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# BREAKING UP IS HARD TO DO—WHY ANY REMAKE OF ANTITRUST LAW FOR THE DIGITAL ECONOMY SHOULD ADVANCE THE PRINCIPLES OF CONSUMER PROTECTION AND FREE COMPETITION

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ABSTRACT

American antitrust law is at a crossroads, characterized by calls from the Biden Administration and members of Congress to "break up" big technology companies. Traditional measures for conducting merger reviews and enforcement actions have been challenged, with suggestions that the evolving digital economy warrants new standards to promote competition. This Article examines the founding principles of antitrust law and reviews major media and technology cases brought against motion picture studios, IBM, and Microsoft, to help analyze the long-term impact of such cases. The author, a former technology executive and law professor, advocates new laws to protect and value data privacy and personal information, but warns against revising anti-competition principles to new constructs that can shift with the political winds and cause economic uncertainty.

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**Introduction:**

"the current framework in antitrust—specifically its pegging competition to 'consumer welfare,' defined as short-term price effects—is unequipped to capture the architecture of market power in the modern economy."

Lina M. Khan, Amazon's Antitrust Paradox, The Yale Law Journal[1]

The Biden Administration wants to move antitrust law in new directions with new policy goals, especially with respect to regulating the "Big Tech" companies: Google, Facebook, Amazon and others, who have rapidly grown to dominant market positions in the digital era over the past 20 years. The key shapers of our antitrust policy—the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ")—have overtly abandoned the "consumer welfare" standard for antitrust cases in favor of broader policy goals, such as increasing competition and encouraging new market entrants.[2] Some have even suggested that antitrust policy be used to regulate the way big platforms try to administer their codes of conduct regarding speech and other behavior.[3]

The problem with a broader antitrust enforcement approach is that the economic rationale behind bringing such enforcement cases has not been adequately developed and has the potential to be inconsistent because of varying political agendas. Corporations, consumer advocates, lawyers, and policymakers may be flummoxed and confused by changing standards that are not rooted in legal doctrines

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[1] Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017). Khan also wrote: "the potential harms to competition posed by Amazon's dominance are not cognizable if we assess competition primarily through price and output . . . Focusing on these metrics instead blinds us to the potential hazards." *Id.* at 716–17.

[2] *See* Jonathan Kanter, Assistant Att'y Gen. Antitrust Div., Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york [hereinafter *Kanter Remarks*].

[3] *See, e.g.*, Josh Hawley, *Senator Hawley Introduces the Bust Up Big Tech Act*, JOSH HAWLEY: U.S. SEN. FOR MISS. (Apr. 19, 2021)., https://www.hawley.senate.gov/senator-hawley-introduces-bust-big-tech-act.

or supported by precedent.[4] The potential for political factors governing the identification and prosecution of antitrust cases will expand to dangerous levels in the polarized politics of present Washington D.C.. In all of this, the test of whether the American consumer has been harmed by corporate practices or market dominance is no longer the critical factor in the decision to bring an antitrust case. Legal scholars have even questioned whether the consumer welfare standard should ever have stood as the golden rule of antitrust law.[5]

In order to maintain the value of the consumer welfare test, we need to recognize that the world has changed. Notions of antitrust could be expanded to include data privacy and other consumer welfare standards that were not identified in the pre-Internet age, when the standard was conceptualized. The concept of consumer harm need not end with an analysis of the price of consumer products. Rather, the concept should consider factors that affect individual consumers, such as product choice, use of their data, and tracking of their location.

Concepts of data profiling and targeted advertising did not exist fifty years ago when the consumer welfare standard was in its heyday.[6] Today's digital companies reap billions of dollars in benefits from exploiting user data without paying for it and, in many cases, without obtaining user consent.[7] What used to be an externality in economic parlance has become a prime asset to many companies in the digital marketplace.[8] In fact, Microsoft CEO Satya Nadella and others have been quoted as saying that the "currency of [the Internet] is . . . data."[9]

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[4] Stephen G. Giles, *The Supreme Court and Legal Uncertainty*, 60 DEPAUL L. REV. 311 (2011).

[5] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 101, 102–04 (2019).

[6] David A. Zetoony, *What is Considered 'Profiling'?*, 12 NAT'L L. REV. (Nov. 15, 2021).

[7] *See* Jathan Sadowski, *Companies are Making Money from Our Personal Data – But at What Cost?*, GUARDIAN (Aug. 31, 2016, 9:00 AM), https://www.theguardian.com/technology/2016/aug/31/personal-data-corporate-use-google-amazon.

[8] Andrew Lou, *Externality*, CORP. FIN. INST. (Mar. 8, 2023), https://corporatefinanceinstitute.com/resources/economics/externality/.

[9] Satya Nadella, Chief Executive Officer, Microsoft, Keynote Address at the Build 2017 Conference in Seattle (May 10, 2017), https://news.microsoft.com/wp-content/uploads/2017/05/Build-2017-Satya-Nadella-transcript.pdf.

Yet today's new antitrust theorists, led by Lina Khan at the FTC and Jonathan Kanter at the DOJ[10], seem to embrace a much more radical view of how antitrust should be expanded to address economic ills.[11] For example, bigness alone is a problem for this new school.[12] The standard for assessing monopoly power used to examine whether a given firm was illegally using its power to its advantage, now mere bigness makes a company a potential target for an antitrust suit.

The scrutiny given to Amazon announcing the purchase of film studio Metro-Goldwyn-Mayer ("MGM") is a case in point.[13] Amazon is not a monopoly power in the streaming media marketplace and MGM is not a majority, or even plurality, content-producing company in today's motion picture and television production landscape.[14] But in the opinion of the new regulators in Washington D.C., simply because Amazon has huge market power in ecommerce, a challenge against Amazon for this proposed deal is justified.[15] Their theory seems to be that Amazon is simply too big or that it is not appropriate for a company to use its wealth to move into another marketplace.[16] Imagine the absurd applications

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[10] Matt Kelly, *A Major Shift in Antitrust Policy*, RADICAL COMPLIANCE (Jan. 25, 2022) (quoting Kanter's speech at the New York Bar Association on Jan. 24, 2022: "Antitrust law enforcement has not succeeded in keeping pace with these massive changes in our economy…").

[11] *See* Khan, *supra* note 1. In her well-regarded 2017 Yale Law Journal article, Khan emphasized the need to analyze the structure and conduct of a firm in order to appreciate its anticompetitive market effects, suggesting that the consumer welfare standard didn't capture the impact of market dominance. She wrote, "My argument is that gauging real competition in the twenty-first century marketplace—especially in the case of online platforms—requires analyzing the underlying structure and dynamics of markets. Rather than pegging competition to a narrow set of outcomes, this approach would examine the competitive process itself." *Id.* at 717. Ms. Khan also criticized Amazon for creating low profits by design and plowing earned revenue back into the company. *Id.* Paradoxically, Amazon's gross income in 2018 was $93.7 billion, by $114.9 billion in 2019, $152.7 billion in 2020 and over $200 billion in 2021. WALL ST. J. MKTS., *Amazon.com Inc. Income Statement*, https://www.wsj.com/market-data/quotes/AMZN/financials/annual/income-statement (last visited Feb. 15, 2022).

[12] *See generally* Khan, *supra* note 1.

[13] *See* Brent Kendall, *Amazon's Planned Purchase of MGM Faces FTC Scrutiny*, WALL ST. J. (June 22, 2021, 4:22 PM), https://www.wsj.com/articles/amazons-planned-purchase-of-mgm-to-be-reviewed-by-ftc-11624379614.

[14] Ria Puneyani, *The Top 10 Movie Studios in the World*, STARTUP TALKY (July 15, 2022) (MGM ranks number 9 of 10 studios in terms of annual revenue).

[15] *See* Kendall, *supra* note 13.

[16] *See* Khan, *supra* note 1, at 749–51, 754–55.

of such a theory in other contexts. Would General Electric have been prohibited from entering into new businesses such as insurance? Would Microsoft have been allowed to purchase a games company? Should Google be prevented from entering the autonomous vehicle marketplace? Using bigness as the standard will lead to distortions and undermine investment, as discussed further below.

This emphatically does not mean that robust levels of antitrust prosecution should not be utilized to remedy anticompetitive business practices, many of which are on display in the world of ecommerce, social media, and search platforms. The question, rather, is whether antitrust is the proper vehicle to address all of the issues we have with big tech, especially problems relating to user privacy, data misuse, and other abuses. Rather than expand the antitrust doctrine into new frontiers, perhaps Congress should write more targeted laws regarding user consent, the exploitation of user data, and other aspects of privacy which would more directly address the consumer harm in this area, as we will discuss in this Article.

This is a critical moment in legal history. The ideas floated by key officials in the Biden Administration present a unique opportunity to examine a venerable legal doctrine and ask whether it needs revision and, if so, which principles should adhere in an antitrust prosecution.

This Article concludes that antitrust law should continue using the consumer welfare focus as its primary test, but should also facilitate energetic prosecution in instances where both companies and consumers are harmed by anticompetitive behavior that leverages monopoly power in specific markets. Further, new laws targeted to protecting consumer privacy, data, and surveillance would address the need to remedy the new species of consumer harm brought about by the digital world, without sailing the antitrust ship into uncharted waters. Instead of restitching and stretching old clothing to fit new bodies, we would more productively start with the question of how best to address the specific problems we are trying to solve.

In Part 1, this article reviews recent movements in antitrust theory, as the classical "consumer welfare" analysis became replace by scholars offering a more nuanced approach to anti-competitive practices spurred by the digital economy and other factors. In Part 2, I observe how the industrialization of the American economy at the turn of the 20th Century gave rise to consolidation of the petroleum industry by John Rockefeller, the birth of the legal vehicle of "trusts," and the first major antitrust legislation, "The

Sherman Act." In Part 3, the article dissects three major antitrust cases brought by the Department of Justice against Paramount Pictures (and the other major theater-owning studios), IBM and Microsoft. I analyze how the rapid evolution of technology and other major shifts, such as the birth of television, can often outpace the ability of federal regulators to reign in a major monopoly. The section points out the futility attempting to break up companies engaged in innovation in quickly growing industries. Part 4 specifically examines the streaming media industry and questions whether the FTC and DOJ should seek to prevent combinations of technology companies and motion picture content producers and libraries, with a focus on the recent Amazon acquisition of MGM Studios. Part 5 suggests that a better use of regulatory time and effort would be to address the issues that have arisen regarding the collection and processing of consumer data by data miners and data brokers. Part 6 notes the recent wave of antitrust suits and the rhetoric of both the current DOJ and FTC against "bigness," have accelerated. The section notes that antitrust cases, especially against technology companies, seldom achieve their initial goals and advocates that antitrust enforcement cases align to advance consumer welfare, innovation and competition in our global economy.

## I. The Recent Fracturing of Antitrust Doctrine

Legal scholars have recently observed that antitrust doctrine in the United States has fractured into three schools of thought.[17] As in any observation of this type, the lines drawn between the schools will be artificial to some degree, but the demarcation itself illustrates that we have moved beyond the certainty of the Chicago School and now face a brave new world of antitrust theory.[18]

One newer school is the Antitrust Populists. "Populists are deeply concerned about the political power of large companies. They favor deconcentrating the economy to reduce that power and thereby open up opportunities for small businesses, benefit workers, and lessen racial and economic inequalities. They favor simple, bright-line rules

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[17] Carl Shapiro, *Antitrust: What Went Wrong and How to Fix It*, 35 ANTITRUST 33, (No. 3 2021).

[18] *See, e.g.*, Herbert J. Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 258.

and are highly skeptical of the role of economics and expertise in antitrust."[19] They see the consumer welfare standard as fundamentally flawed.[20] They also embrace challenges to Big Tech companies based on privacy and speech issues. One might interpret Assistant Attorney General Jonathan Kanter's recent comments to echo the themes of the Populist school, as he outlines the futility of nuanced remedies and favors a more definitive "yes" or "no" determination on proposed mergers in the technology industry.[21]

A second school of thought has been termed the New School. This approach contends that antitrust law and policy have not been vigorous enough in recent years.[22] The New School favors stronger antitrust enforcement for a variety of policy reasons. "[They] believe that antitrust should continue to focus on protecting and promoting competition, which is fundamentally about economic effects."[23] They are less focused on finding or measuring consumer harm and more focused on finding and stopping the abuse of monopoly power.[24] Numerous statements by Biden's appointee FTC Chair Lina Khan fall into this category. In fact, Khan was well established as a critic of Amazon and Big Tech' after authoring a well-regarded *Yale Law Review* article in 2017, titled *Amazon's Antitrust Paradox*.[25] Other officials in the Biden Administration also appear to hew to New School beliefs.

Finally, there are the former darlings of legal theory, the Chicago School. This approach to antitrust developed by Chicago School lawyers and jurists—such as Robert Bork and Richard Posner—is heavily based on laissez-faire ideology that gained ascendency during the 1980s and has been embraced by many judges on the federal bench.[26] Chicago School adherents persistently advocate to narrow the reach of antitrust law.[27] They embrace a focus on whether market behavior results in consumer harm and do not want antitrust to serve other policy goals.[28] Market forces are generally

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[19] Shapiro, *supra* note 17, at 34.
[20] *Id.*
[21] *Id.*; *see also Kanter Remarks*, *supra* note 2.
[22] Shapiro, *supra* note 17, at 33.
[23] *Id.* at 34.
[24] *See id.*
[25] *See* Khan, *supra* note 1.
[26] Shapiro, *supra* note 17, at 33, 36–38.
[27] *Id.* at 33.
[28] *Id.*

counted on to erode monopoly power and abuses of large corporations.[29]

The question that this Article explores is whether the theories advocated by any one of these schools applies most accurately to the modern American economy, which has now enjoyed thirty years of unparalleled growth as a result of digital innovation and the birth and growth of technology firms such as Microsoft, Apple, Google, Amazon, Meta and others formed since the dot-com boom and its subsequent waves.

Scholarly articles properly tend to focus on legal theories and suggested public policy revisions. Yet, in any economic analysis it is crucial not to ignore the social and public benefits brought about by the technological innovations of the past thirty years, despite their imperfections. This wave of innovation was enabled by three underlying trends: (1) A transition from analog to digital technologies made possible by the transistor and its subsequent generations of silicon chips; (2) the transition from landline telephony to a robust cellular network and the spread of Wi-Fi networks; and (3) the birth of cloud computing, which vastly increased the storage of information and the distribution of applications.

That consumers rapidly adopted Internet technologies speaks to their convenience and benefits.[30] The wave of innovative products introduced over the past generation has become interwoven with our culture and vocabulary.[31] This is a "Rip Van Winkle" moment in history. Americans born after the year 2000 probably cannot imagine life without Wikipedia, Internet search, mobile phones, renting through Airbnb, social media, ride-share apps such as Uber and Lyft, ecommerce, portable and streaming music and video, and the ability to just "Google it."[32]

This unprecedented surge in innovative consumer products is relevant to antitrust doctrine, as the consumer benefit consideration represents a key value in determining

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[29] *Id.*

[30] Jeff Desjardins, *The Rising Speed of Technological Adoption*, VISUAL CAPITALIST (Feb. 14, 2018), https://www.visualcapitalist.com/rising-speed-technological-adoption/.

[31] Virginia Heffernan, *Just Google It: A Short History of a Newfound Verb*, WIRED (Nov. 15, 2017), https://www.wired.com/story/just-google-it-a-short-history-of-a-newfound-verb/.

[32] *See* ALEX ALBEN, ANALOG DAYS: HOW TECHNOLOGY REWROTE OUR FUTURE 2–5 (2012).

the benefits and detriments of particular corporate behaviors, as we will discuss below.

## II. A Short History of the Roots of Antitrust Doctrines in the United States

The American economy of the late 1800s offers a few parallels to the Internet Age (roughly defined for our purposes as 1990–2020). With the rapid growth of industrialization, America began to transform in the 1880s from a rural to a more urban society.[33] Railroads, the telegraph, and the birth of the American steel industry paved the way for economic growth, tied the country together, and revolutionized communications.[34] Later, in the 1890s and first decade of the 1900s, the discovery of vast oil deposits in Titusville Pennsylvania (circa 1859) and Spindletop in southeast Texas (1901) revealed an energy source that could power American industry through the next century and enabled luxuries such as home heating and personal cars.[35] The entrepreneurs who harnessed these new technologies made huge fortunes and sought to cement their gains either by cornering markets or establishing monopoly power over key sectors such as fossil fuel extraction or transportation.[36]

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[33] *Rural Life in the Late 19th Century*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/rural-life-in-late-19th-century/ (last visited Feb. 15, 2022).

[34] *Rise of Industrial America, 1876-1900*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/overview/ (last visited Feb. 15, 2022).

[35] *See First Oil Discoveries*, AM. OIL & GAS HIST. SOC., https://aoghs.org/petroleum-discoveries/.

[36] For example, Jay Gould earned his fortune by means of financial manipulation, using investments in western U.S. railroads to gain a virtual monopoly on rail traffic. *Jay Gould*, ENCYCLOPEDIA.COM (May 21, 2018), https://www.encyclopedia.com/people/social-sciences-and-law/business-leaders/jay-gould). Similarly, "[Andrew Carnegie] created a vertical monopoly in the steel industry by obtaining control over every level involved in steel production, from raw materials, transportation and manufacturing to distribution and finance." Andrew Carnegie, HISTORY CENTRAL, https://www.historycentral.com/Bio/rec/AndrewCarnegie.html (last visited Feb. 15, 2022). A term emerged starting in August 1870 to refer to businessmen who purportedly used exploitative practices (create monopolies and raise prices) to amass their wealth: a robber baron. *See* Lida F. Baldwin, *Unbound Old Atlantics*, THE ATLANTIC MONTHLY at 683(Nov. 1907).

Advances in finance facilitated the American industrial boom. With the growth of Wall Street in the last half of the 19th century, firms could tap capital markets and public participation in bond markets to finance expansion in manufacturing, transportation, and the steel industry.[37] The House of Morgan and other major eastern banks came to dominate the country's financial sector.[38]

Not unlike today's economic boom, the era was marked by growing income inequality as the country created a new millionaire class. In 1900—when the U.S. population stood at 75 million—only 5000 millionaires existed.[39] Income accumulated at the top of the economic food chain. "By 1890, the top 1 percent of the American population owned 51 percent of all wealth. The top 12 percent owned an astounding 86 percent."[40] Meanwhile, the bottom 44 percent of the population owned just 1.2 percent of national wealth.[41]

Yet, the American economy in the period of 1875–1900 also saw unprecedented job and wage growth,[42] even though the farm population of the country still weighed in at 40 percent of households in 1900.[43] The U.S. became the world's most powerful economy, driven by industrialization.[44] America experienced a tidal shift from rural to urban areas in

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[37] *See* Gary Richardson & Tim Sablik, *Banking Panics of the Gilded Age*, FED. RSVR. BANK OF ST. LOUIS (Dec. 4, 2015), https://www.federalreservehistory.org/essays/banking-panics-of-the-gilded-age.

[38] *See, e.g.*, RON CHERNOW, THE HOUSE OF MORGAN: AN AMERICAN BANKING DYNASTY AND THE RISE OF MODERN FINANCE (1990).

[39] By 1980, the number stood at 500,000. In 2000, five million individuals attained that status and by 2007, just before the Great Recession, America counted 9.2 million "millionaires." Robert Frank, *U.S. Millionaire Tally Soared 16% in '09*, WALL ST. J. (Mar. 9, 2010); *see also* Charlotte Wold, *The Number of Millionaires Continues to Increase*, INVESTOPEDIA (Jan. 23, 2022), https://www.investopedia.com/news/number-millionaires-continues-increase/.

[40] Edward T. O'Donnell, *Are We Living in the Gilded Age 2.0 ?*, HISTORY.COM (Jan. 31, 2019), https://www.history.com/news/second-gilded-age-income-inequality.

[41] *Id.*

[42] *See America at Work*, LIBR. OF CONG., https://www.loc.gov/collections/america-at-work-and-leisure-1894-to-1915/articles-and-essays/america-at-work/ (last visited Feb. 16, 2022).

[43] Figure 1 in Carolyn Dimitri et al., *The 20th Century Transformation of U.S. Agriculture and Farm Policy*, USDA (June 2005).

[44] "Between 1860 and 1900, U.S. factory output soared from $1.9 billion to $13 billion, an increase of nearly 600 percent. By 1900 the U.S. boasted the most powerful industrial economy in the world." O'Donnell, *supra* note 40.

the last 25 years of the 19th century, not unlike the transition from manufacturing to service industry jobs the country experienced from 1975–2000.[45] The mansions of Manhattan's Fifth Avenue, the Frick Collection, and the Carnegie Endowment stand as symbols of this vast accumulation of wealth, later dubbed "the Gilded Age."[46]

### A. The Power of the Trusts and the Standard Oil Case

As Ron Chernow details in his comprehensive study, *Titan: The Life of John D. Rockefeller, Sr.*, the trusts grew to unprecedented power in this period of our economic development.[47] John D. Rockefeller had begun his rise as a kerosene refiner, operating two refineries in the Cleveland area by the end of the Civil War. Despite this humble status, Rockefeller and his partner incorporated in the state of Ohio under the name The Standard Oil Company. At the time, Rockefeller's greatest challenge was moving oil cheaply by rail from Pennsylvania's oil fields to his refineries in Cleveland and then throughout the country, mostly to America's growing urban centers. To do this, Standard Oil needed stable rail rates and to consolidate ownership over Cleveland's refineries. Starting in the 1870s, Rockefeller used hardball tactics, such as manipulating pipelines and threatening rail carriers, to convince Cleveland's incumbent refiners to sell out to him, eventually accumulating about a quarter of the refinery market.[48]

Rockefeller's industrial combination model succeeded, but it eventually exceeded the bounds of Standard Oil's Charter:

> By 1880, Standard Oil owned or controlled 90 percent of the U.S. oil refining business, making it the first

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[45] *See* Joseph P. Ferrie, *How Ya Gonna Keep 'Em Down on the Farm [When They've Seen Schenectady]?: Rural-To-Urban Migration in 19th Century America 1850-70*, 14 fig.2, 15 tbl.1, NBER (2005), https://faculty.wcas.northwestern.edu/fe2r/papers/urban.pdf.

[46] *See* O'Donnell, *supra* note 40. *See also* Leena Kim, *10 Gilded Age Landmarks in New York City Still Standing Today*, TOWN & COUNTRY (Mar. 21, 2022), https://www.townandcountrymag.com/leisure/travel-guide/g39475441/gilded-age-landmarks-nyc.

[47] *See generally* RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. (1998).

[48] *See id.*

> great industrial monopoly in the world. But in achieving this position, Standard violated its Ohio charter, which prohibited the company from doing business outside the state. Rockefeller and his associates decided to move Standard Oil from Cleveland to New York City and to form a new type of business organization called a "trust."[49]

In an era not known for transparency, the new trust had a clandestine and unusual structure: "[u]nder the new arrangement (done in secret), nine men, including Rockefeller, held 'in trust' stock in Standard Oil of Ohio and 40 other companies that it wholly or partly owned. The trustees directed the management of the entire enterprise and distributed dividends (profits) to all stockholders."[50]This successful organization paid high wages while allowing highly concentrated ownership by one individual, not unlike modern tech giants: "[w]hen the Standard Oil Trust was formed in 1882, it produced most of the world's lamp kerosene, owned 4,000 miles of pipelines, and employed 100,000 workers. Rockefeller often paid above-average wages to his employees, but he strongly opposed any attempt by them to join labor unions. Rockefeller himself owned one-third of Standard Oil's stock, worth about $20 million."[51]

These broad statistics illustrate the economic trends that set the table for the creation of the country's first antitrust statute in 1890. At the time, doubt existed as to whether common law in the United States, in the absence of legislation, prohibited the making of contracts in restraint of trade and the creation and maintenance of monopolies.[52] The stage was set for regulation of the trusts and their powerful brethren on Wall Street.

Proposed in 1888 by Ohio Republican Senator John Sherman—the younger brother of Union General William Tecumseh Sherman—the U.S.'s first antitrust law had murky political origins.[53] In the 1888 presidential election, the out-of-power Democrats sought to link strong tariffs to the

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[49] *John Rockefeller and the Standard Oil Monopoly*, CONST. RTS. FOUND., https://www.crf-usa.org/bill-of-rights-in-action/bria-16-2-b-rockefeller-and-the-standard-oil-monopoly.html (last visited Feb. 15, 2022).
[50] *Id.*
[51] *Id.*
[52] William Kolasky, *Senator John Sherman and the Origin of Antitrust*, 24 ANTITRUST 85, 87 (No. 1 2009).
[53] *Id.* at 85.

emergence of trusts in a given industry, despite a lack of compelling evidence.[54] Nevertheless, Republicans felt politically vulnerable on the issue and sought to fend off direct attacks on the tariffs by dealing directly with the emergence of trusts.[55] In his 1888 Senate resolution prior to the introduction of legislation, Senator Sherman stated that a bill would seek to promote "free and full competition," while also "increasing production . . . [and] lowering prices."[56] In the 1889 Congressional Session, the Senate debated whether Congress's antitrust authority flowed from its power to raise revenue or whether the authority to act would derive from Congress's charge to regulate interstate commerce.[57] This debate on the origins of antitrust authority, first surfacing before the passage of the Sherman Act, continues to this day. By 1890, the political landscape had tilted in favor of taking action against trusts and Sherman's bill found a more fertile reception in Congress.[58] In his only major speech regarding the purpose of his bill:

> "Sherman insisted that his bill would 'not in the least affect combinations in aid of production where there is free and fair competition,' but would only 'prevent and control combinations made with a view to prevent competition, or for the restraint of trade, or to increase the profits of the producer at the cost of the consumer.'"[59]

Thus, from its early origins, the dual motive to promote competition in a business-to-business realm and to protect consumer welfare was expressed. Unfortunately for Sherman, he lost control of the Senate debate and the Judiciary Committee quickly stepped in with a substitute bill.[60] This substitute bill encapsulates both the standards and the rationale for congressional power that came to form the bedrock of the U.S.'s antitrust laws.[61] The bill declared unlawful: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce

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[54] *Id.* at 86.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 87.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

among the several States, or with foreign nations."[62] Further, it provided that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several States, or with foreign nations, shall be guilty of a misdemeanor." [63]

Sherman deeply regretted losing control of the legislation, especially after a House bill was drafted to match the Judiciary Committee's version, paving the way for the passage of the final Act.[64] It is more than a little ironic that after the legislation passed Congress on July 2, 1890, it became known as "The Sherman Act."[65] Sherman lamented that enforcement of the Act would come down to popular sentiment, as he believed that the final bill would not be effective in dealing with combinations and trusts.[66]

As Sherman predicted, courts were initially reluctant to invoke the Act's "restraint of trade" standard and, paradoxically, some of the first cases brought under the Act were against labor unions.[67] Not until Progressive Republican Theodore Roosevelt became President did the executive branch vigorously bring cases against industrial concerns.[68]

Standard Oil, as it turns out, had fixed prices, favored its own kerosene shipments on captive rail lines, and otherwise engaged in a variety of actions that met the "illegal restraint of trade" standard.[69] Counter-intuitively to our notion of price fixing behavior, Standard Oil often sought to lower prices—for transportation or for extraction of oil—long enough for a competitor to suffer from the revenue loss and be driven out of business or become vulnerable to an offer to sell out at a distressed valuation.[70] While such predatory price

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[62] *Id.*; *see also* 15 U.S.C. § 1 for the modern statute.
[63] Kolasky, *supra* note 52, at 87; *see also* 15 U.S.C. § 2 for the modern statute.
[64] Kolasky, *supra* note 52, at 87-88.
[65] *Id.* at 88.
[66] *Id.*
[67] Editors of Encyclopaedia Britannica, *Sherman Antitrust Act*, BRITANNICA , https://www.britannica.com/event/Sherman-Antitrust-Act.
[68] *Id.*
[69] Standard Oil Co. of N.J. v. United States, 221, U.S. 1, 2 (1911).
[70] *See* Jessica Melugin, *U.S. Antitrust's Greatest Misses*, COMPETITIVE ENTER. INST. (Jan. 21, 2021), https://cei.org/studies/u-s-antitrusts-greatest-misses/; *see also The Standard Oil Monopoly*, CONST. RTS. FOUND. (last visited Apr. 26, 2023), https://www.crf-usa.org/bill-of-rights-in-action/bria-16-2-b-rockefeller-and-the-standard-oil-monopoly.html#:~:text=When%20independent%20companies%20tried%20to,went%20into%20killing%20off%20competition.

fixing might temporarily benefit consumers or another supplier in the stream of commerce, the courts recognized that the long-term effect would be to reduce the number of competitors in a given market, give Standard Oil monopoly power, and thus establish the conditions for the manipulation of prices to serve the company's needs, potentially to the detriment of consumers.[71]

In 1902, *McClure's Magazine* published a series of investigative reports by journalist Ida Tarbell documenting Standard Oil's anticompetitive business practices, including Rockefeller's practice of forcing his competitors to "sell or perish." By then, ten states had brought 33 antitrust lawsuits against the company, which managed to evade rulings by shifting its corporate structure from state to state.[72] But in 1906, the Roosevelt Justice Department sued Standard Oil of New Jersey in federal court.[73] The case went to trial in Missouri in 1908, where the government presented evidence that kerosene prices had jumped a full 46 percent from the years 1895–1906 as a result of Standard Oil's market manipulations. Losing at the federal court level in a unanimous decision, Standard Oil landed in the Supreme Court in 1911.[74] It is meaningful to note that President Roosevelt, in suing Standard Oil, did not seek to break up or abolish the company.[75] Rather, he expressed a desire to end Standard Oil's anticompetitive and abusive business practices.[76]

In *Standard Oil Co. of New Jersey v. United States*, a unanimous Supreme Court held that the company was a monopoly.[77] It further ruled—with one dissent—that while the Sherman Act does not prohibit every restraint of trade, it does outlaw those that are unreasonable.[78] Certain acts, according to the Court—including plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids—are considered so harmful to

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[71] Standard Oil Co. v. United States, 337 U.S. 293, 299 (1949).
[72] IDA M. TARBELL, THE HISTORY OF THE STANDARD OIL COMPANY (1904).
[73] *See Standard Oil Co. of N.J. v. United States*, 221 U.S. at 31.
[74] *Id.* at 30.
[75] *See Progressives in the Era of Trustbusting*, 23 BILL OF RTS IN ACTION (Spring 2007), https://www.crf-usa.org/bill-of-rights-in-action/bria-23-1-b-progressives-and-the-era-of-trustbusting.html.
[76] *Id.*
[77] *Standard Oil Co. of N.J. v. United States*, 211 U.S. at 81–82.
[78] *Id.* at 88, 103.

competition that they are almost always illegal.[79] These acts are *per se* violations of the Sherman Act: No defense or justification is allowed.[80] As a result of the Court's *Standard Oil* decision, American law and business has lived with the "unreasonable restraint of trade" standard for the past century.[81]

To quote one of the more famous passages from the Supreme Court's ruling:

> "The constituents of an unlawful combination under the Anti-Trust Act should not be deprived of power to make normal and lawful contracts, but should be restrained from continuing or recreating the unlawful combination by any means whatever, and a dissolution of the offending combination should not deprive the constituents of the right to live under the law, but should compel them to obey it."[82]

Interpreting the long term lessons of *Standard Oil* has become polarized, reflecting the tenor of our times. For example, Assistant Attorney General Makan Delrahim claimed in 2019, "consumers actually enjoyed lower prices during the height of Standard Oil's dominance."[83] However, other factors such as Standard Oil's decline in innovation as it became an entrenched monopoly and its efforts to restrain the trade of petroleum products were sources of concern for the Court.[84] Prices were only one potential measure of harm to competition.[85]

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[79] *Id.* at 63; *see also The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

[80] *The Antitrust Laws*, *supra* note 79.

[81] Not surprisingly, while Standard Oil was ordered to break up into 34 separate companies, those companies continued to act to preserve their market power for over a decade after the ruling. Many companies, such as Amoco, Chevron, Exxon and Mobil survive to this day. Rockefeller retained a 25% share in each of the 34 companies, with his net worth growing to $900 million by 1913 after automobiles, powered by his oil, began to dominate American roads. *See* CONST. RTS. FOUND., *supra* note 49.

[82] *Standard Oil Co. of N.J. v. United States*, 211 U.S. at 4.

[83] Makan Delrahim, Assistant Att'y Gen. Antitrust Div., *"...And Justice for All": Antitrust Enforcement and Digital Gatekeepers*, U.S. DEPT. JUST. at 4 (June 11, 2019).

[84] *Id.*

[85] *Id.*

While this statement contradicts the kerosene pricing evidence introduced in the trial court in 1908, Delrahim's general point that triers of fact need to consider multiple factors in antitrust cases is well-taken. But an "innovation" factor was not top of mind either by the authors of the Sherman Act or the writers of the 1911 Supreme Court decision. Shortly after the ruling in *Standard Oil*, Congress added a dimension of unfair competition law to the Clayton Act of 1914.[86]

The *Standard Oil* case set the paradigm for subsequent antitrust enforcement cases and it is not the focus of this Article to further recap antitrust history (for that, I would recommend Phil Areeda's book, *Antitrust Analysis*). Rather, we examined the origins of American antitrust law in order to distill its core principles. Specifically, from the outset of federal legislation, American antitrust law has focused on three principles: (1) Consumer welfare as expressed in non-manipulation of prices of consumer goods; (2) making combinations that result in restraints of trade illegal, including monopolies that have that effect; and (3) free and fair competition that results in robust production.[87]

As the U.S. transitioned from an industrial economy rooted in transportation to a 20th century economy rooted in information and computer technology, salient cases were brought against companies deemed to be monopolies in their relevant markets and alleged to have engaged in unfair competition.[88] As discussed in Part 3, these cases had mixed results.

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[86] *The Clayton Antitrust Act*, HISTORY, ART & ARCHIVES U.S. H.R., https://history.house.gov/Historical-Highlights/1901-1950/hh_1914_10_15_clayton_antitrust/ (last visited Feb. 16, 2022). The Clayton Antitrust Act was enacted to supplement the Sherman Act. *Id.* "The newly created Federal Trade Commission enforced the Clayton Antitrust Act and prevented unfair methods of competition. Aside from banning the practices of price discrimination and anti-competitive mergers, the new law also declared strikes, boycotts, and labor unions legal under federal law. The bill passed the House with an overwhelming majority on June 5, 1914. President Woodrow Wilson signed it into law on October 15, 1914." *Id.*

[87] *See generally The Antitrust Laws, supra* note 79.

[88] *See* Alden Abbott, *US Antitrust Laws: A Primer*, MERCATUS CTR. (Mar. 24, 2021), https://www.mercatus.org/research/policy-briefs/us-antitrust-laws-primer. *See, e.g.*, United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); United States v. Int'l Bus. Machs. Corp., 517 U.S. 843 (1996); United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).

## III. Antitrust Enforcement in the Media and Technology Industries—Three Pivotal Cases

### A. The Motion Picture Consent Decrees of the 1940s

In 1938, the DOJ filed a complaint under Section 4 of the Sherman Act alleging that eight major motion picture studios had conspired to control the film industry through their ownership of film production, distribution, and exhibition. The case focused on Paramount Pictures, Inc., Twentieth Century-Fox Corporation, Loew's Incorporated (later MGM), Radio-Keith-Orpheum (dissolved in 1959), and Warner Brothers Pictures, each of which owned cinemas across the country.[89] In November, 1940, before the case went to trial, the defendant studios agreed to enter a broad consent decree to govern their business practices. The consent decree included provisions outlawing price fixing and the practice known as "block booking," where a studio would require an independent theater to take a slate of its films, even if the theater only wanted a few of the films due to their featured stars or subject matter.[90]

Yet despite their commitments, the studios did not reform their ways. By the summer of 1944, the DOJ determined that judicial enforcement would be required for the studios to meaningfully reform their business practices, so

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[89] *The Paramount Decree*, U.S. DEP'T JUST., https://www.justice.gov/atr/paramount-decree-review (last updated Aug. 7, 2020). The DOJ complaint also included three minor studios--Columbia Pictures Corporation, Universal Corporation, and United Artists Corporation—although they did not own theaters. *Id.*

[90] "The government, relying on the faith of the defendants to curtail their past behavior and the strength of the decree to put an end to the illegal activities that had taken over the industry, further backed away from taking a strong stance by providing for the expiration of the decree after only a three year period. Specifically, the decree enjoined the consenting defendants as follows: (1) block booking was limited to no more than five pictures; (2) blind bidding was prohibited; (3) the use of unreasonable clearances was prohibited; (4) forced rentals were abolished; (5) limits were placed on the rights of distributors to refuse to license motion pictures to exhibitors; and (6) the defendants were prohibited from engaging in a 'general program of theater acquisition.'" Kraig G. Fox, Note, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 512 (1992) (footnotes omitted).

it refiled its complaint in the Southern District of New York.[91] As the studios grew in power and profitability from the birth of Hollywood through the post-war period, their operations became increasingly vertically integrated.[92] Evidence was introduced at trial that in 1946 the major studios technically owned only 17.35 percent of the nation's theaters, yet these theaters represented about 90 percent of the significant theaters in major markets.[93] Coupled with the fact that the major studios distributed 75 percent of all motion pictures made in the country, this was determined to constitute vertical integration of the industry.[94] At the time, it was felt that such vertical integration led to anticompetitive business practices, as each studio could exert control over the production of a film, its distribution, and its exhibition.[95]

Issuing its decision in 1946, the court adopted six remedies regarding distribution and exhibition of motion pictures against the studios, but did not require that the studios sell their wholly-owned cinemas.[96] However, this ruling did not put the issue to rest. On appeal to the Supreme Court in 1948, it was determined that divorce of theater ownership and distribution might be required and remanded the remedy to the district court.[97] Before the Southern District could issue its ruling on this point, Paramount and Radio-Keith-Orpheum settled out, entering into a consent decree to sell their theaters.[98] The remaining defendants contested the case, but the court ruled in 1949 that as a matter of law they had conspired to illegally constrain trade and that sale of their

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[91] *Part 6: The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, SOC'Y OF INDEP. MOTION PICTURE PRODUCERS (2005), https://www.cobbles.com/simpp_archive/paramountcase_6supreme1948.htm.

[92] For an excellent definition of Vertical Integration, see Robert H. Cole, General Discussion of Vertical Integration, *in* VERTICAL INTEGRATION IN MARKETING 9, 9 (Nugent Wedding ed., 1952).

[93] United States v. Paramount Pictures, Inc., 70 F. Supp. 53, 67, 70 (S.D.N.Y. 1946).

[94] Fox, *supra* note 90, at 513 (*citing* MICHAEL CONANT, ANTITRUST IN THE MOTION PICTURE INDUSTRY 16–17 (1960)).

[95] *See* Olivia Pakula, Comment, *The Streaming Wars+: An Analysis of Anticompetitive Business Practices in Streaming Business*, 28 UCLA ENT. L. REV. 147, 152 (2021).

[96] *Part 6: The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, *supra* note 92.

[97] *Id.*

[98] *Id.*

cinemas was the appropriate remedy.[99] Thus, each of the studios had to sell their cinemas.[100]

It is interesting to note—given the current controversy over aspects of the streaming media marketplace and its cost to subscribers—that ticket prices to consumers were relatively low in the 1930s and 1940s.[101] The average price of a movie ticket in 1940—which often included a double feature—was 25 cents.[102] Thus, the Paramount Decrees and cases largely were brought to protect independent motion picture theaters from the business practices of the studios, which mainly sought to ensure that their films would be widely distributed throughout the country. In this sense, breadth of distribution was the key to motion picture profitability, rather than individual ticket pricing.[103] Owning theaters gave the studios a degree of certainty about guaranteed distribution, and their block-booking and bidding practices ensured they would complete their market saturation through exhibition by independent theaters.[104] Similarly, today's streaming marketplace is also characterized by streaming platforms' substantial investment in attaining distributional reach.[105]

With the hindsight of history, it is tempting to view the Paramount Decrees and cases as a great anomaly. Less than a decade after the 1949 forced divestment remedy, the advent of television radically reshaped the film distribution market and the economics of motion picture production, with the

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[99] United States v. Paramount Pictures, 1948-1949 Trade Cas. (CCH) ¶ 62, 335 (S.D.N.Y. 1948) (RKO Consent Decree).

[100] *See generally Part 6: The Supreme Court Verdict That Brought an End to the Hollywood Studio System, 1948*, *supra* note 91.

[101] Dave Manuel, *The Cost of a Movie Ticket Throughout the Years*, DAVEMANUEL, https://www.davemanuel.com/the-cost-of-a-movie-ticket-throughout-the-years-166/.

[102] Graphiq, *See How the Cost of a Movie Ticket Has Changed Since 1940,* MERCURY NEWS (Aug. 11, 2016, 11:35 PM), https://www.mercurynews.com/2016/07/13/see-how-the-cost-of-a-movie-ticket-has-changed-since-1940/.

[103] Stephen Madoff, *The End of the Paramount Antitrust Consent Decrees: A Brief Look at Movie History and the Future*, ANTITRUST ATT'Y BLOG (Aug. 7, 2020), https://www.theantitrustattorney.com/the-end-of-the-paramount-antitrust-consent-decrees-a-brief-look-at-movie-history-and-the-future/.

[104] The author wishes to acknowledge that his grandfather, Miles H. Alben, worked as a senior attorney in the Warner Bros.' real estate division throughout the 1930s until the early 1960s and was directly responsible for achieving compliance with the divestment of cinemas court ruling.

[105] Pakula, *supra* note 95.

majority of the studios branching out into the new medium.[106] Enforcement of the consent decrees relaxed in the 1970s, with many studios making investments in the country's dominant theatrical chains.[107] This trend snowballed into studios' outright ownership of individual theaters by the end of the century.[108] Belatedly, in August, 2020, the DOJ determined that the Paramount Decrees were defunct and formally abrogated them.[109] The Decrees lasted, on and off, for eighty years.

Why did antitrust enforcers look the other way while studios became major media outlets and reacquired theaters over the past thirty years? One might speculate that as the number of channels for distribution of video entertainment proliferated, the need to focus on vertical integration affecting a specific channel became less important. By 2020, a consumer in the United States had various options for watching a desired film: consumers could attend a movie theater but could also view films on broadcast television (delivered through satellite or cable), cable television, satellite subscription, home video (another format that briefly dominated the industry after the Paramount Decrees) or, increasingly, through a streaming subscription service.[110] The unprecedented degree of flexibility and consumer choice speaks to the vast growth of the video production industry, which remains dominated by American companies and now serves billions of customers globally.

Imagine if the DOJ concocted a 2022 version of the Paramount Complaint and decided today that Netflix could not produce, distribute, or own means of streaming distribution because that violated the principle of vertical integration. With the FTC's revision of its antitrust guidelines and the DOJ's announced scrutiny of Amazon's proposed $8.5 billion purchase of the MGM studio library, that scenario is becoming less and less hypothetical.[111] Yet, before examining

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[106] Madoff, *supra* note 103.
[107] *See id.*
[108] *See id.*
[109] Kate Cox, *Why Movie Theaters Are in Trouble after DOJ Nixes 70-Year-Old Case*, ARS TECHNICA (Aug. 11, 2020, 3:30 AM), https://arstechnica.com/tech-policy/2020/08/why-movie-theaters-are-in-trouble-after-doj-nixes-70-year-old-case/.
[110] *See, e.g.*, Pakula, *supra* note 95.
[111] Brent Kendall, *Amazon's Planned Purchase of MGM Faces FTC Scrutiny*, WALL ST. J. (June 22, 2021, 4:22 PM), https://www.wsj.com/articles/amazons-planned-purchase-of-mgm-to-be-reviewed-by-ftc-11624379614.

the Amazon-MGM combination on the merits, it is instructive to examine how antitrust enforcement has morphed when applied to the technology industry in the two major antitrust cases of the 20th century.

### B. The IBM Case—The Price of Being Big Blue

"The Justice Department's landmark suit against the International Business Machines Corporation is the most vivid illustration of the difficulty and expense of the big antitrust cases in which a basic restructuring of a major industry is sought as the remedy."[112]

Like the Paramount Decrees and cases, the IBM saga began with a 1956 consent decree leading to a 1969 formal complaint that took an additional thirteen years to resolve.[113] Not surprisingly, the computer industry underwent dramatic changes in that 24-year period such that many of the alleged unfair practices engaged in by IBM were moot by 1982.[114] While the specific legacy of the case is debated by scholars, the core complaint against the company derived from the notion that it had become too dominant in the mainframe computer business and that its business practices warranted judicial remedies. In today's parlance, IBM was Big Tech[115] and therefore the effort to rein it in contains parallels to current sentiments focused on regulating the Amazons and Facebook's[116] of today.

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[112] *U.S. vs. I.B.M.*, N.Y. TIMES (Feb. 15, 1981), https://www.nytimes.com/1981/02/15/business/us-vsibm.html.

[113] Marc L. Songini, *Is History Repeating Itself With Antitrust Battle?*, COMPUTERWORLD (Mar. 5, 2001, 12:00 AM), https://www.computerworld.com/article/2590745/is-history-repeating-itself--with-antitrust-battle-.html.

[114] Edward T. Pound, *Why Baxter Dropped the I.B.M. Lawsuit*, N.Y. TIMES, (Jan. 9, 1982), https://www.nytimes.com/1982/01/09/business/why-baxter-dropped-the-ibm-suit.html#:~:text=Baxter%20told%20reporters%20that%20Government,flimsy%20for%20the%20most%20part.

[115] "We've had three major eras in modern technology since the 1960s, and for the first two, the dominant company of the time has eventually been reined back by political pressure. First, there was IBM in the mainframe age." Brian Glick, *When Tech Firms Get Too Big - Will Facebook & Google Follow the Cycle of IBM & Microsoft?*, COMPUT. WKLY. (Mar. 20, 2018),

[116] Facebook changed its name to Meta in 2021, with Facebook becoming a product inside its Social Media division. This article will refer to Facebook and Meta interchangeably.

The DOJ suit charging IBM with monopolizing "interstate trade and commerce in general-purpose digital computers" was lodged in January 1969, but only after it was determined that IBM violated the terms of its 1956 consent decree.[117] The decree pertained to IBM's domination of punch-card tabulating machines and, later, electronic data-processing machines.[118] They had mandated that IBM offer its computers for sale, rather than simply leasing them.[119] It also required that IBM service and sell parts for computers that IBM no longer owned.[120] The consent decree was not formally terminated by the DOJ until 2001.[121]

The 1956 consent decree exacted a huge economic toll on IBM, with estimated losses of $100 million annually over its 40-year time span.[122] During this period, the company was severely constrained on how it could service and sell computers.[123] Further, the decree may have played a role in the company's decision to allow the creation of independent operating systems, such as Microsoft's 1980 version of Microsoft Disk Operating System (MS DOS).[124] While Microsoft received $430,000 from IBM for the rights to use the new operating system, IBM allowed Microsoft to license MS

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[117] *U.S. vs. I.B.M.*, *supra* note 112; John. E. Lopatka, *United States v. IBM: A Monument to Arrogance*, 68 ANTITRUST L. J. 145 (2000), https://www.jstor.org/stable/40843461.

[118] Lopatka, *supra* note 117, at 146 n.5.

[119] *See* United States' Memorandum on the 1969 Case, U.S. v. I.B.M Corp., No. 72.-344 (S.D.N.Y. Oct. 5, 1995).

[120] CNET News Staff, *40-year-old IBM Antitrust Case Ends*, CNET (July 2, 1996, 6:00 PM), https://www.cnet.com/tech/services-and-software/40-year-old-ibm-antitrust-case-ends/.

[121] *Id.* ("While portions of the consent decree involving PCs and workstations were ended earlier this year, the Justice Department has still been enforcing antitrust policies against IBM's bigger systems, including AS/400 mini-computers and System 390 mainframes."*); see also* Press Release, U.S. Dept. of Just., Justice Department Agrees to Terminate Last Provisions of IBM Consent Decree in Stages Ending 5 Years from Today (July 2, 1996), https://www.justice.gov/archive/atr/public/press_releases/1996/0715.htm#:~:text=Termination%20Due%20to%20Change%20in%20Computer%20Climate&text=The%20Department's%20Antitrust%20Division%20said,climate%20in%20the%20computer%20industry.

[122] Bart Ziegler, *IBM Reaches Settlement to End Consent Decree – Justice Department Accord to Phase Out Remaining Restrictions Over 5 Years*, WALL ST. J. (July 3, 1996, 12:01 AM), https://www.wsj.com/articles/SB836341174520145000.

[123] *Id.*

[124] TIM WU, *Tech Dominance and the Policeman at the Elbow*, *in* AFTER THE DIGITAL TORNADO: NETWORKS, ALGORITHMS, HUMANITY 81, 95-96 (2020).

DOS to others.[125] Microsoft turned around and licensed the operating system to Tandy, Commodore and others, becoming the hub of the new software industry.[126] Its revenues climbed from $16 million in 1981 to $140 million in 1985.[127] Thus, unwittingly, the 1956 decree had the effect of allowing software companies to own the basic rights to the code and consequently to dominate the computer industry through software innovation. By 1993, Microsoft had surpassed IBM in terms of market valuation.[128]

As the New York Times noted, "[b]efore the outset, the Government estimated that the presentation of its case would last 60 days.[129] Instead, it took three years.[130] The Justice Department is on its third lead counsel. Robert H. Bork, a Yale law professor, dubbed the case 'the antitrust division's Vietnam.'"[131]

During the trial phase, which did not begin until May 1975, lawyers compiled over 100,000 pages of technical documents and the testimony of nearly 1000 witnesses.[132] IBM spent tens of millions of dollars to defend the case, which also consumed millions of taxpayer dollars on the part of the government.[133]

As a famous poet wrote, the IBM case ended "[n]ot with a bang but a whimper."[134] On January 8, 1982, the DOJ withdrew its complaint in *U.S. v. IBM*, stating that the case was "without merit and should be dismissed." On that same day, AT&T entered into an antitrust settlement with the government, agreeing to divest itself of the 22 Bell Operating

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[125] Sean Braswell, *The Agreement That Catapulted Microsoft Over IBM*, OZY (May 29, 2019), https://www.ozy.com/true-and-stories/the-agreement-that-catapulted-microsoft-over-ibm/94437/.
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *U.S. vs. I.B.M.*, *supra* note 112.
[130] *Id.*
[131] *Id.*
[132] Lopatka, *supra* note 117.
[133] "Simply on the financial side, the case was a significant drain on the company, costing IBM something on the order of $1 billion (a figure that would be equivalent to between $4 and $5 billion today)." Ronald A. Cass, *Antitrust and High-tech: Regulatory Risks for Innovation and Competition*, FEDERALIST SOC'Y (June 28, 2013), https://fedsoc.org/commentary/publications/antitrust-and-high-tech-regulatory-risks-for-innovation-and-competition.
[134] THOMAS STEARNS ELIOT, THE HOLLOW MEN at line 98 (1925).

companies.[135] Several months earlier, Assistant Attorney General William Baxter, who was in charge of the DOJ's antitrust division, characterized the DOJ's action against IBM "as a 'perfect example of a case where there were too many theories, the theories were not sharply defined.'"[136]

The IBM litigation illustrates the rapid pace of change in the computer industry and dramatizes the perils of seeking to regulate behavior pertinent to specific technologies, which are destined to evolve and become shaped by a new set of competitors. While it is true that IBM continued to dominate the mainframe computer industry for many years, prominent outside observers came to view the IBM case as evidence that the DOJ cannot, and should not, engage in attempts to restructure major global industries. Irving S. Shapiro, chairman of E.I. du Pont de Nemours & Company, commented at the conclusion of the IBM litigation in 1981: "All the ballplayers are above their heads in these cases that concern the structure of key industries. From the lawyer who drafted the case right on up, you're talking about people who have no experience in economics or industry."[137]

It is difficult to assess the economic impact of the IBM litigation. Echoing the complaint against Standard Oil's practices in the previous century, the DOJ alleged that IBM used its wealth to finance price wars against competitors who were trying to gain footholds in various parts of the computer business, selling IBM products at low prices that denied the competing firms a sufficient profit.[138] The government maintained that, similar to the Standard Oil Company, IBM strategically decided to absorb a drop in revenue in order to exert price pressure on its competitors, who were less able to withstand temporary revenue losses.[139] Yet, ultimately, in a

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[135] Ernest Holsendolph, Special, *U.S. Settles Phone Suit, Drops I.B.M. Case; A.T.& T. To Split Up, Transforming Industry*, N.Y. TIMES (Jan. 9, 1982), https://www.nytimes.com/1982/01/09/us/us-settles-phone-suit-drops-ibm-case-at-t-to-split-up-transforming-industry.html.

[136] Judi Hasson, *Government Settles with ATT, Drops IBM case,* UPI (Jan. 8, 1982), https://www.upi.com/Archives/1982/01/08/Government-settles-with-ATT-drops-IBM-case/6476379314000/.

[137] *U.S. vs. I.B.M., supra* note 112.

[138] Peter Behr, *IBM, Justice Rests Cases in Historic Antitrust Trial*, WASH. POST (June 2, 1981), https://www.washingtonpost.com/archive/business/1981/06/02/ibm-justice-rests-cases-in-historic-antitrust-trial/5cc16db0-8e7f-4763-a17d-fdfb6fef0464.

[139] *Id.*

case that generated 30 million pages of evidence, the DOJ decided to throw in the towel.[140]

Some legal scholars and economists have come to view these massive antitrust cases as a form of economic regulation themselves.[141] The theory is that the government does not even need to win, it simply needs to put pressure on a major firm to change its behavior during the course of the litigation. This occurred during the decades the government pursued IBM, as individuals close to the case have observed:

> "But had it not been for the consent decree, things certainly would have been different, users and analysts said. [¶] Imagine a world in which Bill Gates is just a senior software programmer and Larry Ellison a motivational speaker. In fact, there would be no EMC Corp., no Cisco Systems Inc. and no Sun Microsystems Inc. were it not for the decree".[142]

Others have noted that the real lesson to be drawn from the decades-long battle between the DOJ and IBM is that the DOJ poorly handled the case. According to Michael L. Glassman, an antitrust consultant, "[i]n the big cases the Government, for lack of knowledge and for fear of missing something, frequently has not been willing to define the issues narrowly enough. . . . [s]o the cases just go on and on."[143] The lessons drawn from previous antitrust cases, like the IBM case, might sound a warning note for the DOJ as it seeks to embark on a new round of antitrust cases against Big Tech.

Despite its disappointing conclusion against IBM, in 1998, the DOJ brought an action seeking to break up IBM's dominant industry successor, Microsoft Corporation, charging it with an illegal monopoly under section 2 of the Sherman Act.[144] As Part C suggests, this effort also had an unsatisfying legal result and did not end with breaking

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[140] *Business: The Case of the Century*, TIME (May 21, 1979), https://content.time.com/time/subscriber/article/0,33009,920363-1,00.html.

[141] *See, e.g.*, Fred McChesney, *Antitrust*, ECONLIB (last visited Apr. 26, 2023), https://www.econlib.org/library/Enc/Antitrust.html.

[142] Songini, *supra* note 113.

[143] *U.S. vs. I.B.M.*, *supra* note 112.

[144] Melugin, *supra* note 70 (noting that the U.S. Department of Justice Antitrust Division acknowledged the IBM suit was "without merit" in 1982); Complaint, U.S. v. Microsoft Corp., No. 98-1232 (D.D.C. May 18, 1998).

Microsoft up into several companies, as regulators had sought.[145] The Microsoft case again illustrates the practical limits of seeking to rein in the specific business practices of a company that seeks to leverage its dominance in one market to secure a business advantage in another market.

### C. The Microsoft Case—Technology as a Moving Target

Antitrust law enforcement has not managed to keep pace with these massive changes in our economy. In Assistant Attorney General Jonathan Kanter's view, "the only way to reinvigorate antitrust enforcement is to adapt our approach to reflect the obvious economic and transformational technological changes that now define our economy."[146]

Kanter's words can be read with a profound sense of déjà vu. Once again, the DOJ appears poised to seek the break-up of large tech companies that dominate their business sectors. Kanter, FTC Chair Khan, and others have expressed a desire to act quickly to avoid the lessons learned in previous major antitrust cases against Big Tech companies.[147] With a view toward the battles that loom ahead, it is a particularly opportune time to revisit the Microsoft case, which—despite its ultimately murky resolution—contains important lessons for would-be regulators, companies, and those who wish to understand the fundamental dynamics of antitrust actions.

In 1998, the DOJ and 20 states[148] brought a major antitrust action under the Sherman Act, alleging that Microsoft Corporation was illegally restraining trade due to its monopoly position in the software industry. After a relatively short trial by antitrust litigation standards, Microsoft roundly lost in the trial phase of the case.[149] On November 5, 1999, D.C. District Court Judge Thomas Penfield Jackson, who had expressed great frustration with Microsoft's behavior during

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[145] Michael Brick, *Justice Department Will Not Seek to Break Up Microsoft*, N.Y. TIMES (Sept. 6, 2001), https://www.nytimes.com/2001/09/06/technology/justice-department-will-not-seek-to-break-up-microsoft.html.

[146] *Kanter Remarks*, *supra* note 2.

[147] *See* Khan, *supra* note 1, at 803–04; *Kanter Remarks*, *supra* note 2, at 2.

[148] Technically, 20 states, including the District of Columbia.

[149] Nicholas Economides, *The Microsoft Antitrust Case*, 1 J. OF INDUS., COMPETITION AND TRADE (forthcoming Aug. 2001) (manuscript at 5–6) (http://neconomides.stern.nyu.edu/networks/Microsoft_Antitrust.final.pdf).

the litigation and who found Microsoft's CEO and Chair Bill Gates annoyingly evasive, issued his findings of fact.[150] Judge Jackson concluded that Microsoft's dominance of the x86-based personal computer operating systems market constituted a monopoly and that Microsoft had behaved in a manner to preserve its monopoly, including via hostile actions against Apple, Linux, Lotus Software, Netscape, RealNetworks, Sun Microsystem and others.[151] On April 3, 2000, Judge Jackson issued his conclusions of law, ruling that Microsoft had committed monopolization and attempted monopolization.[152] The conclusion also tied in violations of sections 1 and 2 of the Sherman Act.[153] Microsoft immediately appealed the decision.[154]

On June 7, 2000, Judge Jackson took the extraordinary step of ordering a break-up of Microsoft.[155] The court prescribed that in order to curb its monopoly power, Microsoft would have to be broken up into two separate units: one to produce the Windows operating system, and another to manage its Internet operations, such as MSN, the Internet Explorer (IE) browser, and other web applications.[156]

On June 28, 2001, though affirming Judge Jackson's findings of fact and most of his legal analysis, the D.C. Circuit Court of Appeals overturned Judge Jackson's rulings against Microsoft.[157] The Court of Appeals agreed with Judge Jackson that Microsoft engaged in anticompetitive business practices regarding its Windows Operating System, in violation of section 2 of the Sherman Act; yet it disagreed with the scope of Jackson's break-up remedy and criticized his behavior during the trial, noting that his "public comments were not only improper, but also [sic] would lead a reasonable,

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[150] *Id.* at 13.
[151] *See id.*
[152] *Id.* at 6.
[153] *Id.* at 22.
[154] Mitch Betts, *Bulletin: Judge Orders Microsoft Breakup*, COMPUTERWORLD (Jun. 8, 2000, 12:00 AM), https://www.computerworld.com/article/2595315/bulletin--judge-orders-microsoft-breakup.html.
[155] United States v. Microsoft Corp., 97 F. Supp. 2d 59 (D.D.C. 2000), *vacated,* 253 F.3d 34 (D.C. Cir. 2001).
[156] Betts, *supra* note 154.
[157] James V. Grimaldi, *Microsoft Breakup Order Reversed,* WASH. POST (Jun. 29, 2001), https://www.washingtonpost.com/archive/politics/2001/06/29/microsoft-breakup-order-reversed/81e9118f-0c4e-40a9-8cc5-0775e9377f4e/.

informed observe[r] to question the district judge's impartiality."[158]

Although the D.C. Circuit found that it was possible to examine high-tech industries with traditional antitrust analysis, the court announced a new and permissive liability rule that repudiated the Supreme Court's dominant rule of per se illegality for tie-ins, because of the court's concern for the detrimental effects that a per se rule would have on innovation.[159] The D.C. Circuit remanded the case for consideration of a proper remedy under a more limited scope of liability, including whether Microsoft had illegally advantaged the IE browser.[160] D.C. District Court Judge Colleen Kollar-Kotelly was chosen to hear the case.[161]

The DOJ announced on September 6, 2001, that it no longer sought to break up Microsoft and would instead seek a lesser antitrust penalty.[162] Microsoft decided to draft a settlement proposal allowing PC manufacturers to adopt non-Microsoft software.[163] The deal did not prohibit future tying-in of Microsoft's operating system (OS) to other products, such as a browser application.[164] Despite an announced settlement of the case in November, 2001, which included provisions intended to protect middleware products and imposed an obligation on Microsoft to share its application programming interfaces with other companies, nine states and the District of Columbia refused to join the deal.[165] Finally,

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[158] Michael Brick, *U.S. Appeals Court Overturns Microsoft Antitrust Ruling*, N.Y. TIMES (June 28, 2001), https://www.nytimes.com/2001/06/28/business/us-appeals-court-overturns-microsoft-antitrust-ruling.html. The Appeals Court further rebuked Judge Jackson —"'The trial judge engaged in impermissible ex parte contacts by holding secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside of the courtroom, giving rise to an appearance of partiality,' the court said. 'Although we find no evidence of actual bias, we hold that the actions of the trial judge seriously tainted the proceedings before the district court and called into question the integrity of the judicial process.'" *Id.*

[159] *Id.*; *see also United States v. Microsoft*, 231 F. Supp. 2d 144.

[160] Grimaldi, *supra* note 157.

[161] *See* Amanda Cohen, *Surveying the Microsoft Antitrust Universe*, 19 U.C. BERKELEY TECH. L.J. 333, 338 n.30 (2004) (discussing appointment of Judge Kollar-Kotelly).

[162] *Id.* at 335.

[163] *Id.* at 339.

[164] *Id.* at 338.

[165] *Id.* at 344.

on June 30, 2004, the Court of Appeals approved the proposed settlement, ending six years of litigation.[166]

Many computer industry observers have speculated on what might have happened if Microsoft had in fact been split up into two or more divisions, presumably separating the Windows OS from applications, games, and other distinct lines of business.[167] In his recent bar association remarks, Assistant Attorney General Kanter suggested that a clean company break-up is far more preferable than the extended and expensive litigation that characterizes major antitrust cases, often leading to confusing and unenforceable results:

> I'm concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.[168]

Taking Kanter's approach, Microsoft could have been ordered to split off its Internet products and services in 1998. In practice, a separate company would most likely have been spun off to continue to make Internet Explorer, the Microsoft Network, and Internet-related products based on Extensible Markup Language and other formats supported by Microsoft.[169] Ignoring the integration issues with Windows OS for a moment, the new company could then have decided to license IE back to Microsoft and to others. The net effect would likely have been to place a higher valuation on IE. Microsoft shareholders, consistent with past cases, would have been offered proportional shares in the new company, allowing them to reap the benefits of their investment but not to profit from Microsoft's anticompetitive business practices. Computer industry observers speculated years later that five

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[166] *Id.* at 357

[167] Alex Fitzpatrick, *A Judge Ordered Microsoft to Split. Here's Why It's Still a Single Company*, TIME (Nov. 5, 2014, 9:00 AM) https://time.com/3553242/microsoft-monopoly/.

[168] *Kanter Remarks*, *supra* note 2.

[169] *See* Eric Lai, *Microsoft Says Support for Open XML is Growing*, COMPUTERWORLD (May 9, 2007, 12:00 AM), https://www.computerworld.com/article/2545066/microsoft-says-support-for-open-xml-is-growing.html.

separate mini-Microsoft companies might have increased the company's value substantially.[170]

The real damage wrought by Microsoft's anticompetitive behavior was to isolate Netscape, constrain its market share, and make it difficult to do business with potential partners. After AOL acquired Netscape in 2001, Microsoft sought to smooth things over with the then-leading Internet provider and agreed to pay AOL a $750 million settlement for its past anti-Netscape behavior.[171] AOL merged into media company Time Warner in January, 2000, with a $350 billion post-merger valuation.[172] Reporters speculated that paying down its new debt motivated AOL Time Warner to enter into the deal with Microsoft and resolve the internet browser wars.[173] Of course, this settlement represented little solace for the Netscape employees and shareholders who suffered as a result of Microsoft's anticompetitive tactics.

At its peak, IE held a 65 percent share of the browser market.[174] By January 2016, IE was supplanted by Google's Chrome browser, which garnered 57.75 percent.[175] At that time, IE held 15.95 percent, Firefox 16 percent, and Safari 4.6 percent of the market.[176] By 2020, IE dwindled to 3.7 percent of the browsing market share. [177]

Another prime example of Microsoft leveraging its desktop control against a competitor involved RealNetworks,[178] a media player company, which pioneered audio and video streaming media in the mid-1990s and held

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[170] Diane Ainsworth, *Breaking up Microsoft: What's at Stake for the Megagiant?*, BERKELEYAN (June 7, 2000), https://newsarchive.berkeley.edu/news/berkeleyan/2000/06/07/microsoft.html (quoting Emeritus EE and Computer Science Professor Michael Harrison).

[171] Paul R. La Monica, *Microsoft to Pay AOL $750M*, CNN MONEY (May 30, 2003, 10:25 AM), https://money.cnn.com/2003/05/29/technology/microsoft/.

[172] Tim Arango, *How the AOL-Time Warner Merger Went So Wrong*, N.Y. TIMES, (Jan. 10, 2010), https://www.nytimes.com/2010/01/11/business/media/11merger.html.

[173] La Monica, *supra* note 171.

[174] *Desktop Browser Market Share United States of America from Jan 2009 to Oct 2019*, STATCOUNTER, https://gs.statcounter.com/

[175] *Id.*

[176] *Id.*

[177] *Id.*; *see also Usage Share of Web Browsers*, WIKIPEDIA, https://en.wikipedia.org/wiki/Usage_share_of_web_browsers.

[178] The author worked as a senior executive at RealNetworks from 1997-2003 but was not directly involved in the Microsoft antitrust suit.

numerous patents on the technology.[179] The legal controversy flowed from Microsoft's ability to incorporate its own Windows Media Player into its suite of media products and to offer it as part of the Windows NT Server product.[180] Where RealNetworks customers had to pay for access to RealNetworks' media servers, Microsoft customers essentially received the service bundled into their purchase of NT.[181] In this sense, Microsoft not only packaged a separate product into Windows, but also used its desktop dominance to favor the Windows Media Player, often minimizing the visibility of the RealPlayer, even if a user had previously downloaded the product.[182] Ultimately, Microsoft's Windows Media Player displaced the RealPlayer, bolstered by its monopoly presence—which exceeded 95 percent of the global personal computer (PC) marketplace.[183] While not part of the original Microsoft litigation, RealNetworks subsequently reached a $761 million settlement agreement with Microsoft in October, 2005.[184] A similar case brought in the European Union in 2004 was also settled by Microsoft.[185]

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[179] Microsoft, in fact, had licensed early versions of RealNetworks streaming technology and argued in the antitrust suit that it had simply innovated on top of its paid-for license. This argument was rejected.

[180] CNN MONEY, *Glaser Stands by Testimony* (July 24, 1998, 7:19 PM), https://money.cnn.com/1998/07/24/technology/microsoft/.

[181] *Id.*

[182] Specifically, Microsoft disfavored the placement of the RealPlayer icon on a PC user's desktop if it ran Windows. For a time, it deployed a "desktop cleaner" utility which "organized" a desktop to remove the RealPlayer icon from the first screen.

[183] Richard MacManus, *Microsoft has 97% of the OS Market, Says OneStat.com*, ZDNET (Aug. 21, 2006), https://www.zdnet.com/article/microsoft-has-97-of-os-market-says-onestat-com/. "[M]arket analytics firm OneStat.com, which is reporting that Microsoft's Windows OS family of products has 97% of the operating system market – 'a global usage share of 96.97 percent', to be exact. The leading OS on the web is Windows XP, with 86.80% share. Microsoft's Windows 2000 has a global usage share of 6.09 percent and is the second most popular OS on the web. Meanwhile OneStat.com claims that Apple Macintosh has only 2.47 percent and Linux a mere 0.36 percent." *Id.*

[184] Wendy Kaufman, *Microsoft, Real Networks Settle Antitrust Case*, NPR (Oct. 11, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=4954656.

[185] In March 2004, the European Commission in the European Union Microsoft antitrust case fined Microsoft €497 million and ordered the company to provide a version of Windows without Windows Media Player, claiming Microsoft "broke European Union competition law by leveraging its near monopoly in the market for PC operating systems onto the markets for work group server operating systems and for media

Clearly, Microsoft sought to leverage its overwhelming PC desktop monopoly in order to favor its own products and to eliminate competition. And it did so successfully. Unlike the Netscape example, in the RealNetworks example a separate Microsoft media company may not have been as successful if it was competing as a separate company, given RealNetworks' technology lead and IP. Yet, once Flash media became incorporated into Internet browsers, separate media player applications became disfavored.[186] As bandwidth increased on a global basis, consumers became more adept at downloading files such as songs and videos.[187] YouTube emerged as a major outlet for video content, followed by a host of smaller competitors.[188] Despite its position within various versions of Windows, Microsoft failed to leverage its technology presence into a dominant position in the marketplace for audiovisual entertainment.[189]

A often overlooked conclusion to draw from these tie-in cases is that consumers largely benefited from market competition, especially when products such as media players and browsers were offered under a "freemium" business model. Small innovators faced pressure from Microsoft, a better-funded company that was willing to make investments in product areas it thought would be fruitful in the long run, extending its relationship with consumers into new areas.[190] Should it be illegal *per se* for dominant companies to "forward invest" in new technology products in unrelated or adjacent spaces? In a sense, isn't that role also played by venture capitalists and other investors who are willing to take on economic risk for future gain?

While the consensus view of the Microsoft case seems to be that too little was done to moderate the company's

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players". *Microsoft Corp. v. Commission*, WIKIPEDIA, https://en.wikipedia.org/wiki/Microsoft_Corp._v._Commission.

[186] *See* Jay Hoffman, *Flash and Its History on the Web*, THE HISTORY OF THE WEB (Aug. 7, 2017), https://thehistoryoftheweb.com/the-story-of-flash/.

[187] *See* FED. COMMC'N COMM'N, 30 FCC RCD. 1375, FCC FINDS U.S. BROADBAND DEPLOYMENT NOT KEEPING PACE (2015).

[188] Bernhard Rieder et. al., *Mapping YouTube: A Quantitative Exploration of a Platformed Media System*, 25 FIRST MONDAY, (Aug. 2020).

[189] *See* Gregg Keizer, *The Microsoft Breakup that Never Happened*, COMPUTERWORLD, (June 18, 2013, 2:19 PM), https://www.computerworld.com/article/2497911/the-microsoft-breakup-that-never-happened.html.

[190] Herbert Stein, *Does Microsoft Play Fair?*, SLATE, (June 25, 1996, 3:30 AM), https://slate.com/news-and-politics/1996/06/does-microsoft-play-fair.html.

business practices, the rapid evolution of the technology landscape quickly obviated some of the major concerns that gave rise to the case.[191] Microsoft missed the boat on digital music with its failed Zune product,[192] missed the smartphone market despite purchasing Nokia and Skype,[193] and again failed to capitalize on its early efforts in creating a popular social media platform. To its credit, Microsoft rebounded with a growing game platform, Xbox, fueled by strategic content acquisitions, and is now the second-biggest company in cloud computing.[194]

In both the Microsoft and IBM cases the DOJ sought to end what it deemed predatory pricing behavior and illegal tie-in practices of dominant firms. With the emergence of the commercial World Wide Web in the 1990s, the computer industry experienced a major shift to new business models, often based on providing free products to consumers.[195] Revenue models supported by advertising sales and the collection of user data proliferated and fueled the growth of social media and online media companies.[196] In Part 4 of this Article, we will explore whether the new dynamics of the digital marketplace warrant different approaches to regulation.

## IV. A Brief Examination of the Streaming Media Distribution and Content Markets from an Antitrust Perspective

By the second decade of the 21st century, technology companies and global media distribution began to merge into

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[191] *Id.*

[192] *See* Matt Rosoff, *Former Microsoft Zune Boss Explains Why It Flopped*, BUSINESS INSIDER (May 11, 2012, 1:41 PM), https://www.businessinsider.com/robbie-bach-explains-why-the-zune-flopped-2012-5.

[193] Todd Haselton, *Departing Windows Chief Terry Myerson Explains Why Microsoft Failed in Smartphones*, CNBC (Mar. 29, 2018, 2:28 PM), https://www.cnbc.com/2018/03/29/why-microsoft-failed-in-phones.html.

[194] Nick Statt, *How Microsoft's Xbox Challenged Nintendo and Sony and Changed Console Gaming Forever*, PROTOCOL (Nov. 15, 2021), https://www.protocol.com/xbox-20-anniversary-microsoft-history.

[195] Vineet Kumar, *Making "Freemium" Work*, HARV. BUS. REV. (May 2014)

[196] Aashish Pahwa, *The Data Monetization | Big Data Business Models*, FEEDOUGH, (Mar. 22, 2023), https://www.feedough.com/the-data-monetization-big-data-business-models/.

a new, robust market.[197] This has been especially true in the market for video content, which consists of both predominantly free services, such as YouTube, and paid subscription services led by Netflix, Amazon, Disney, Hulu, HBO Max, Apple and others.[198] The number of global subscribers to these services reached over 90 million by the end of 2022 and is expected to reach over a billion users by 2027.[199] While it is difficult to gather precise subscription numbers, by April, 2023, Netflix led the global marketplace with nearly 231 million monthly subscribers, and Disney's combined streaming services—Disney+, Hulu, and ESPN+—had over 234 million.[200] Other streaming services with large subscription bases include: Amazon Prime (200 million); Anime streaming Crunchyroll (120 million free subscribers); Peacock (54 million free subscribers); and HBO Max (81 million).[201] Despite considerable investment, Apple trails the pack with an estimated 40 million subscribers to its Apple+ service.[202]

Since the FTC's June 2021 announcement that it would scrutinize Amazon's proposed purchase of MGM Studios for $8.5 billion,[203] questions have been raised about the antitrust basis for such a merger review, given that Amazon is not a streaming media monopoly and the once-lustrous MGM now consists of only 4000 film titles, since the studio sold its library

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[197] Alex Sherman, *Here Are the Next Media Mergers that Make the Most Sense*, CNBC (May 29, 2001, 9:31 AM), https://www.cnbc.com/2021/05/29/media-mergers-whos-next-.html.

[198] *See generally* Pakula, *supra* note 95.

[199] FLIXPATROL, *Streaming Services by Subscribers in the World* (last visited Apr. 26, 2023), https://flixpatrol.com/streaming-services/subscribers/; Statista, *Video Streaming (SVoD) – Worldwide*, (last visited Apr. 26, 2023), https://www.statista.com/outlook/dmo/digital-media/video-on-demand/video-streaming-svod/worldwide.

[200] FLIXPATROL, *supra* note 199.

[201] *Id.*; *see also* Christine Persaud & Keith Langston, *12 Most Popular Streaming TV Services, Ranked By Subscriber Numbers*, SCREENRANT (Nov. 20, 2021), https://screenrant.com/ten-most-popular-streaming-services-ranked-subscriber-numbers/. Amazon claims that of its 200 million prime subscribers, 175 million accessed its Prime Video service in 2021. *Id.*

[202] *Id*.

[203] Brent Kendall, *Amazon's Planned Purchase of MGM Faces FTC Scrutiny: Commission Secures Antitrust Reviews After Talks with Justice Department, and as Amazon Critic Lina Khan takes the FTC's Helm*, WALL ST. J. (June 21, 2021, 4:22 PM), https://www.wsj.com/articles/amazons-planned-purchase-of-mgm-to-be-reviewed-by-ftc-11624379614. *See also* Aisha Malik, *Amazon Completes $8.5 Billion Acquisition of MGM*, TECHCRUNCH, (Mar. 17, 2022, 6:52 AM), https://techcrunch.com/2022/03/17/amazon-completes-its-8-5-billion-acquisition-of-mgm/.

to Turner Broadcasting System in 1986 (which included classics such as *Gone With the Wind*, *The Wizard of Oz*, and *Singing in the Rain*).[204]

Worldwide revenue from video streaming is projected to rise from $419 billion in 2021 to $932 billion by 2028, exhibiting a compound annual growth rate of 12.1 percent during the forecast period.[205] To supply content for this voracious appetite for long form video entertainment, it is estimated that both the technology companies and the old-line studios will spend more than $230 billion on video content this year, nearly doubling the figure spent a decade ago.[206] Led by a creative surge in long form television, series such as *Breaking Bad*, *Game of Thrones*, *The Handmaid's Tale*, *The Mandalorian*, *The Crown*, *Bridgerton*, *Ozark*, and *Lovecraft Country* have garnered both popular and critical acclaim as innovative and well-crafted productions.[207] The 2022 Academy Award nominations confirmed a big shift toward critical recognition of productions by Netflix and other streaming media companies.[208] Hollywood production was surging prior to the pandemic and mostly recovered by the end of 2021, as measured by the number of productions produced.[209] The crunch for skilled Hollywood crafts and

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[204] Allison Durkee, *Amazon Closes MGM Deal – But Here's Why You Still Won't Find 'Wizard of Oz' or 'Gone with the Wind' on There*, FORBES (May 26, 2021, 10:53 AM), https://www.forbes.com/sites/alisondurkee/2021/05/26/amazon-buys-mgm. "Turner's library of MGM films are now under the control of WarnerMedia and parent company AT&T, after Turner Broadcasting System merged with Time Warner Inc. in 1995, and a number of the classic films are now streaming on HBO Max." *Id.*

[205] *Video Streaming Market Share to Touch USD 932.29 Billion by 2028; Video Streaming Market Size 2021 to 2028*, GLOBE NEWSWIRE (Dec. 15, 2021, 12:08 AM), https://www.globenewswire.com/news-release/2021/12/15/2352238/0/en/Video-Streaming-Market-Share-to-Touch-USD-932-29-Billion-by-2028-Video-Streaming-Market-Size-2021-to-2028.html.

[206] *Just How Big in Media Does Apple Want to Be?*, THE ECONOMIST (Jan. 8, 2022), (citing a forecast by Ampere Analysis, a research firm), https://www.economist.com/business/2022/01/08/just-how-big-in-media-does-apple-want-to-be (discussing increased spending on video content).

[207] Madison Troyer, *25 Most Popular Emmy-nominated Shows of 2019*, STACKER (Aug. 22, 2019) https://stacker.com/stories/3436/25-most-popular-emmy-nominated-shows-2019.

[208] Josh Rottenberg, *OSCAR NOMINATIONS; Key Takeaways from Oscar Nominations as Power of the Dog Leads the Pack*, L.A. TIMES (Feb. 8, 2022).

[209] Alexandra Steigrad, *Hollywood Production More than Doubled in 2021 During COVID Recovery*, N.Y. POST (Jan. 20, 2022),

guild members spurred talk of a strike by the International Alliance of Theatrical Stage Employees (IATSE) in the fall of 2021, although the strike was avoided when a new three-year agreement was reached with television and motion picture producers.[210]

Rising revenues, growing consumer demand, and the labor shortage all point to a healthy economy for the streaming industry.[211] Measured by the Herfindahl-Hirschman Index, the streaming market is not characterized by dangerous concentration or an indication of monopoly power wielded by any one streaming service.[212] Instead, the number of new entrants to the marketplace indicates overall market health. In the past few years new streaming services have proliferated, although many of them are traditional media companies launching dedicated streaming services under their brands, such as Paramount or NBCUniversal. Sony Corporation stands out as a media producer that has opted to license broadly across the marketplace rather than launch its own subscription service.[213]

As a result of the lack of market concentration and MGM's relatively small content library, the FTC's merger review of Amazon's announced purchase raised eyebrows across both Hollywood and the technology industry.[214] The

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https://nypost.com/2022/01/20/hollywood-production-more-than-doubled-during-covid-recovery/.

[210] *Landmark Tentative Agreement Reached for IATSE West Coast Film and Television Workers Before Strike Deadline*, INT'L ALLIANCE OF THEATRICAL STAGE EMP'S (Oct. 16, 2021), https://iatse.net/landmark-tentative-agreement-reached-for-iatse-west-coast-film-and-television-workers-before-strike-deadline/.

[211] See generally Pakula, *supra* note 95 for an excellent overview of the streaming media marketplace and analysis of business practices.

[212] The Herfindahl-Hirschman Index is an index that measures the market concentration of an industry. A highly concentrated industry is one where only a few players in the industry hold a large percentage of the market share, leading to a near-monopolistic situation. A low degree of concentration means that the industry is closer to a perfect competition scenario, where many firms of more or less equal size share the market. *See Herfindahl-Hirschman Index*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/finance/herfindahl-hirschman-index-hhi/ (last updated Feb. 10, 2020).

[213] R.T. Watson, *In the Streaming Wars, Sony Sits on the Sideline*, WALL ST. J. (Aug. 7, 2022), https://www.wsj.com/articles/in-the-streaming-wars-sony-stands-on-the-sidelines-11628308803.

[214] *See* Alex Alben, Is MGM-Amazon Deal Antitrust? Not in Booming Streaming Market, SEATTLE TIMES (July 1, 2021), https://www.seattletimes.com/opinion/is-mgm-amazon-deal-antitrust-not-in-booming-streaming-market/.

primary basis of the Biden Administration's issue with the acquisition seems to be a desire to rein in Amazon from further expansion into the video streaming market. As reported in *The Verge*: "The FTC is focused on 'the larger implications of the deal for Amazon's market power . . . the FTC is wary of whether the deal will illegally boost Amazon's ability to offer a wide array of goods and services and is not just limited to content production and distribution.'"[215]

The FTC's action illustrates the danger of lacking consistent principles for antitrust mergers. In this case, a consumer harm argument would be highly attenuated and probably based on speculation that over time the market would consolidate into a few dominant streaming companies that would have power to set prices in anticompetitive ways. The argument that Amazon could exert its overall size in ecommerce to limit new market entrants into the streaming business also seems to run counter to trends, given the desire of content producers and other tech companies to enter and participate in the streaming industry.

The history of the American economy is full of examples of successful companies extending into new product areas, ranging from a timber company called Boeing that decided to build aircraft in 1916,[216] to Google forming its Waymo subsidiary in 2016 to build autonomous vehicles.[217] In fact, one might argue that the creation of surplus capital in a given business is put to a highly productive use when that business branches out, creating jobs and offering new goods and services to consumers. The IBM and Microsoft cases have been cited as an illustration that the government is not well-positioned to determine whether and when a company should enter into a new line of business.[218]

The FTC's long history of enforcement[219] inconsistency is highlighted by its decision to allow Amazon's purchase of

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[215] Jay Peters, *The FTC Has Reportedly Opened an Investigation into Amazon's MGM Acquisition*, THE VERGE (July 9, 2021), https://www.theverge.com/2021/7/9/22570797/ftc-amazon-mgm-investigation-probe-lina-khan.

[216] AMIR R. AMIR ET AL, BOEING COMPANY, BRITANNICA (1998) (last updated Sep. 5, 2022).

[217] WAYMO, https://waymo.com/company/#story (last visited Feb. 16, 2022).

[218] Elizabeth Nolan Brown, *The Bipartisan Antitrust Crusade Against Big Tech*, REASON (July 2021), https://reason.com/2021/06/05/the-bipartisan-antitrust-crusade-against-big-tech.

[219] For example, companies such as Boeing and Google have a long history of investing in or purchasing companies in other fields.

Whole Foods in 2016, a large company in an unrelated industry,[220] while potentially barring Amazon from acquiring content to fuel its video business, raises questions about the basis of this merger review.

This is not to suggest that Amazon has not engaged in anticompetitive practices that give rise to legitimate scrutiny, particularly in areas where it exerts dominant market control. Multiple sellers on Amazon's ecommerce platform have accused the company of unfairly competing against them by using data to reverse engineer Amazon products. Further, Amazon's inherent control of all data in a segment of its platform gives rise to the potential that it will use that data in a way that benefits its own white-labeled products or favored partners, rather than share the data with competitive sellers on its marketplace.[221]

In addition to complaints against Amazon, similar charges have been leveled against Google, claiming that the search giant favors its own partners when returning user search queries.[222] In these instances, Google's critics have charged that it manipulates its search algorithm in order to skew outcomes that are not in sync with Google's goals.[223] A

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[220] *See* Press Release, Fed. Trade Comm'n, Statement of Federal Trade Commission's Acting Director of the Bureau of Competition on the Agency's Review of Amazon.com, Inc.'s Acquisition of Whole Foods Market Inc. (Aug. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau.

[221] Annie Palmer, *Amazon Uses Data from Third-party Sellers to Develop Its Own Products, WSJ Investigation Finds*, CNBC (Apr. 23, 2020, 11:14 AM), https://www.cnbc.com/2020/04/23/wsj-amazon-uses-data-from-third-party-sellers-to-develop-its-own-products.html, ("The Journal's findings directly contradict Amazon's previous messaging around the issue of how it uses data from third-party merchants to build private-label products. For many years, Amazon has housed its own private-label goods under the AmazonBasics branding, which offers everything from furniture to clothing. It also makes private-label products under other brand names. Amazon has long maintained that it's against company policy to use such data to build future products. Last July, at a hearing of the House Judiciary subcommittee on antitrust, Nate Sutton, associate general counsel at Amazon, denied that individual seller data is used to manipulate search algorithms to favor Amazon's own products, or in any other way to directly compete with merchants.").

[222] Press Release, U.S. Dep't of Just., Justice Department Sues Monopolist Google for Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

[223] Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023),

Senate Bill has been introduced to counter such search result manipulation, both by Amazon and Google.[224]

State-level antitrust actions have also been brought against Google, claiming that it manipulates its ad auctions to illegally enhance the price it charges its customers for advertising.[225] While Google denied the allegations, the allegations appear to have broad support, especially among Republican Attorney Generals[226]:

While announcing a suit filed in federal court, Texas Attorney General Ken Paxton claimed that, "Google is using its "'monopolistic power' to control pricing of online advertisements, fixing the market in its favor and eliminating competition."[227] Paxton added, "[t]his Goliath of a company is

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https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies#:~:text=In%202020%2C%20the%20Justice%20Department,for%20trial%20in%20September%202023.

[224] Theo Wayt, *Bipartisan Senate Bill Seeks to Ban Big Tech from Rigging Search Results*, N.Y. POST (Oct. 14, 2021, 10:52 AM), https://nypost.com/2021/10/14/senate-bill-seeks-to-ban-big-tech-from-rigging-search-results/ ("Tech giants like Amazon and Google would be banned from rigging search results to favor their own products under new legislation that a bipartisan group of US senators revealed on Thursday. News of the bill, which is sponsored by the top Democrat and Republican on the Senate's antitrust committee, comes just one day after a bombshell Reuters investigation revealed that Amazon allegedly used data on third-party sellers to come up with ideas for its own labels in India — then rigged search results to favor the knockoffs.").

[225] In the "ad tech" marketplace that brings together Google and a huge universe of online advertisers and publishers, the company controls access to the advertisers that put ads on its dominant search platform. Google also runs the auction process for advertisers to get ads onto a publisher's site. Seven of Google's products in search, video, mobile, email, mapping and other areas are estimated to have over a billion active monthly users each, providing the company a trove of users' data that it can deploy in the advertising process. *See* Ben Popken, *Google Sells the Future, Powered by Your Personal Data*, NBC NEWS (May 10, 2018), https://www.nbcnews.com/tech/tech-news/google-sells-future-powered-your-personal-data-n870501.

[226] Tony Romm, *Nearly 40 States Sue Google Alleging Search Manipulation, Marking the Third Antitrust Salvo Against the Tech Giant*, THE WASH. POST (Dec. 17, 2020, 2:50 PM), https://www.washingtonpost.com/technology/2020/12/17/google-search-antitrust-lawsuit/.

[227] Kari Paul, *Texas and Other States Sue Google for Abusing 'Monopolistic Power,'* THE GUARDIAN (Dec. 16, 2020, 6:22 PM), https://www.theguardian.com/technology/2020/dec/16/google-lawsuit-texas-monopolistic-power.

using its power to manipulate the market, destroy competition, and harm you, the consumer."[228]

On the heels of this litigation, states have further amended their claims, maintaining that Google and Facebook have entered into an agreement to divide the digital ad sales market in a manner that thwarts competition.[229]

Such manipulative behavior might constitute precisely the type of anticompetitive market dynamics that FTC Chair Khan warned against in her 2017 article. The question remains, however, whether bringing antitrust suits constitutes the most effective remedy against such behavior. A monopoly position that gives a company such significant market data, gleaned from its platform, certainly warrants scrutiny, and perhaps even warrants legislative action to remedy such unfair business practices.

## V. Should Antitrust Law be Used as a Tool to Regulate Data Monopolies and Data Brokers?

### A. The Rise of the Data Economy

In the first decade of the commercial Internet, websites collected personal data, but had yet to figure out how to utilize this data to enhance revenue.[230] Even leading sites, such as ESPN.com, drew advertisers by promising page views to

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[228] *Google Sued by 10 States for Alleged "Anti-competitive Conduct" in Advertising*, CBS NEWS (Dec. 17, 2020, 6:21 AM), https://www.cbsnews.com/news/google-lawsuit-texas-10-states-alleged-anti-competitive-conduct-advertising/.

[229] Zachary Pearce, *Online Advertising: Facebook and Google Accused of Conspiracy and Manipulation*, AROVER (Jan. 17, 2022), https://www.arover.net/2022/01/17/online-advertising-facebook-and-google-accused-of-conspiracy-and-manipulation/, ( "The complaint in question, filed in New York on January 14, 2022, is a new version of the lawsuits initiated in December 2020 against Google. The Web giant remains the first target, accused of having manipulated, for its own benefit, the auction system for advertising inserts set up on its various platforms. The company would have gone so far as to inflate the prices presented to advertisers to increase its margins. For the Texas prosecutor, it is as if Google were a bank that owned the Stock Exchange, the complaint showing how Google 'manipulates the online auction system to the detriment of content publishers to whom the company blatantly lies about the reality of auctions.'").

[230] The Investopedia Team, *Web 3.0 Explained, Plus the History of Web 1.0 and 2.0*, INVESTOPEDIA (Oct. 23, 2022), https://www.investopedia.com/web-20-web-30-5208698.

its clients.[231] Over time, the level of sophistication of delivering a specific audience moved from knowing a user's location by zip code or IP address, to actually identifying specific individuals based on their web browsing history combined with a myriad of third-party data.[232] Today's internet is characterized by a sophisticated user-profiling regime, encapsulated in the phrase "Big Data." Powerful computer algorithms analyze individuals' purchasing profiles and consumer habits, often pinpointing our movements and favorite locations.[233] Meta, Google, Twitter, Amazon and other Big Tech companies use versions of the Big Data model to maximize their revenues and develop ongoing relationships with their customers.[234] In fact, Apple CEO Tim Cook has observed that while it used to be an individual engaging with a computer product, today "you are the product."[235]

### B. Assessing the Price of "Free" Platforms

The Big Data model works hand-in-hand with the freemium business model, under which a consumer receives a given digital product free of charge, with the possibility of upgrading to pay for a more fully featured product.[236] Meta's product line—WhatsApp, Instagram, and Facebook—come free of charge to consumers.[237] Similarly, SNAP, Reddit, Pinterest, TikTok, WeChat, Twitter, YouTube and thousands of other companies offer attractive free platforms, enabling

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[231] Playwire Technical Team & Anthony Berra, *How Much Ad Revenue Can a Website Make?*, PLAYWIRE, https://www.playwire.com/blog/how-much-ad-revenue-can-a-website-make (last visited Apr. 6, 2023) (noting that leading internet companies based revenue on page views).

[232] *See* Keith D. Foote, *A Brief History of Data Quality*, DATAVERSITY (July 29, 2021), https://www.dataversity.net/a-brief-history-of-data-quality/#.

[233] *See id.*

[234] Thulara N. Hewage et al., *Review: Big Data Techniques of Google, Amazon, Facebook and Twitter*, 13 J. OF COMMC'NS. 94, 94 (2018).

[235] Justin Bariso, *Tim Cook May Have Just Ended Facebook*, INC. (Jan 30, 2021), https://www.inc.com/justin-bariso/tim-cook-may-have-just-ended-facebook.

[236] Vineet Kumar, *Making 'Freemium' Work: Many Start-ups Fail to Recognize the Challenges of This Popular Business Model*, HARVARD BUS. REV. 27 (May 2014).

[237] *See* Mia Pearson, *Why an Ad-Free, No-Cost Social Network is Unsustainable*, THE GLOBE AND MAIL (Oct. 20, 2014), https://www.theglobeandmail.com/report-on-business/small-business/sb-marketing/why-theres-no-such-thing-as-a-free-social-network/article21362429.

commerce and communication.[238] It is no secret that the value extracted by these companies lies in user data.[239] In lieu of charging subscription fees or other forms of access payments, modern technology companies thrive on selling user profiles, sometimes anonymized, to third-party advertisers and to ecommerce vendors.[240]

An old-school economist[241] would label the Big Data phenomena an "externality" that is not directly accounted for in a transaction. Users that download Google's free email service or office productivity software do not pay an upfront fee, but they pay in a different form by granting Google the right to know quite a bit about them.[242]

For the most part, the exchange of data for services is perfectly legal.[243] Our consumer privacy law in the United States relies on the concept of notice of actual practices of data collection and sharing with third parties.[244] According to the system, no legal rights are lost if citizens have the chance to research a business's actual privacy practices and can decline to associate with companies that offend their privacy preferences.[245] This incentivizes companies to fully disclose their data collection, processing, and sharing practices in lengthy privacy policies, which over 90 percent of consumers do not read.[246] Because such policies are nonnegotiable, the

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[238] *See id.*

[239] Colin Campbell, *Social Media Data Mining: Understanding What It Is and How Businesses Can Use It*, UNIV. OF SAN DIEGO: KNAUSS SCH. OF BUS. BLOGS (Apr. 3, 2020), https://www.sandiego.edu/blogs/business/detail.php?_focus=76022.

[240] Kalev Leetaru, *What Does It Mean For Social Media Platforms To "Sell" Our Data?*, FORBES (Dec. 15, 2018, 3:56PM), https://www.forbes.com/sites/kalevleetaru/2018/12/15/what-does-it-mean-for-social-media-platforms-to-sell-our-data/?sh=1e6450d42d6c.

[241] Pierre Lemieux, *Government Externalities and the Friedman Criterion*, ECONLIB (July 10, 2022), https://www.econlib.org/government-externalities-and-the-friedman-criterion.

[242] Mitchell Nemeth, *The Hidden Costs of Free Social Media*, FOUND. FOR ECON. EDU. (July 15, 2019), https://fee.org/articles/the-hidden-costs-of-free-social-media/.

[243] Alexander Alben, *When Artificial Intelligence and Big Data Collide—How Data Aggregation and Predictive Machines Threaten our Privacy and Autonomy*, 1 AI ETHICS J. 1, 10 (2020)).

[244] *Id.*

[245] *See* Richard Warner & Robert H. Sloan , *Beyond Notice and Choice: Privacy, Norms, and Consent*, 14 SUFFOLK UNIV. J. OF HIGH TECH. L. 370, 376-79 (2014).

[246] *See* BROOKE AUXIER ET AL., AMERICANS AND PRIVACY: CONCERNED, CONFUSED AND FEELING LACK OF CONTROL OVER THEIR PERSONAL INFORMATION, PEW RSCH. CTR. (2019),

only real option left to consumers would be not to visit the company's site or utilize its services. When the upfront price of that service is "free," as is the case with most social media platforms, billions of users have opted, via a click of the mouse, to sign up and agree to the firm's data usage policies.[247]

Only in the past few years have meaningful laws been passed to address the limits of the privacy notice regime and give consumers some rights to control the use of their data.[248] With the advent of California's Consumer Privacy Act in January, 2020, qualifying companies were required to give individuals access to their data and the option to opt out of the sale of data to third parties.[249] Similar laws were enacted in Virginia and Colorado.[250] Yet, because the rights under such state laws are structured as "opt out" choices, relatively few consumers actually avail themselves of this means to control their data.[251]

Different methods can be used to value a user's data to firms. These methods range from estimating at what price users would accept to stop using a service to calculating a monetary value by dividing the company's advertising revenues by its user base.[252] The Federal Reserve itself has recently engaged in an inquiry into the valuation of online user data:

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https://www.pewresearch.org/internet/2019/11/15/americans-and-privacy-concerned-confused-and-feeling-lack-of-control-over-their-personal-information/ ("only about one-in-five adults overall say they always (9%) or often (13%) read a company's privacy policy before agreeing to it.").

[247] *See* Josh Constine, *Facebook Now Has 2 Billion Monthly Users… and Responsibility*, TECHCRUNCH (June 27, 2017, 10:06 AM), https://techcrunch.com/2017/06/27/facebook-2-billion-users/, (reporting that Facebook has over 2 billion users while Twitter has 328 million).

[248] *See* Paul Kirvan, *State of Data Privacy Laws in 2023,* TECHTARGET (Jan. 2023), https://www.techtarget.com/searchsecurity/tip/State-of-data-privacy-laws ("While no national legislation exists, a growing number of states have enacted their own data privacy laws. California, Colorado, Connecticut, Utah and Virginia have detailed and wide-ranging data privacy laws in force.").

[249] CAL. CIV. CODE § 1798.110 (West 2023) (right to access collected data); CAL. CIV. CODE § 1798.120 (West 2023) (right to opt out of sale or sharing of personal information).

[250] *See* VA. CODE ANN. §§ 59.1-575 to 585; COLO. REV. STAT. § 6-1-1303 to 1313.

[251] *See* VA. CODE ANN. § 59.1-577 to 578; COLO. REV. STAT. § 6-1-1313.

[252] *See, e.g.*, Stephan Zoder, *How Much Is Your Data Worth?*, FORBES (Aug. 6, 2019, 2:57 pm), https://www.forbes.com/sites/stephanzoder/2019/08/06/how-much-is-your-data-worth/?sh=3463bbd270fc.

Google's ad arm brought in $59.04 billion in advertising dollars for the fourth quarter of 2022, while Facebook took in $32.17 billion in the same period.[253] Facebook said that its 2.41 billion monthly active users generated an average of $7.05 each in revenue during the quarter between ad activity and other payments and fees.[254]

In a 2019 speech, Federal Reserve Chairman Jerome Powell referenced research by MIT and the University of Groningen in the Netherlands regarding the value of digital services.[255] The research found that people would have to be paid $17,530 per year to stop using search engines.[256] "Another group of researchers studied how much the average user would need to be paid to deactivate their Facebook account for one year.[257] The result: more than $1,000, according to the researchers from Kenyon College, Susquehanna University, Michigan State University and Tufts University."[258]

In efforts to meaningfully control Big Data, politicians have called for large online platforms to pay users a "data dividend."[259] Others have suggested laws to mandate the

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[253] Jonathan Vanian, *Amazon's Advertising Business Grew 19%, While Google and Meta Both Deal with Slowdowns*, CNBC (Feb. 2, 2023), https://www.cnbc.com/2023/02/02/amazons-advertising-business-grew-19percent-unlike-google-meta.html.

[254] S. Dixon, *Facebook Average Revenue Per User (ARPU) as of 4th Quarter 2022, by Region*, STATISTA (Feb. 13, 2023), https://www.statista.com/statistics/251328/facebooks-average-revenue-per-user-by-region.

[255] Jerome H. Powell, Fed. Rsvr. Bd. Chair, "Trucks and Terabytes: Integrating 'Old' and 'New' Economies," Speech at the 61st Annual Meeting of the Nat'l Ass'n for Bus. Econ., (Oct. 8, 2019).

[256] Erik Brynjolfsson et. al., *Using Massive Online Choice Experiments to Measure Changes in Well Being*, NATL. ACAD. SCI. at 6 (2019), available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3163559.

[257] Mary C. Baca, *What You Do on the Internet Is Worth a Lot. Exactly How Much, Nobody Knows.*, WASH. POST (Oct. 14, 2019, 7:00 AM), https://www.washingtonpost.com/technology/2019/10/14/what-you-do-internet-is-worth-lot-exactly-how-much-nobody-knows.

[258] *Id.*

[259] *See* Jazmine Ulloa, *Newsom Wants Companies Collecting Personal Data to Share the Wealth with Californians*, L.A. TIMES (May 5, 2019, 5:00 AM) https://www.latimes.com/politics/la-pol-ca-gavin-newsom-california-data-dividend-20190505-story.html, (quoting Governor Gavin Newsom); *see also* Yuka Hayashi, *US Urges Canada to Scrap Digital Tax*, WALL ST. J. (Feb. 22, 2022, 4:34 PM), https://www.wsj.com/articles/u-s-urges-canada-to-abandon-digital-service-tax, (reporting that Canada has proposed a 3% data tax applying to American companies on revenue derived from the provision of digital services to Canadian users–a cross-border digital service tax that the U.S. Trade Representative opposed.)

creation of advertising-free paid alternatives that users could switch to in lieu of their current free service.[260]

The standards for assessing consumer harm based on data usage, even when there is a clear manifestation of user consent, would be extremely difficult to frame.[261] This has proven to be true in hundreds of data breach cases and also where an individual's user profile contained inaccurate data.[262] Rather than use the sledgehammer of antitrust remedies such as breaking up a company, legislators have the option to craft much more specific and targeted laws to address the arising consumer harm. For example, a federal privacy law could require up front user consent to the collection, processing, or sale of data. Numerous consumer privacy rights bills have been introduced in Congress over the past ten years, yet very few have gained a serious hearing and none have passed.[263]

This effort to value user data intersects with the ability to measure both consumer benefits and consumer harms from an antitrust perspective. While Big Tech companies maintain that their customers receive enormous benefits in the form of free software applications and services, their critics point to the myriad ways that users are actually harmed by data profiling and location tracking.[264] This has given rise to sympathetic calls by both federal officials and key legislators to regulate or break up Big Tech firms, presumably to bring an end to the widespread use of data.[265] But as discussed in

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[260] Jeff Spross, *Facebook and Google Are Free. They Shouldn't Be*, THE WEEK (Jan. 8, 2018), https://theweek.com/articles/746872/facebook-google-are-free-shouldnt.

[261] Baca, *supra* note 258.

[262] *See* Spokeo, Inc. v. Robins, 578 U.S. 330 (2016) (where the Supreme Court refused to recognize a class action cause of action in a case where the Spokeo people search engine published inaccurate information about an individual in a data profile).

[263] Jessica Rich, *After 20 Years of Debate, it's Time for Congress to Finally Pass a Baseline Privacy Law*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/blog/techtank/2021/01/14/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law/. Most recently, the American Data Privacy and Protection Act failed to progress after making it out of committee in the House. Am. Data Priv. and Prot. Act, H.R. 8152, 117th Cong. (2022).

[264] *See, e.g.*, *Google to Pay 40 States $392M in Location-Tracking Settlement*, CBS NEWS (Nov. 14, 2022, 2:35 PM), https://www.cbsnews.com/news/google-location-tracking-data-william-tong-392-million-settlement/.

[265] Jordan Marlatt, *Bipartisan Support for Big Tech Regulation Adds to the Sector's 2023 Challenges*, MORNING CONSULT (Jan. 18, 2023, 5:00 AM),

the context of the IBM and Microsoft cases, antitrust suits rarely achieve their intended results and more often than not wind up levying monetary fines well after the firm under scrutiny has moved on to new avenues for generating revenue.

### C. Regulation of Data Brokers

Much of the infrastructure of the Big Data industry is handled by entities known as "data brokers." Led by Acxiom, Oracle, Equifax, LexisNexis and many others, data brokers buy, sell, and repackage user data, creating rich user profiles.[266] A user profile derived from public records, web browsing data, Meta usage data, and transaction history might contain many unique data points about a person.[267] Because few individuals can remember every home loan, credit card transaction, web visit, or social media comment they make over the course of many years, it is sometimes asserted that a data broker knows more about an individual than they know about themselves.[268]

"Other leading data brokers include Oracle, Experian, Trans Union, Lifelock, Equifax, Moody's, and Thomson-Reuters. Each systematically gathers personal information from public sources, purchases other personal data from private sources, and monetizes their different user profiles to meet the needs of [their] data-hungry customers.[269] To date, over 400 firms have identified themselves under the data broker provisions of California's new privacy law."[270]

As noted above, under current American law, such extensive data profiling of individuals is perfectly legal. While federal antitrust regulators have signaled their interest in companies that collect data, such as social media and search platforms, they have evinced almost no interest in dealing with these huge data markets.[271]

Several states have passed specific statutes requiring data brokers to register their activities and, upon request, to

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https://morningconsult.com/2023/01/18/big-tech-regulation-2023-challenges/.

[266] Alben, *supra* note 243, at 11.

[267] *Id.* at 9-11, 14.

[268] *Id.* at 10.

[269] *Id.* at 12.

[270] *Id.; see also Data Broker Registry,* STATE OF CAL. DEP'T OF JUST. OFF. OF THE ATT'Y GEN., https://oag.ca.gov/data-brokers (last visited Mar. 20, 2023).

[271] *See id.*

disclose certain types of information they collect to end users. When Vermont passed the first data broker registry law in 2018, over 120 data brokers eventually signed up and paid the $100 registration fee.[272] While difficult to arrive at a single definition of "data" or "information" broker, it is believed that the global data broker industry makes between $200 and $300 billion annually.[273]

Because data brokers largely operate in an unregulated marketplace, the opportunities for consumer harm regarding undisclosed sales of user data and extensive profiling once again raise the issue of whether such organizations should come under antitrust scrutiny. The credit score functions of Equifax, Experian and Transunion, for example, could be separated from their data brokerage activities. Yet this deep profiling of nearly every adult in the United States has oddly not excited the new wave of antitrust advocates, perhaps because the data broker industry is highly competitive. To rein in its excesses, Congress and the states might shine a brighter light on the scope of this industry's activities and the damage it causes to consumers.

## VI. Conclusions

This Article began with the observation that antitrust law was in flux and that the new proposals to revise antitrust standards stray from notions of protecting consumers and curbing monopoly behavior. Instead, these proposals, as further discussed below, focus on business models, dominant intermediaries and control of profits. The danger of moving

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[272] *See* VT. OFFICE OF THE ATT'Y GEN., GUIDANCE ON VERMONT'S ACT 171 OF 2018 DATA BROKER REGULATION 6 (2018), https://ago.vermont.gov/wp-content/uploads/2018/12/2018-12-11-VT-Data-Broker-Regulation-Guidance.pdf; *see also* Steven Melendez, *A Landmark Vermont Law Nudges over 120 Data Brokers Out of the Shadows*, FAST COMPANY (Mar. 2, 2019), https://www.fastcompany.com/90302036/over-120-data-brokers-inch-out-of-the-shadows-under-landmark-vermont-law ("The law also requires companies to spell out whether there's any way for consumers to opt out of their data collections, to specify whether they restrict who can buy their data, and to indicate whether they've had any data breaches within the past year.").

[273] *See Big Data Analytics Market Size, Share, & COVID-19 Impact Analysis, by Component (Software, Hardware, and Services), by Application (Data Discovery and Visualization, Advanced Analytics, and Others), by Vertical (BSFI, Automotive, Telcom/Media, Healthcare, Life Sciences, Retail, Energy & Utility, Government, and Others), and Regional Forecast, 2022-2029*, FORTUNE BUS. INSIGHTS, (Jul. 2022), https://www.fortunebusinessinsights.com/big-data-analytics-market-106179.

in this direction is that as technology companies and their business models continue to rapidly evolve, antitrust enforcement will come to resemble a carnival shooting gallery with random targets and random results that shift based on political whims.

As illustrated by the antitrust cases discussed above, the law and its enforcement will always lag behind technological developments. Often, by the time a remedy is put into place, consumers have moved on to new products offered by new companies.[274] Antitrust cases seem to have their maximum impact in altering a company's market behavior when the company is operating under a consent decree and extracting a cost in terms of time and legal fees.[275] Antitrust enforcement, therefore, is a blunt instrument requiring sustained investment and effort on the part of government regulators and defenders. The continuous thread woven into cases brought under the Sherman Act over the past 130 years is a desire to achieve consumer protection by stopping the bad behavior of a dominant firm, which is usually a monopoly.

Yet, under the Biden Administration, the FTC and DOJ seem to be embracing a new antitrust paradigm, encapsulated in their recent statements of endorsing new antitrust principles and rejecting the merger guidelines endorsed by previous administrations.[276]

### A. The FTC Chair Strikes Back

In September 2021, FTC Chair Khan issued a staff memo, urging a new "integrative approach" to antitrust enforcement, suggesting that the agency focus on these three policy priorities:

1. Addressing consolidation across industries by revising merger guidelines for businesses and deterring deals that are illegal on their face and have overwhelmed commission resources. The agency has seen such an influx in transactions that it's begun telling some businesses to merge at their own risk even when it hasn't finished reviewing their deals.
2. Going after "dominant intermediaries and extractive business models." Khan wrote, "Business models that

[274] Brown, *supra* note 218.
[275] *The Paramount Decree*, *supra* note 89.
[276] Khan, *supra* note 1; *Kanter Remarks*, *supra* note 2.

centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse."

3. Assessing how contracts can set up unfair methods of competition or deceptive practices. Khan mentioned non-competes and repair restrictions in the memo.[277]

While the first and third points of Khan's memo seem fairly common sense on their face, the second point's emphasis of "going after . . . extractive business models" represents a new horizon for the agency and would deeply entwine both the FTC and the DOJ in parsing out how companies operate and making judgments about nebulous concepts of control and outsourcing. We might ask, for example, what an "asymmetric relationship" means under Khan's vision of antitrust law.

One might think that merger guideline review is a fairly arcane topic of federal law, but apparently the Biden administration feels that it is at war with previous merger review guidelines issued under the Trump Administration. In rejecting the January 2020 merger guidelines, the FTC issued a press release stating:

> The Federal Trade Commission voted to withdraw its approval of the Vertical Merger Guidelines, issued jointly with the Department of Justice (DOJ), and the FTC's Vertical Merger Commentary. The guidance documents, which were published in 2020, include unsound economic theories that are unsupported by the law or market realities. The FTC is withdrawing its approval in order to prevent industry or judicial reliance on a flawed approach. In voting to withdraw, the FTC reaffirmed its commitment to working closely with the DOJ to review and update the agencies' merger guidance.[278]

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[277] Lauren Feiner, *FTC Chair Lina Khan Outlines New Vision for Antitrust Enforcement, Consumer Protection*, CNBC (Sep. 23, 2021, 4:28 PM), https://www.cnbc.com/2021/09/23/ftc-chair-khan-outlines-vision-for-antitrust-enforcement-consumer-protection.html (emphasis added).

[278] Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sep. 15, 2021) (on file with FTC press releases), https://www.ftc.gov/news-

As a result of such pronouncements, it is clear that antitrust policy is currently in flux. In late January 2022, the DOJ and FTC jointly announced that they were seeking input as to how to evolve previously existing merger guidelines.[279] The joint agency announcement of this review is worded in a way that presumes mergers are inherently anticompetitive in nature:

> When businesses face competition, it spurs them to improve their products, develop new ones, and lower prices. Mergers can reduce choices for consumers, workers, and other businesses, leaving them increasingly dependent on larger and more powerful firms that have purchased greater power to dictate the terms of their deals. To protect competition and prevent increased consolidation, Congress passed a series of antitrust laws and authorized the FTC and the Justice Department to enforce them.[280]

This reading of antitrust history is both activist and vague. If we are to extract a lesson from the Paramount Decrees and attendant court cases, the IBM saga of nearly three decades, and the Microsoft case of the 1990s and early 2000s, it is that a dominant firm will use its market power to increase its leverage, assure product distribution, or stymie competition. Over many decades, the great resources of the federal government were expended to curb the behavior of these firms, divest motion picture companies of their theaters, and restrain Microsoft's desktop monopoly.[281] Yet, as the economics of these industries evolved, these antitrust

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events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines (emphasis added).

[279] Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers.

[280] Press Release, Dep't of Just., Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-seek-strengthen-enforcement-against-illegal.

[281] David Shepardson & Diane Bartz, *Government Funding Bill to Bolster U.S. Antitrust Regulators*, REUTERS (Dec. 22, 2022, 5:14 PM), https://www.reuters.com/world/us/government-funding-bill-bolster-us-antitrust-regulators-2022-12-22/.

remedies soon became irrelevant.[282] The motion picture industry was allowed to vertically reintegrate in the past forty years, with production and distribution now combined in streaming media services.[283] Mainframe computing and desktop dominance gave way to much more distributed computing as well as new services incorporating "freemium" business models

Expensive, long-term prosecutions must not be undertaken lightly or in order to send a message to a given industry because these cases come with huge costs for both firms and consumers. If large companies are engaged in anticompetitive business practices, such as using data to disfavor competitors or shut them out of markets, then existing laws allow for prosecution under traditional unfair competition standards. In cases in which existing laws do not reach new digital realities, new privacy and data governance laws would yield a much more targeted and efficient result than the threat of a firm break up.

### B. Don't Throw Out the Baby

Revising antitrust laws to scrutinize large, successful firms without evidence of them engaging in unfair competition threatens to undermine both innovation and economic growth.[284] The adoption of such an official policy would discourage investment and development, precisely at a moment in history when the United States is struggling to stay competitive in the global technology marketplace, characterized by fierce competition with China and other nations.[285]

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[282] Brown, *supra* note 218.

[283] *See* Jason Hellerman, *Vertical Integration is Legal Again. What Does This Mean for the Film Industry?*, NO FILM SCHOOL (Aug. 7, 2020), https://nofilmschool.com/vertical-integration-legal.

[284] Donald J. Boudreaux, *Breaking Up Amazon: The Great Tech Debate*, WALL ST. J. (Feb. 14, 2022, 11:38 AM), https://www.wsj.com/articles/amazon-break-up-monopoly-predatory-pricing-economics-big-tech-11644615815, ("That the low prices enjoyed today by Amazon's customers perhaps result from Amazon's shareholders spending some of their wealth to make these low prices possible is no antitrust offense . . . History does know of many instances of government officials and courts-- especially before the consumer welfare standard became dominant-- mistakenly identifying competitive prices as 'predatory' and then using antitrust to deny consumers the benefits of competition.").

[285] *See* Jan Rybnicek, *Op-ed: Recent Antitrust Proposals Could 'Throw Sand in the Gears' of Economic Recovery by Stalling M&A*, CNBC (Feb. 21, 2022, 3:07 PM), https://www.cnbc.com/2021/02/12/op-ed-recent-antitrust-proposals-add-friction-to-ma-at-wrong-time.html.

Before executing fundamental changes to antitrust law, the FTC and DOJ should review the consequences of large government interventions in rapidly evolving markets and understand the historical practice of firms leveraging their market power in one sector to enter into, and compete, in other sectors. Without this phenomena, competition within markets would tend to fossilize around a few incumbents who had no fear of vigorous challenges from well-funded, established companies. Very often, as was the case with Amazon's acquisition of Whole Foods, the acquiring company brings new business methods and incorporates new technologies into a more traditionally managed business, thereby creating positive change.

This is different from scrutinizing a company that uses monopoly or near-monopoly power from leveraging that power to influence a related activity in an unfair manner. For example, Microsoft used its desktop monopoly and unfair tactics to influence consumer browser choices in order to favor its own web browser, Internet Explorer.[286] Enforcement in such cases is warranted and does not require a rethinking of antitrust law or its underlying principles.

### C. Break Ups vs. Targeted Actions

We began this exploration with Assistant Attorney General Kanter's suggestion that it might be easier simply to break up companies that tend toward monopoly status or to block combinations preemptively:

> I am concerned that merger remedies short of blocking a transaction too often miss the mark. Complex settlements, whether behavioral or structural, suffer from significant deficiencies. Therefore, in my view, when the division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction. It is the surest way to preserve competition.[287]

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[286] Press Release, U.S. Dep't of Just., Just. Department Files Antitrust Suit Against Microsoft for Unlawfully Monopolizing Computer Software Market (May 18, 1998), https://www.justice.gov/archive/atr/public/press_releases/1998/1764.htm.

[287] *Kanter Remarks*, *supra* note 2.

Rather than rely on outdated tests from previous eras of antitrust enforcement, Kanter advises that, "[c]ourts should use economics and industry expertise to address questions of fact, not to resolve questions of law."[288] Aside from the remarkable statement that courts should not adjudicate questions of law, this leads to the question of where judges and their clerks will gain the relevant training in economics and who will determine the correctness of their expertise. Indeed, there are many reasons to doubt that the FTC's new approach is economically sound.

While both members of Congress and federal officials have recently called for a break-up of Big Tech companies, few go beyond the suggestion that the world would be a better place if Amazon, Google, Meta and others were simply split apart, as if they could be quickly disassembled.[289] Aside from the disruption, loss of jobs, and potential loss of shareholder value inherent in a large company break-up process, what would real "break-ups" look like in the context of these specific companies?

Amazon could be split into several firms by isolating: (1) Amazon Web Services; (2) the ecommerce and physical distribution company; (3) Amazon Studios; and (4) Amazon's advertising business. The theory of such a suit would be that competition in each separate business area would increase, while consumers would continue to benefit from the activities of the new, smaller companies. Yet this theoretical gain must be weighed against the negative effects of the break-up, as already mentioned, in addition to millions of dollars in legal fees and the economic uncertainty caused by an antitrust battle that would dissuade many potential investors and newcomers from participating in the particular economic market.

It is also apparent that the FTC would like to roll back the clock on the Facebook—now Meta—acquisition of Instagram

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[288] *Id.*

[289] *See* Sarah Westwood, *Exclusive: Sen. Josh Hawley Explains Why Big Tech Monopolies Need to Be Broken Up*, WASH. EXAM'R (May 6, 2021, 7:00 AM), https://www.washingtonexaminer.com/politics/josh-hawley-government-break-upbig-tech-monopolies.

in 2012[290] and WhatsApp in 2014.[291] The District Court for the D.C. Circuit rejected the FTC's first effort to revisit these mergers in 2021, but the agency has refiled its case.[292] It seems that the agency rejects the notion of respecting merger review decisions of previous administrations and denies the disruption that would result to a company that had spent anywhere from five to seven years integrating a merged entity into its business operations.[293] Efforts to pare down Meta by geography or demographics would tend to reduce the power of its network effect, but perhaps reducing such power would be the administration's goal.

Finally, breaking up a Big Tech company like Google would create unique problems for regulators. While Google has a few relatively distinct business units, such as the Waymo autonomous vehicle division and its broadband effort, its core advertising and search products are deeply entwined.[294] The reach of Google's search algorithm and web crawling also determines its accuracy for potential advertisers.[295] Therefore, tampering with one function would diminish the efficacy of the other.

These difficulties bring us back to first principles of antitrust theory and remind us that the Sherman Act and Standard Oil cases were grounded on the dynamic ideas that

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[290] Facebook bought Instagram for $1 billion in 2012, a shocking sum at that time for a company with 13 employees, Instagram today has over one billion users and contributes over $20 billion to Facebook's annual revenue. "In hindsight, it probably looks obvious that Instagram would have reached the scale that it has today[,]" said Zuckerberg. *See* Casey Newton & Nilay Patel, '*Instagram Can Hurt Us': Mark Zuckerberg Emails Outline Plan to Neutralize Competitors*, THE VERGE (July 29, 2020, 11:07 AM), https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing.

[291] Adrian Covert, *Facebook Buys WhatsApp for $19 billion*, CNN BUS. (Feb. 19, 2014, 6:54 PM), https://money.cnn.com/2014/02/19/technology/social/facebook-whatsapp/.

[292] Leah Nylen, Federal Court Tosses Antitrust Suits Against Facebook, in Huge Blow to D.C.'s Fight with Tech, POLITICO (June 28, 2021, 6:11 PM), https://www.politico.com/news/2021/06/28/federal-court-dismisses-ftcs-antitrust-case-against-facebook-496764.

[293] *See* Neely B. Agin et al., *FTC Broadens Scope of Considerations in Merger Reviews*, WINSTON & STRAWN LLP (Sep. 29, 2021), https://www.winston.com/en/competition-corner/ftc-broadens-scope-of-considerations-in-merger-reviews.html.

[294] Gennaro Cuofano, *Google Business Model Analysis*, FOURWEEKMBA (Feb. 8, 2023), https://fourweekmba.com/google-business-model/.

[295] Britney Muller & Moz Staff, *How Search Engines Work: Crawling, Indexing, and Ranking*, MOZ, https://moz.com/beginners-guide-to-seo/how-search-engines-operate (last visited Feb. 24, 2022).

antitrust law should protect consumer welfare and advance competition in markets where monopolies were behaving badly. Substituting new guidelines for these foundational values might suit the political whims of the moment but would provide very little practical guidance for future regulators, who would have to guess at which "economic facts" warranted attention and which behaviors demanded structural remedies. The new problems posed by the current digital economy deserve careful scrutiny and new laws focused on protecting user privacy and properly valuing user data should be debated and passed. As I have outlined above regarding the salient media and technology cases brought in the past eighty years, the history of major antitrust actions against dominant firms suggests that the federal government would be wise to always move with precision and an eye toward the evolution of business models and underlying technologies in our dynamic economy.