

Self-Preferencing and Big Tech

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Introduction

Technlash—the fear stemming from the growth of technology's influence over society—is a pernicious movement that has found a home on both sides of the political aisle, with Democrats and Republicans calling for greater government regulation of how tech firms operate. However, while technlash has inspired legislative attempts to rein in Big Tech, its proponents have failed to show that the legislation would achieve its intended goals of promoting competition.

Part of an ongoing series, this report seeks to step away from political rhetoric and examine whether these fears are justified by empirical evidence. The scope of the series aims to answer whether the need to restructure the tech landscape is justified. What are the economic and consumer benefits overlooked by the growing technlash attitude? Furthermore, what economic and consumer risks are policymakers willing to put at stake by restructuring the tech landscape?

Our first report showed that the five most prominent tech companies' contributions to the economy and job market far surpass their profits.¹ For example, the five largest companies had \$1.5 trillion in global sales, contributed \$3.7 trillion to global GDP and created 12 million jobs in 2021.

While the first report focused on what societal benefits Big Tech provides at a macro level, this report will narrow its focus

¹ Krisztina Pusok and Edward Longe, "The Perils of Restructuring the Tech Landscape," *American Consumer Institute*, February 2022.

on the American Innovation and Choice Online Act (AICOA), which would ban covered platforms from self-preferencing their products. For companies like Amazon, which will be the case study for this report, self-preferencing allows them to meet their customers' needs and offer low-priced goods. In addition to bans on self-preferencing, the legislation would also require platforms like Amazon to share data with third-party providers.

This report seeks to assess the impact that the AICOA will have on Amazon and its customers. The AICOA uniquely targets Amazon's treatment of its own products, its protection of consumer data, and its expansive shipping infrastructure that allows the company to fulfill its 2-day shipping promise. Future reports will expand upon this foundation by focusing on potential legislative impacts on consumers of other online platforms.

Focusing on empirical research empowers lawmakers to weigh the costs of current legislative efforts against big tech's benefits to society. Unlike recent legislative attempts to rein in big tech, policy efforts should be grounded in unbiased research to avoid unnecessarily burdening an industry that contributes massively to national GDP and provides immense consumer benefits.

What Is Self-Preferencing

In simple terms, self-preferencing occurs when "when a firm modifies its operations to privilege its own, another firm's, or a set

of firms' products or services."² Self-preferencing can take numerous forms, such as grocery stores displaying their branded goods at eye level, online stores showing their products before third-party competitors, or data not being shared with competitors. It could also include the bundling of goods and services. Despite the growing hostility towards self-preferencing, the practice is pervasive across our economy and vital to how businesses of all sizes operate.

As tech lash has become more prominent in American public and political discourse, there has been a growing hostility toward self-preferencing. The Open Markets Institute, for example, has alleged that "those dominant technology corporations, like Google and Facebook, use self-preferencing to acquire, maintain, and entrench their dominant market position."³ Democratic lawmakers have been equally critical of self-preferencing, arguing that it is just one of many ways "dominant platforms" exploit "their power to become even more dominant."⁴

Who Self-Preferences?

There is a growing, yet erroneous, belief that only tech platforms like Amazon, Google, and Apple engage in self-preference.

² Daniel Hanley, "Competition Policy International: How Self-Preferencing Can Violate Section 2 of the Sherman Act," *Open Markets Institute*, June 16, 2021, <https://www.openmarketsinstitute.org/publications/competition-policy-international-how-self-preferencing-can-violate-section-2-of-the-sherman-act>.

³ Ibid.

⁴ Democratic Majority Staff Report, "Investigation of Competition In Digital Markets," 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519.

However, that ignores the reality that grocery stores and traditional brick and mortar stores also self-preference their goods and services. As the National Taxpayers Union notes, "few people bat an eye when their local grocery store offers a coupon for its own generic version of a name-brand product."⁵

While Amazon offers its own AmazonBasics range that is typically priced lower than other competitors and appears first in search results, stores like Target offer "45 owned brands," and BestBuy, which also has a range of owned brands.⁶ These goods are typically priced lower than their competitors and receive preferential placement on shelves. Self-preferencing is so prevalent in U.S. sales that the *Private Label Manufacturers Association* estimated "Retailers' private brands accounted for 23.4% of all units sold" in 2020, and "one out of every five dollars spent by shoppers in all outlets, or 19.5%, was for the retailer's store brand."⁷

Much like brick and mortar stores give their goods and services preferential space on supermarket shelves, Apple and Google routinely show consumers their free apps

⁵ Josh Withrow, "Issue Brief: Klobuchar's 'Self-Preferencing' Assault on Big Tech Ignores Economics and Consumer Welfare," January 18, 2022, <https://www.ntu.org/library/doclib/2022/01/Klobuchar-s-Self-Preferencing-Assault-on-Big-Tech-Ignores-Economics-and-Consumer-Welfare.pdf>.

⁶ Target Corporate, "Target Brands." <https://corporate.target.com/about/products-services/Target-Brands>; BestBuy, "BestBuy Brands," <https://www.bestbuy.com/site/brands/best-buy-brands/pcmcat1596746025285.c?id=pcmcat1596746025285>.

⁷ *Private Label Manufacturers Association*, "PLMA's 2021 Private Label Yearbook." <https://plma.com/sites/default/files/files/2021-05/plma2021yearbook2.pdf>.

before competitors' apps. As noted by Democratic staffers, "Google, for example, engaged in self-preferencing by systematically ranking its content above third-party content."⁸

How Consumers Benefit

One of the principal benefits of self-preferencing is that it allows consumers to save money. A 2019 study by IRI found that 65% of shoppers stated that purchasing store brand products made them "feel good" because it saved them money.⁹

In the case of digital platforms, self-preferencing goods and services allow companies like Amazon to expose consumers to low and no-cost goods and services. Amazon, for example, usually shows its AmazonBasics products before other competitors. This method of self-preferencing is pro-consumer because it allows consumers to see the lowest-priced goods from the most reputable sellers.

Self-preferencing also enhances competition. As Aurelien Portuese from Information Technology and Innovation Foundation has noted, companies can self-preference "to challenge incumbents in a second market."¹⁰ Portuese continues to

⁸ Democratic Majority Staff Report, "Investigation of Competition In Digital Markets," 2020,

⁹ John Driggs, "Beyond Price, Consumers Find Value in Private Brands," IRI, November 2019. https://www.iriworldwide.com/IRI/media/Library/Q3-Consumer-Connect-Executive-Summary_Private-Brands.pdf.

¹⁰ Aurelien Portuese, "Please, Help Yourself": Toward a Taxonomy of Self-Preferencing," October 24, 2021, *Information Technology and Innovation Foundation*, <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing#:~:text=Self%2Dpreferencing%20its%20products%20to,presumably%20yields%20considerable%20procompetitive%20effects.>

illustrate this point by arguing, "Google uses its search engine's market position to enter into the market for shopping-comparison websites with Google Shopping, it intends to compete with large incumbents in the market for such websites."¹¹

If Congress prohibits self-preferencing, consumers will lose access to a range of goods they overwhelmingly prefer, be unable to access low-priced goods and services, and face a less competitive marketplace.

Overview of Legislation Limiting Self-Preferencing

The effect of recent antitrust proposals have potentially disastrous consequences for American consumers and the welfare they receive from big tech. We hope this report will warn lawmakers about the dangers of re-writing America's antitrust laws.

Congress is currently considering a bill that would re-write the rules governing how big tech platforms sell their goods and services. The House of Representatives is considering Rep. David Cicilline's (D-RI) American Choice and Innovation Online Act of 2021. The House Judiciary Committee approved the bill by 21-20 on June 17th, 2021. Since then, there has been no movement on the bill as it awaits a vote in the full House. The U.S. Senate is considering a version of the American Choice and Innovation Online Act of 2021. The Senate bill was introduced by Senator Klobuchar (D-MN) on October 10th, 2021. The bill was approved by the Senate Judiciary Committee on March 2nd,

mably%20yields%20considerable%20procompetitive%20effects.

¹¹ Ibid.

2022, and awaits a full Senate vote.

If enacted into law, AICOA would fundamentally alter how big tech platforms can sell their goods and services. Under the provisions of AICOA, covered platforms would be prohibited from preferencing their goods and services over competitors. Under the House version of the bill, a tech platform would be required to comply with the bill's provisions if the platform "has at least 50,000,000 United States-based monthly active users on the online platform; or has at least 100,000 United States-based monthly active business users on the platform" and "is owned or controlled by a person with net annual sales, or a market capitalization greater than \$600,000,000,000" and "is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform." On the other hand, the Senate bill sets the market capitalization limit at \$550,000,000,000.

How Proposed Legislation Would Affect Big Tech

Once designated a covered platform, the tech platform in question would be prohibited from preferencing its goods and services over the goods and services of other competitors who use the platform.

For example, Amazon would not have its own Amazon Basics range appear above competitors' products, even if Amazon's products are higher quality or cheaper than those offered by competitors. The clear result of a ban on self-preferencing will be consumers paying more than they have to for goods and services.

AICOA could also have substantial

ramifications for cybersecurity. If passed, AICOA would force tech platforms to hand over consumer information to competitors and be forced to develop platforms and programs that interoperate with competitors.¹² These provisions present a significant risk to consumers on two levels. First, small companies often offer less data protections than larger tech platforms. Second, cybersecurity experts have routinely warned about the dangers of interoperability as it creates unnecessary vulnerabilities that cybercriminals can exploit. As a result, these provisions could ultimately leave consumer data vulnerable to cybercriminals.

While AICOA imposes onerous restrictions on tech platforms, the bill is written to exempt other more traditional brick and mortar stores. Not only do most major brick and mortar retailers fail to meet the market capitalization requirements, the bill explicitly states it only applies to online platforms. This is problematic because many major retailers offer their in-house brands and other branded products yet would be free to self-preference their goods and services. For example, Best Buy, Target, and Walmart- a company far larger than Amazon- would be exempt from compliance despite having in-house brands and selling competitors' products. The exemptions would create an uneven regulatory environment that penalizes big tech platforms in favor of other platforms.

¹² Interoperability refers to the ability of goods and software to communicate with other goods or software.

Why Amazon?

While all big tech firms would be impacted by a re-write of America's antitrust rules, Amazon is unique as it offers a diverse range of services and products to consumers. While it is perhaps most famously known as an online store where almost anything can be purchased, it also provides, among other things, video and music streaming services, a gaming platform, an online pharmacy, groceries, web services, and web services. Amazon's significant range of services means that any mandated restructuring to the business could inflict considerable harm on consumers who utilize the broad range of services offered.

The plethora of services offered by Amazon also makes it unique among big tech companies insofar as its benefits can be quantifiable. It's difficult, for example, to quantify the consumer benefits of tweets or Facebook posts, but it is possible to quantify the value offered through Prime membership.

Perhaps most uniquely, Amazon also benefits millions of Americans and every state through employment opportunities and investments. Since 2010, the company has invested over \$530 billion and contributed over \$499 billion to U.S. GDP. The company also supports around 3.8 million jobs. Any mandated restructuring to how Amazon operates would not only jeopardize investments but could also see thousands, if not millions, of jobs, disappear.

Antitrust Bill Could Disrupt Video Streaming

Like the public, lawmakers and regulators in Washington are taking an increasingly tough line against big tech platforms and their business practices, which are regularly decried as anti-competitive and anti-consumer. These concerns have led to proposals that would re-write America's antitrust laws and prohibit many practices that have generated substantial consumer welfare.

AICOA is a dangerously misguided proposal that could deny consumers billions of dollars of savings each year and make streaming TV shows and movies considerably more expensive.

If Congress passes the AICOA, it will prohibit tech companies from preferencing their own "products, services, or lines of business of the covered platform operator over those of another business user." While this provision would specifically target companies offering their product ranges, such as Amazon Basics, it could also impact the on-demand streaming services often bundled with membership. The bill, for example, could force Amazon to sell subscriptions to its Prime Video service in addition to its core promise of 2-day delivery on millions of items.

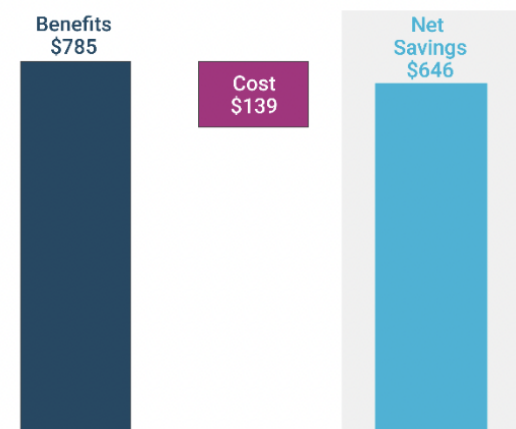
Consumers now have a significant choice in streaming services, with companies like Amazon, Netflix, HBO, and Apple, all offering consumers access to thousands of hours of content. In addition to these platforms, consumers also have access to more specialized content such as WOWPresentsPlus- a service dedicated to LGBTQ+ content or CrunchyRoll, which focuses its offerings on Anime.

Figure 1: Video Subscription Fees (for Selected Providers)

Streaming Service	Cost Per Year
Netflix	\$107.88
Hulu	\$83.88
HBO Max	\$119.88
Paramount Plus	\$59.88
Disney Plus	\$96.00
Peacock	\$59.88
Amazon Prime Video (Stand Alone)	\$107.88
Amazon Prime Video (With Subscription)	\$0.00

Most consumers who regularly watch content on Prime Video likely get the service included in their Amazon Prime subscription price. The cost of the complete prime package ranges from \$139 if users pay the fee annually or \$179 if they decide to pay monthly. This price includes access to Prime Video and 2-day delivery, Prime Music, Amazon Photos, and Prime Gaming. Those who do not subscribe to a wider prime membership can purchase \$8.99 per month, a price point comparable to Netflix and HBO Max.

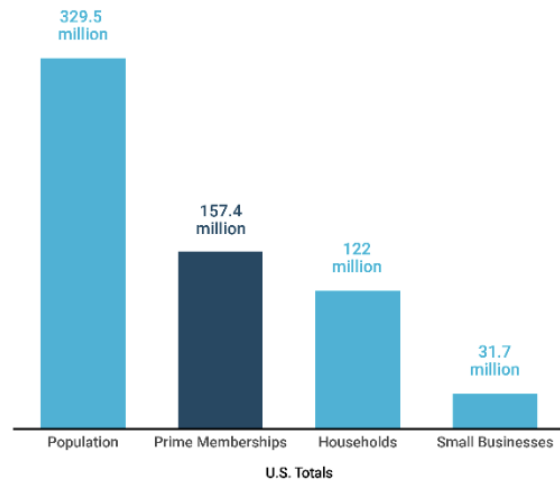
Figure 2: Amazon Prime Consumer Benefits versus Costs



JP Morgan estimated the real value of Prime membership was \$785, meaning consumers receive a benefit of \$646 when they pay

annually.¹³ Given the significant value Prime offers, it's unsurprising that Amazon is projected to reach 157.4 million American members of its Prime services in 2022 as shown in Figure 3.¹⁴

Figure 3: Number of Prime Memberships



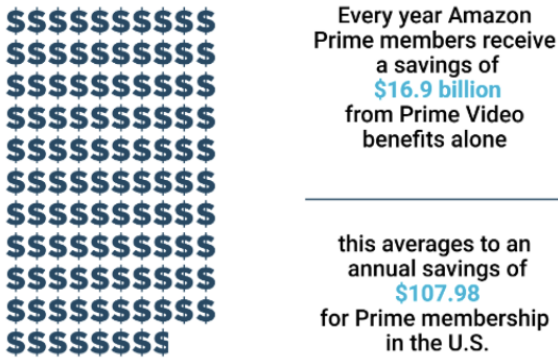
If Congress prohibited Amazon from preferencing its streaming service, it could be forced to charge all customers for using its video streaming service \$8.99 per month or \$107.98 each year. With a projected 157.4 million prime consumers, that equates to

¹³ Hayley Peterson, "Amazon Customers Should Be Paying \$785 for Prime Membership — Here's Why," *Business Insider*, May 16, 2018, <https://www.businessinsider.com/amazon-prime-membership-should-cost-785-2018-5>.

¹⁴ Bureau, U.S. Census. "United States," Explore census data. Accessed May 9, 2022. <https://data.census.gov/cedsci/profile?q=United+States&g=0100000US&table=DP05&tid=ACSDP1Y2018.DP05>; Brian Dean, "Amazon Prime User and Revenue Statistics (2022)," Backlinko, January 5, 2022, <https://backlinko.com/amazon-prime-users>; and U.S. Small Business Administration, Office of Advocacy, "Frequently Asked Questions," October 2020, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/11/05122043/Small-Business-FAQ-2020.pdf>.

\$16.9 billion each year.¹⁵ Since subscribers currently enjoy Prime Video for free, \$16.9 billion can be considered consumer savings each year. However, were consumers forced to pay to access Prime Video in the future, that figure would also represent lost savings.

Figure 4: Prime Video Benefits per Prime Membership



These lost consumer benefits would occur on top of the billions of dollars of other benefits that Amazon offers through its free 2-day delivery each year.

While lawmakers are considering prohibitions on self-preferencing, they must also be aware of the wider ramifications of their proposals. The case of Amazon Prime Video is just one example of how any law that imposes substantial restrictions on how big tech operates could leave consumers paying more for services they presently enjoy for free and billions of dollars in lost welfare. Congress must do better to preserve the substantial consumer benefits big tech companies routinely provide.

¹⁵ Based on the annual standalone price for Prime video times the number of Amazon Prime subscribers.

Antitrust Bill Could Limit Prime Shipping

Amazon Prime is a subscription service that is expected to reach 157.4 million U.S. members this year and provides benefits including fast delivery, streaming services, exclusive discounts, and digital book services.¹⁶

On the platform, select products are sold with the Prime badge which typically promises a 2-day free delivery—although select items have even shorter delivery times, sometimes overnight or same day.

Products that offer Prime delivery fall into three main categories. The first are Amazon-branded products, that Amazon sells, packs, and ships using its existing infrastructure.

The second category are products that are sold by third-parties who use the Fulfilled by Amazon (FBA) service.¹⁷ The service allows third-party sellers to ship items to the Amazon warehouses and have Amazon handle the logistical side of the packaging, shipping, and delivery.

The final category are products referred to as Seller Fulfilled Prime.¹⁸ This service allows businesses to sell products with the

¹⁶ “Help & Customer Service Amazon Prime.” Amazon, Amazon, 2011, <https://www.amazon.com/gp/help/customer/display.html?nodeId=G6LDPN7YJHYKH2J6>.

¹⁷ “Fulfillment by Amazon (FBA) | Definition + How It Works - Amazon.” Sell Amazon, accessed May 5, 2022, <https://sell.amazon.com/fulfillment-by-amazon>.

¹⁸ “Seller Fulfilled Prime, ” Sell Amazon, Amazon, 2022, <https://sell.amazon.com/programs/seller-fulfilled-prime>.

Prime badge, but the third-party is responsible for packing and shipping their items using Amazon Buy Shipping services.¹⁹ While available to third-party sellers, eligibility for Prime shipping is conditional on the use of FBA or Amazon Buy Shipping so that Amazon can guarantee its 2-day shipping promise.

The relationship between Amazon and their third-party sellers who use either FBA or Seller Fulfilled Prime is what would be impacted by the AICOA. This legislation would ban Amazon from establishing conditional “access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator.”²⁰ Since access to Prime status is conditional on the use of FBA or Amazon Buy Shipping, the model that enables Prime--and as an extension, Prime itself--would effectively be banned under the legislation.

In the statement on the impact of AICOA, Brian Huseman, vice president of Public Policy at Amazon, argues that the bill “would jeopardize our ability to allow small businesses to sell on Amazon.”²¹ The bill would also make it difficult for us to

guarantee one or two-day shipping for those small businesses' products....”

Meanwhile, the bill’s sponsor, Klobuchar, claims that the bill won’t end Prime or free shipping.²² Her claim is based on the fact that the bill does not mention Prime services directly. However, the bill would effectively end the service without explicitly outlawing it by undermining the mechanism through which Amazon provides Prime.

Policy Implications

The American Choice and Innovation Online Act combines multiple objectives while forgetting a central focus of antitrust laws—the consumer.²³ Proponents say the bill has an overarching goal of eliminating discriminatory conduct; however, it attempts to achieve this through a wide range of mandates that include limiting self-preferencing and requiring the sharing of consumer data.

Instead of trying to paint restrictions with a broad brush, regulators should instead take heed of established goalposts such as the Consumer Welfare Standard (CWS), which considers how behavior affects consumer welfare. Negating the CWS risks consumer benefits such as data privacy and discounted rates. Still, it also threatens to undermine

¹⁹ Sellers are required to use Amazon Buy Shipping Services for at least 99% of orders.

²⁰ U.S. Congress, Senate, American Innovation and Choice Online Act, S 2992, 117th Cong., <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>.

²¹ “Amazon Statement on American Innovation and Choice Online Act,” *About Amazon*, Amazon, January 18, 2022, <https://www.aboutamazon.com/news/policy-news-vie ws/amazon-statement-on-american-innovation-and-choice-online-act>.

²² *On Senate Floor, Klobuchar, Grassley Push Back Against Baseless Claims That Their Bipartisan Bill to Stop Big Tech Self-Preferencing Will Hurt Consumers*, n.d. Senator Amy Klobuchar, <https://www.klobuchar.senate.gov/public/index.cfm/2021/11/on-senate-floor-klobuchar-grassley-push-back-against-baseless-claims-that-their-bipartisan-bill-to-stop-big-tech-self-preferencing-will-hurt-consumers>.

²³ U.S. Congress, Senate, American Innovation and Choice Online Act, S 2992, 117th Cong., <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>.

established business models such as store brand items and bulk shopping discounts.

Risks of Current Legislation

Current legislation such as the AICOA goes against the standards established by the consumer welfare standard by focusing on businesses in competition with big tech. However, lowering the competitive standard by creating targeted regulatory burdens jeopardizes the consumer for the sake of a few businesses.

As it currently stands, the bill would put data at risk by requiring it to be shared with business partners, which is not something the consumer has necessarily agreed to. This would not only make consumers more vulnerable to cybercrime, but it could also erode trust in Amazon, something the company has spent decades trying to foster.

Finally, the mandated sharing of consumer information could jeopardize advertising revenues as big tech companies often generate substantial revenue from targeted advertisements based on consumers' purchasing and browsing history.

Despite the growing prominence of techlash in public and political discourse, lawmakers must be aware of the potential dangers of pursuing antitrust reform based on these beliefs. For consumers, the passage of AICOA and an outright ban on certain companies from self-preferencing will inevitably lead to the loss of significant consumer welfare, particularly for Amazon consumers who utilize the multitude of services offered through prime. States could also suffer through the lost investment Amazon has made over the past ten years.

However, while adhering to the letter of the current law may not work well for some business models, the spirit of the law should not be thrown out. Rather than trading CWS for blanket bans based on size, it would be better to broaden the CWS to encompass changes to competition that aren't reflected in the price.

For example, it could be expanded to use models to measure consumer choice and ensure that consumer consent is given and can be withdrawn in a transparent and informed way.

Conclusion

The tech realm offers unique differences from traditional antitrust regulations and consumer interactions. Improvements can be made, but they should be specific changes rather than blanket bans and create a more level field for competition rather than punishing successful businesses.