, what kind of society do we want to live in? What sorts of security do we need? What kind of citizens do we want to be? What sort of world do we want to build?

NOTES

[1] W. E. B. Du Bois, Black Reconstruction in America, 1860–1880. New York: Atheneum, 1992.
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[3] "Trusts, Speech of Hon. John Sherman of Ohio, Delivered in the Senate of the United States," Friday, March 21, 1890.
[4] https://ilsr.org/fact-sheet-how-breaking-up-amazon-can-empower-small-business/
[5] Wilson, Woodrow. The New Freedom: A Call for the Emancipation of the Generous Energies of a People. New York: Doubleday, 1913.
[6] Lynn, Liberty.
[7] The marketplace in early America was "the most visible, potent expression of public control over buying and selling," Novak, William. The People's Welfare. Chapel Hill: University of North Carolina Press, 1996.
[8] Henry Adams, The Life of Albert Gallatin, Philadelphia, Lippencott, 1879.
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[10] United States v. Von's Grocery Company, 233 F. Supp. 976 (S.D. Cal. 1964).
[11] Large blocks of the following text are adapted from my book Liberty from All Masters.
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[14] Nigel Key and William McBride, The Changing Economics of U.S. Hog Production, *United States Department of Agriculture*, December 2007.
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[21] Barry Lynn, "Killing the Competition," *Harper's*, February 2012. Nicholas Thompson and Fred Vogelstein, "Fifteen Months of Fresh Hell Inside Facebook," *Wired*, May 2019,
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