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Big Tech Is Why I Have (Anti)Trust Issues

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BIG TECH IS WHY I HAVE (ANTI)TRUST ISSUES

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INTRODUCTION

"There is a cost to bigness, even if it's not passed onto the consumer."[1] Antitrust laws were once an effective tool to break up companies that had grown too large. However, subsequent rulings have altered their original meaning, and they are no longer useful in regulating large technology companies such as Amazon, Facebook, and Google. This Note will argue that judicial interpretation of antitrust laws should no longer be governed by the consumer welfare standard. Rather, judges should apply a two-part test, focusing on the market power and any anticompetitive business practices of the defendant corporation.

The antitrust laws in the United States cannot allow the aforementioned companies to amass information and wealth while killing all competition. The consumer welfare standard is unable to account for the dangers of monopolies because a lower price does not necessarily result in a better product for the consumer or the economy. Competition necessitat-es higher-quality products and the companies and brings innovation. Part I of this Note discusses the background of the Sherman and Clayton Acts and their application from 1890 to the 1970's, highlighting the per se illegal test and the rule of reason test. Additionally, Part I discusses the consumer welfare standard, the antitrust school of thought that emerged in the 1960's and 1970's that is still in effect. Part II then proposes that the courts should adopt a two-part test in analyzing

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[1] *Patriot Act with Hasan Minhaj: Amazon*, NETFLIX (Nov. 4, 2018), https://www.netflix.com/watch/80990674?trackId=13752289&tctx=0%2C1%2Ce15f5b4216f49d21900f952dffdce25d84c91be7%3A9c2b99dae92ffbdf78ac7ad1194be9ab394fbb1a%2Ce15f5b4216f49d21900f952dffdce25d84c91be7%3A9c2b99dae92ffbdf78ac7ad1194be9ab394fbb1a%2Cunknown%2C.

antitrust cases: (1) what is the market power of the defendant corporation and (2) does the company engage in unreasonable anticompetitive behavior. This test will allow both the intent and text of the Sherman and Clayton Acts to be applied to modern-day companies. Last, Part III discusses how the proposed test should be applied in suits againstbig technology companies, specifically Amazon, Facebook, and Google. It argues that these companies have created monopolies within their respective industries and have and will continue to engage in anticompetitive behavior to amass wealth and market share. Under the proposed test, all three companies would find themselves in violation of antitrust laws.

I. BACKGROUND OF ANTITRUST LAW

A. The Beginning of Antitrust Law

In 1890, Congress passed the first antitrust act, the Sherman Act.[2] The Act sought to reign in companies that had become monopolies or were engaged in anticompetitive practices.[3] Section One of the Act prohibited anticompetitive agreements and other business practices that restrain trade—namely contracts, combinations, and conspiracies.[4] Section Two of the Act outlawed monopolies that were either unfairly attained or fairly attained but abused thereafter, along with attempts to monopolize.[5] The Act was a direct response to the massive trusts that had come to dominate and control several industries in America, such as steel and oil.[6] Trusts were monopolies that controlled an entire industry, primarily through the supply and price of their products.[7] By controlling the industry, trusts obviated competition, and therefore consumers had no choice but to buy from one company.[8] These trusts were spawned by laissez-faire

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[2] The Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. §§ 1–38).

[3] *See id.*

[4] *See id.* "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *Id.*§ 1.

[5] *See id.* "Every 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 . . . shall be deemed guilty of a misdemeanor . . . ." *Id.* § 2.

[6] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 30–31 (2018).

[7] *Id.* at 24–25.

[8] *Id.*

economic policy.[9] This economic policy was based upon a strong belief the market would regulate itself and any government interference would only harm business.[10] President McKinley had no problem with this economic policy and let it run wild.[11]

In 1901, just as Theodore Roosevelt assumed the presidency following McKinley's assasination, J.P. Morgan and other railroad magnates formed the Northern Securities Company, which effectively monopolized the entire Western railroads system.[12] Roosevelt believed the Northern Securities Company violated the Sherman Act and launched an investigation into the trust.[13] This investigation led to the Justice Department filing suit against the Northern Securities Company, and later to the Supreme Court of the United States enjoining the merger.[14] Writing for the Court, Justice Harlan held the merger "destroy[ed] every motive for competition between two roads . . . by pooling the earnings of the two roads for the common benefit of the stockholders of both companies."[15]

This precedent enabled the federal government to enforce antitrust laws against the trusts, and gave the federal government a check on private power. Utilizing this authority, Roosevelt launched an investigation into Standard Oil Company.[16] The two-year investigation led to a finding that Standard Oil had monopolized the oil refining industry by creating exclusionary cartels, leveraging railroad pricing power, acquiring competing firms, and by creating collective deals with railroads to exclude those not in the conspiracy.[17] The investigation found that Rockefeller utilized his economic power and influence with the railroads to exclude competitors, and within a decade turned Standard Oil's market share from 10 percent to 90 percent.[18] In 1906, the Justice Department filed a 170-page complaint against Standard Oil and, in 1911, the Supreme Court held that Standard

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[9] *See* WU, *supra* note 6, at 27.
[10] *Id.* at 28.
[11] *Id.* at 45–46.
[12] *Id.* at 48.
[13] *Id.*
[14] N. Sec. Co. v. United States, 193 U.S. 197, 359–60 (1904).
[15] *Id.* at 328 (citation omitted).
[16] WU, *supra* note 6, at 63.
[17] *Id.* at 63–65.
[18] *Id.* at 64–65. Standard Oil not only had 90 percent of the market share, but kept this monopoly on the oil refining industry for thirty years, despite changes in technology. *See id.* at 65. This evidences that the lassaiz-faire economic policy will not simply work itself out.

Oil had engaged in the kind of abusive and anticompetitive behavior in violation of the Sherman Act was designed to outlaw.[19]

B. The Clayton Act Passes

Seeking to fill some gaps in the Sherman Act, Congress passed the Clayton Act in 1914, which expressly prohibited certain mergers and interlocking directorates.[20] The Clayton Act was intended to strengthen the Sherman Act and stop monopolistic practices.[21] The Act imposed civil rather than criminal penalties, and prohibited anticompetitive business practices such as price discrimination, exclusive dealing arrangements, and mergers that substantially lessen competition.[22] From the 1890's until the 1970's, the Justice Department utilized the Sherman and Clayton Acts to bust trusts and reign in monopolies.

Through judicial interpretation, the Supreme Court found many business practices to be unreasonable restraints on trade, including "preferential routing" treatments,[23] tying agreements,[24] combining and conspiring for the purpose of artificially raising and fixing prices,[25] and price agreements.[26] Courts applied antitrust laws in two ways: the "rule of reason" test and the "per se illegal" rule. The rule of reason test requires a court to conduct an analysis of (1) the harm on competition that has resulted or may result from the anticompetitive activities; (2) the goal the company is trying to achieve, and whether it is a legitimate one; and (3) whether there are less restrictive means to the restraint sought.[27] The per se illegal rule declared certain acts illegal

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[19] Standard Oil Co. v. U.S., 221 U.S. 1, 77 (1911).

[20] The Clayton Act of 1914, ch. 323, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 1–38); *see The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Nov. 8, 2021) [hereinafter *The Antitrust Laws*]. Interlocking directorates occur when the same person is making business decisions for competing companies. *Id.*

[21] *Id.*

[22] *Id.*

[23] Northern Pacific R. Co. v. U.S., 356 U.S. 1, 5, 7 (1958).

[24] *Id.* Tying agreements are "defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Id.* at 7.

[25] U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

[26] *Id.*

[27] PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 2 (1981); *The Antitrust Laws*, *supra* note 20; Bd. of Trade v. U.S., 246 US 231, 238 (1918).

regardless of the defense.[28] For a period of time, the Justice Department went after even relatively small mergers,[29] leading to criticism that antitrust was " 'the coonskin cap' law enforcement—the blind firing of muskets at companies that just seemed bad."[30]

C. The Consumer Welfare Standard

The consumer welfare standard, a new antitrust theory with its foundation in the Chicago School of Antitrust, emerged in the 1960's and 1970's. [31] The consumer welfare standard advanced the idea that antitrust should only be measured in terms of consumer welfare.[32] Consumer welfare measures whether the economic prospects of the consumer were enhanced in a measurable way, which usually means evidence of lower prices.[33] The theory in large part reverted back to the idea of laissez-faire economics.[34]

Consumer welfare has been largely attributed to Aaron Director. Director was not a lawyer or economist, but garnered great influence over his students and late twentieth century legal thought.[35] Director taught the theory of consumer welfare to his students at University of Chicago Law School in his antitrust course.[36] Robert Bork, a former student of Director, endorsed the consumer welfare standard and argued that it was not only what

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[28] *Socony-Vacuum Oil*, 310 U.S. at 218; U.S. v. Sealy, Inc., 388 U.S. 350, 357–58 (1967). This includes business practices such as agreements between businesses to fix price, rig bidding, or divide markets. *The Antitrust Laws*, *supra* note 20. Horizontal mergers, those between competitors within a market, are likely to be deemed per se illegal; vertical mergers, those between companies on the same supply chain, generally are subject to the rule of reason test. Thomas B. Leary, *A Structured Outline for the Analysis of Horizontal Agreements* 1 (2004), https://www.ftc.gov/sites/default/files/documents/public_statements/structured-outline-analysis-horizontal-agreements/chairsshowcasetalk.pdf.

[29] U.S. v. Von's Grocery Co., 384 U.S. 270, 274 (1966). The Court held that a merger between grocery stores that amounted to 7.5% market share violated antitrust laws. *Id.* at 272.

[30] WU, *supra* note 6, at 103.

[31] *Id.* The Chicago School of Antitrust is the colloquial name for the individuals who created and advanced this theory within the University of Chicago Law School.

[32] *Id.*

[33] CHRISTINE S. WILSON, WELFARE STANDARDS UNDERLYING ANTITRUST ENFORCEMENT: WHAT YOU MEASURE IS WHAT YOU GET 5 (Feb. 15, 2019), https://www.ftc.gov/es/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf. "[I]n a merger analysis, the gains to the merging producers do not count; only the effect on consumer prices is relevant." *Id.* at 4.

[34] WU, *supra* note 6, at 85.

[35] *Id.* at 84.

[36] *Id.*

antitrust law *should do*, but rather the *intent* of the law all along.[37] Bork is perhaps best known for being denied a seat on the Supreme Court after a turbulent confirmation hearing.[38] However, prior to his confirmation hearing, Bork successfully argued that the consumer welfare standard was the correct interpretation of antitrust law.[39] At the time, "judicial activism" was a concern of many in the legal field, and Bork argued that consumer welfare was the legislative intent of the law, and to interpret otherwise was to participate in judicial activism.[40] In an article, Bork stated that "the policy the courts were intended to apply is the maximization of wealth or consumer . . . satisfaction. . . . [C]ourts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies."[41] This policy has frequently been disputed, however as "[n]ot a single statement in the legislative history comes close to stating the conclusions that Bork drew."[42]

The idea that the legislative intent was to solely protect consumer welfare was quickly adopted, despite the fact that neither the text nor the legislative history of the law mentioned consumer welfare or consumer price.[43] In 1979, the Court held that "Congress designed the Sherman Act as a 'consumer welfare prescription.' "[44] This was the first sign that antitrust jurisprudence was heading in the direction of consumer welfare. The theory of consumer welfare soon caught on among the federal courts. The Ninth Circuit held that the Sherman Act was not invoked even when anticompetitive behavior occurs, unless "it harm[ed] consumer welfare."[45] The Supreme Court even held that predatory pricing, while surely destroying competition, was acceptable under antitrust laws since the consumer would pay

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[37] *Id.* at 88.

[38] Linda Greenhouse, *Bork's Nomination Is Rejected, 58-42; Reagan Saddened*, N.Y. TIMES (Oct. 24, 1987), https://www.nytimes.com/1987/10/24/politics/borks-nomination-is-rejected-5842-reagan-saddened.html.

[39] Dylan Matthews, *'Antitrust Was Defined by Robert Bork. I Cannot Overstate His Influence'*, WASH. POST (Dec. 20, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/12/20/antitrust-was-defined-by-robert-bork-i-cannot-overstate-his-influence/.

[40] WU, *supra* note 6, at 90–91.

[41] Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7, 11 (1966).

[42] Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 22 (1989).

[43] *Id.*

[44] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (citation omitted).

[45] Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1433 (9th Cir. 1995).

less.[46] Under this theory of antitrust, large mergers that would substantially lessen competition have been challenged by the government because consumers would pay an extra 45 cents per month.[47]

Many problems have been identified with the consumer welfare standard. Since its adoption there has been an ongoing economy-wide increase in market concentration.[48] First, the consumer welfare standard cannot adequately account for markets where consumers pay nothing, such as social media services, search engines, and internet browsers.[49] Additionally, some studies suggest that the consumer welfare standard has led to large companies having few incentives to protect consumer data, and they "wield significant political power, [which] may lead to increased income inequality, decreased wages, and higher unemployment."[50] Moreover, the consumer welfare standard fails to consider other noneconomic harms to quality, privacy, innovation, and efficiency.[51]

As many antitrust checks on private power prove insufficient, many industries have seen an increase in monopolies. For example,

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[46] Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (stating that it would be illogical to condemn price cutting because, while it would promote competition, it would deprive consumers of the lower price).

[47] *See* U.S. v. AT&T Inc., 310 F.Supp. 3d 161, 199 (D.D.C. 2018) (the DOJ challenged a merger between AT&T and Time Warner, arguing that the merger would raise prices for consumers to the amount of 45 cents per month); *see also* Brian Fung, *$463 Million vs. 45 Cents: The War of Numbers in the Court Battle over AT&T's Mega-Merger*, WASH. POST (Mar. 16, 2018, 8:52 AM) https://www.washingtonpost.com/business/economy/the-atandt-trial-could-curb-mega-mergers—or-weaken-regulators-for-decades/2018/03/15/7906106a-279a-11e8-874b-d517e912f125_story.html.

[48] John M. Gale, *Changing the Consumer Welfare Standard*, ECONOMISTS INK, https://ei.com/economists-ink/economists-ink-summer-2019/changing-the-consumer-welfare-standard/ (last visited October 18, 2021). Between 1997 and 2012, 75 percent of industries saw increased concentration. WU, *supra* note 6, at 115.

[49] Gale, *supra* note 48.

[50] *Id.*

[51] *The Future of Antitrust: Do Higher Profits Merit the Retirement of the Consumer-Welfare Standard?*, FORBES (Oct. 5, 2018, 6:32 AM), https://www.forbes.com/sites/washingtonbytes/2018/10/05/the-future-of-antitrust-do-higher-profits-merit-the-retirement-of-the-consumer-welfare-standard/#32bce2f27af6.

- the airline industry has been deregulated since the 1970's to promote competition, yet it resulted in reducing the number of major airlines to three;[52]
- the beer industry in the United States consists of two major companies, Anheuser-Busch InBev and Miller-Coors, controlling 70 percent of sales;[53]
- the cable industry is merely "three major regional monopolies" and the companies have been free to charge monopoly prices, consistently raising prices "at some eight times the rate of inflation";[54]
- the pharmaceutical industry consolidated from approximately sixty firms to about ten, allowing companies to raise prices by at least 1,000 percent, and sometimes up to 6,000 percent.[55]

These are not the only industries that have seen a growth in monopolies, and without a change in antitrust law, these industries will never see a reduction in monopolies nor an increase in competition.

II. GETTING BACK TO BASICS

To create a more efficient method for judges to decide antitrust violations while also strengthening the scope of antitrust, this Note proposes that the consumer welfare standard be discarded and replaced with a two-part test. The rule of reason test has proved to be arbitrary and difficult for judges to apply, and the per se rule discourages mergers and acquisitions even when they would not substantially impact competition within the market.[56] As discussed previously, the consumer welfare standard presents several problems and does not adequately address the policies antitrust laws seek to enforce.[57] The proposed two-part test would be a simpler approach to antitrust issues that embodies the intent of the lawmakers when the Sherman and Clayton Acts were passed.

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[52] WU, *supra* note 6, at 115. These companies are now able to cooperate in charging new fees or changing seat sizing. *Id.*

[53] *Id.* at 117.

[54] *Id.* at 115–16.

[55] *Id.* at 116.

[56] Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. DAVIS L. REV. 1375, 1390 (2009) (How does a court establish what is a reasonable restraint of trade? A general rule of reason "was unworkable and unwise.").

[57] *See supra* notes 48–51 and accompanying text.

A. The First Part of the Proposed Two-Part Test

The first step of the two-part test analyzes the market power of the defendant corporation within the relevant industry. This requires judges to evaluate the market share of the defendant in relation to their competitors. While this may seem like a daunting task, judges need not be economists to recognize when a given company's market share is so exorbitantly big and consequently suppressing competition.[58] For example, when a company has over 75 percent market share, it likely violates the test. Moreover, if a company has under 50 percent of the market share, but its closest competitor has under 10 percent, it seems that the larger company has dominated and controlled the market.[59]

Some courts have stated that even a large market share is not indicative of monopoly power when the market shares are not "durable."[60] While durability may evidence companies maintaining their monopolies, this cannot be the only measure. Companies leverage their market share to create barriers to entry and ensure that their monopolies last.[61] Courts cannot wait for companies to tilt the market in their favor and block would-be competition. A dominating market share is indicative of a monopoly, even if it has not lasted for years.

This part of the test embodies Section Two of the Sherman Act and the policy behind mergers in the Clayton Act.[62] Under this part of the test, companies can merge or acquire other companies, even competitors, without inherently violating antitrust laws.

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[58] *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2 (last updated June 25, 2015) ("[M]onopoly power requires, at a minimum, a substantial degree of market power.") [hereinafter *Competition and Monopoly*].

[59] Even the Department of Justice believes that

> if a firm has maintained a market share in excess of two-thirds for a significant period and market conditions (for example, barriers to entry) are such that the firm's market share is unlikely to be eroded in the near future . . . such evidence ordinarily should establish a rebuttable presumption that the firm possesses monopoly power.

Id. However, no court has found monopoly power in a firm with market share less than 50 percent. *Id.*

[60] *Id.*

[61] *Barriers to Entry*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/economics/barriers-to-entry/ (last visited Nov. 8, 2020). Monopolistic competition creates medium barriers to entry, an oligopoly creates high barriers to entry, and a monopoly creates very high barriers to entry. *Id.*

[62] *See The Antitrust Laws*, *supra* note 20.

However, a line is drawn when a company becomes too influential over a market. The Supreme Court has held that "market power exists whenever prices can be raised above the levels that would be charged in a competitive market."[63] Additionally, the Court has stated that "[m]onopoly power is the power to control prices or exclude competition."[64] Thus, it follows that market power and monopoly power go hand-in-hand. Judges must analyze whether the defendant company has the power within the industry to control market prices and exclude competitors from the marketplace.[65] This determination is fact-dependent as different markets have different barriers to entry.[66] For example, the airline industry has high barriers to entry due to costs, government regulation, and competition for airport facilities.[67] Because the airline industry has such high barriers to entry, it is much easier for powerful companies to set prices and determine market participants through agreements with airports or lobbying for regulation that deters new market entrants.[68] However, when a company is so dominant in a market, there is a presumption that it has the influence to control price and market participants.[69] If a company is capable of controlling market forces within an industry, it has consolidated more power within the market than antitrust intends.

B. The Second Part of the Proposed Two-Part Test

The second prong of the two-part test evaluates whether the defendant company has engaged in, or continues to engage in, unreasonable anticompetitive behavior. Anticompetitive business practices are an overt attempt to gain market share and monopolize, which is in direct contradiction to Section Two of the Sherman Act and Section Five of the Clayton Act.[70]

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[63] Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27 n.46 (1984).

[64] U.S. v. E. I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 391 (1956).

[65] *Monopolization Defined*, F.T.C., https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited Nov. 8, 2021).

[66] *Barriers to Entry*, ECON. ONLINE, https://www.economicsonline.co.uk/Business_economics/Barriers_to_entry.html (last visited Nov. 8, 2020).

[67] Jad Mouawad, *The Challenge of Starting an Airline*, N.Y. TIMES (May 25, 2012), https://www.nytimes.com/2012/05/26/business/start-up-airlines-face-big-obstacles.html.

[68] *Id.*

[69] *Competition and Monopoly*, *supra* note 58.

[70] *See* 15 U.S.C § 2; 15 U.S.C. § 16.

Anticompetitive business practices consist of stealing trade secrets, interfering with contracts, predatory pricing, price discrimination, mergers that substantially undermine competition, and more.[71] These business practices have the effect of killing competition within the market and cementing or growing the practicing company's market share. When companies behave anticompetitively, they hinder the market in product quality, consumer variety, innovation, and even lower the standard of living.[72]

While this Note focuses on using this test to enforce antitrust laws against "Big Tech" monopolies, namely those of Amazon, Facebook, and Google, the test should also be adopted as the main antitrust test applied to all other monopolies. As previously discussed, there are monopolies, or problematic increases in market concentration, in several industries such as agricultural seed, pharmaceuticals, and beer.[73] The scope of this test does not stop at big tech; it can and should be applied to all industries and companies that have unfairly obtained monopolies, some of which also participate in anticompetitive business practices.

C. The Consumer Welfare Standard is a Uniform and Simple Test

It has consistently been argued that the consumer welfare standard is the best analysis and application of antitrust laws because it provides a clear and concise way for judges to decide antitrust cases.[74] Monopolies sheltered from competition will "reduce output and raise prices."[75] The consumer welfare standard's main goal is to protect consumers from inflated prices.[76] Therefore, a standard that lowers prices for consumers is the most uniform and immediate way to handle antitrust cases.[77] While it is true that traditional monopolies in the 1890's such as Standard

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[71] *Anticompetitive Practices*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/anticompetitive-practices (last visited Nov. 9, 2020) [hereinafter *Anticompetitive Practices*].

[72] COUNCIL OF ECON. ADVISERS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 2 (2016).

[73] *See supra* notes 52–55 and accompanying text.

[74] WILSON, *supra* note 33, at 5.

[75] JOE KENNEDY, WHY THE CONSUMER WELFARE STANDARD SHOULD REMAIN THE BEDROCK OF ANTITRUST POLICY 5 (2018).

[76] Herbert Hovenkamp, *Antitrust in 2018: The Meaning of Consumer Welfare Now*, 6 PENN WHARTON PUB. POL'Y INITIATIVE 1, 2–3 (2018).

[77] KENNEDY, *supra* note 75, at 5.

Oil would shelter themselves from competition and raise prices, companies today do not behave in the same way.[78] Companies now aim to lower prices for consumers to gain market share, knowing they will lose money.[79]

Moreover, companies are no longer structured the same way. While Amazon is generally seen as an ecommerce company, it has business in grocery, music and video streaming, web services, and more.[80] A price theory does not adequately assess modern day companies. It is longstanding antitrust doctrine that relevant product markets are "reasonably interchangeable by consumers for the same purposes."[81] Many modern companies, especially those categorized as "big tech," do not participate in only one product market—making it much more difficult to apply current antitrust doctrine.[82] This application is especially difficult in markets where consumers are not charged to use the company's service.[83] While consumers may not be charged a higher monetary price in these markets, consumers pay with their data, which is not taken into account under the consumer welfare theory despite this being an issue of actual consumer welfare.[84] The proposed two-part test, however, could enforce antitrust laws against companies that evade antitrust restrictions simply because they have low prices or do not charge directly for their product.

Recently, Congress, federal agencies, and President Biden have scrutinized current antitrust principles, specifically with a

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[78] *See* Tim Mullaney, *Be a Boss Like Bezos and Musk: 5 Reasons Losing Money Can Lead to Billionaire Success*, CNBC (Aug. 1, 2017, 9:16 AM), https://www.cnbc.com/2017/08/01/be-like-bezos-musk-5-reasons-losing-money-can-lead-to-success.html.

[79] *Id.* ("[L]osing money is part of the plan.").

[80] SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 247 (2020) [hereinafter INVESTIGATION].

[81] *See* United States v. Microsoft Corp., 253 F.3d 34, 52 (D.C. Cir. 2001) (quoting United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 395 (1956)).

[82] Courts construe the "market" that a company participates in very broadly. This generally results in the company having a lower market share than it really does. *See* David G. Magnum, Mark A. Glick & Duncan J. Cameron, *Importing the Merger Guidelines into Judicial Determinations of Relevant Antitrust Markets: Potential Benefits and Limitations*, PARSONS BEHLE & LATIMER, https://parsonsbehle.com/insights/importing-the-merger-guidelines-into-judicial-determinations-of-relevant-antitrust-markets-potential-benefits-and-limitations (last visited Nov. 10, 2021).

[83] Gale, *supra* note 48.

[84] Dipayan Ghosh, *Don't Break Up Facebook — Treat it like a Utility*, HARV. BUS. REV. (May 30, 2019), https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility.

focus on big tech companies. Five bills aimed at reforming antitrust laws have passed through the House Judiciary Committees with varying levels of bipartisan support.[85] For example,

- the American Choice and Innovation Online Act aims to stop dominant platforms from discriminating against competitors by advantaging their own products and disadvantaging or excluding competitors' products on their platforms;[86]
- the Platform Competition and Opportunity Act aims to stop companies from acquiring nascent competitors in order to neutralize any potential threat;[87]
- the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act would make it easier for consumers to move their data when switching providers;[88]
- the Merger Filing Fee Modernization Act would increase the amount of money companies would have to pay government agencies in merger transactions;[89]
- the Ending Platform Monopolies Act aims to prohibit companies from stamping out small competitors and from killing online competition.[90]

Both the Department of Justice and the Federal Trade Commission ("FTC") have commenced antitrust lawsuits against Google and Facebook, respectively.[91] The FTC lawsuit against Facebook was dismissed for failure to state a claim and statute of limitations grounds.[92] On August 19, 2021, the FTC filed an

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[85] Cecilia Kang & David McCabe, *Antitrust Overhaul Passes Its First Tests. Now, the Hard Parts.*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/technology/antitrust-overhaul-congress.html.

[86] H.R. 3816, 117th Cong. § 2 (2021).

[87] H.R. 3826, 117th Cong. § 2 (2021).

[88] H.R. 3849, 117th Cong. § 3 (2021).

[89] S. 228, 117th Cong. § 2 (2021). The increase in merger transaction fees would likely fund higher enforcement of antitrust laws. Kang & McCabe, *supra* note 85.

[90] H.R. 3825, 117th Cong. § 2 (2021).

[91] *See* Complaint at 55–57, United States of America v. Google LLC, No. 20-3010 (D.C. Dist. Ct. filed Oct. 20, 2020) (alleging that Google has violated antitrust laws by engaging in anticompetitive conduct and exclusionary practices); Complaint at 50–51, Fed. Trade Comm'n v. Facebook, Inc., No. 20-03590 (D.C. Dist. Ct. filed January 13, 2021) (alleging that Facebook is illegally maintaining a monopoly through anticompetitive conduct, such as acquisitions to eliminate competition).

[92] Cecilia Kang, *Judge Throws out 2 Antitrust Cases Against Facebook*, N.Y. TIMES (June 28, 2021), https://www.nytimes.com/2021/06/28/technology/facebook-ftc-lawsuit.html. The Federal Judge who threw out the claim found that the FTC had failed to provide enough facts to prove that Facebook held a monopoly over social

amended complaint in the lawsuit containing the same general arguments as the original complaint, but the FTC bolstered its complaint with additional facts and allegations that "Facebook beat competitors not by improving its own product but instead by imposing anticompetitive restrictions on developers."[93]

President Biden has brought in two big names in the antitrust legal field into the White House.[94] He appointed, and the Senate approved, Lina Khan—a progressive tech critic who is often cited in this Note—as the new chair of the FTC.[95] Additionally, President Biden appointed Tim Wu, a Columbia Law School professor whose book on antitrust is frequently cited to in this Note, to the National Economic Council as a special assistant to President Biden for technology and competition policy.[96] Moreover, President Biden signed an Executive Order on July 9, 2021, ordering federal agencies to "promptly tackle some of the most pressing competition problems across [the] economy."[97] The

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media. *Id.* Forty states also brought an antitrust lawsuit against Facebook that was thrown out as well. *Id.*

[93] Cecilia Kang, *U.S. Revives Facebook Suit, Adding Details to Back Claim of a Monopoly*, N.Y. TIMES (Aug. 19, 2021), https://www.nytimes.com/2021/08/19/technology/ftc-facebook-antitrust.html. Facebook has since asked the court to dismiss the FTC's amended complaint. Barbara Ortutay, *Facebook Asks Court to Dismiss FTC Antitrust Complaint*, AP News (Oct. 4, 2021), https://apnews.com/article/technology-business-facebook-inc-federal-trade-commission-district-of-columbia-4533fd62e9dea3c7c858f46ac4bc7026.

[94] David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html.

[95] *Id.* Amazon and Facebook have filed motions to have Lina Khan recused from any decisions involving the companies, based on her Yale Law Journal article in which Khan criticized concentration within the tech industry. Emily Birnbaum, *Facebook Seeks Recusal of FTC Chair Lina Khan in Antitrust Case*, POLITICO (July 14, 2021, 9:07 AM), https://www.politico.com/news/2021/07/14/facebeook-antitrust-ftc-lina-khan-recusal-499608. Amazon and Facebook argue that Khan's article, as well as her work in Congress investigating Silicon Valley, make her too conflicted to fairly regulate the tech industry. Ryan Grim, *What Amazon and Facebook Get Wrong About FTC Chair Lina Khan*, THE INTERCEPT (July 18, 2021, 12:17 PM), https://theintercept.com/2021/07/18/what-amazon-and-facebook-get-wrong-about-ftc-chair-lina-khan/. If these motions succeed, it may leave the regulation of the tech industry to those who are allies of big tech, or those who are wholly unfamiliar with the industry. *Id.*

[96] Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html.

[97] Press Release, The White House, Fact Sheet: Executive Order on Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/.

Order encourages agencies to focus on antitrust problems within specific markets, such as the healthcare market, agricultural market, labor market, and the tech sector.[98] Additionally, the Order directs the Attorney General and the Chair of the FTC to review merger guidelines and directs the Consumer Financial Protection Bureau to promulgate rules that would allow consumers to download their bank data in order to more easily switch financial institutions.[99] Upon signing the Order, President Biden declared that "[c]apitalism without competition isn't capitalism; it's exploitation."[100]

III. USING THE TWO-PART TEST TO DISMANTLE "BIG TECH" MONOPOLIES

A. Amazon

1. Overview

Amazon began as an online book retailer, but has become one of the largest companies in the world with business divisions in e-commerce, consumer electronics, web services, television and film production, groceries, cloud services, book publishing, and logistics.[101] In 2019, Amazon reported total revenue of $280 billion and a net profits of $11 billion.[102] Amazon's CEO, Jeff Bezos, has continuously advocated for a business strategy dependent on limiting profit to gain market share.[103] To that end, Amazon has a 49 percent market share in the ecommerce industry alone; by comparison, the closest competitor, eBay, has a 6.6 % market share.[104] Amazon's market share is "durable" because the market

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[98] Exec. Order No. 14036, 86 Fed. Reg. 36,987 (July 14, 2021).

[99] *Id.*

[100] President Joe Biden, *Remarks by President Biden at Signing of An Executive Order Promoting Competition in the American Economy*, WH.GOV (July 9, 2021), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/.

[101] INVESTIGATION, *supra* note 80, at 247.

[102] Annual Report (Form 10-K), AMAZON.COM, INC. (Jan. 31, 2020), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001018724/4d39f579-19d8-4119-b087-ee618abf82d6.pdf.

[103] BBCdocumentaries2014, *Amazon's Retail Revolution Business Boomers BBC Full Documentary 2014*, YOUTUBE (Apr. 22, 2014), https://www.youtube.com/watch?v=6UhrIEUjtwI; *see also* INVESTIGATION, *supra* note 80, at 247.

[104] Emily Dayton, *Amazon Statistics You Should Know: Opportunities to Make the Most of America's Top Online Marketplace*, BIGCOMMERCE,

faces high barriers to entry.[105] It is difficult to create a marketplace with a comparable number of buyers and sellers when costs for customers to switch and build a similar logistics network are high.[106]

Due to the stranglehold that Amazon has on the market, third-party sellers and many suppliers cannot turn to alternative marketplaces.[107] Despite Amazon's lack of compliance with its own policies, Amazon puts many restrictions on third-party sellers to keep them locked into Amazon's network: sellers are forbidden from contacting customers and bound to vendor policies, and some brand manufacturers that would rather be third-party sellers are forced into a wholesaler relationship with Amazon.[108] Moreover, Amazon often gathers information from sellers on their websites. It requires sellers who wish to use the Amazon platform to disclose all data to the company.[109] However, if the product is successful, Amazon will take the collected data and sell the same product at a lower price.[110]

Over the past two decades, Amazon has acquired over 100 companies.[111] Some of these companies, such as Zappos, expand Amazon's network and outreach.[112] Others are simply acquired to stamp out competition.[113] One example is the Diapers.com case. Amazon attempted to buy Diapers.com, but Diapers.com refused to sell.[114] Amazon then dropped its prices for diapers so low that Diapers.com was forced to sell to Amazon because it could not

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https://www.bigcommerce.com/blog/amazon-statistics/ [https://perma.cc/W5UA-5BLJ] (last visited Nov. 12, 2020).

[105] INVESTIGATION, *supra* note 80, at 260.

[106] *Id.*

[107] *Id.* at 259.

[108] *Id.* at 258–59 ("A former Amazon employee confirmed that it was not uncommon for Amazon to use its brand standards policy to shut down a brand's third-party seller account and force brands into an exclusive wholesaler relationship."). "Amazon's internal documents suggest that it does not fear consequences for failing to comply with most vendor policies." *Id.* at 259.

[109] Dana Mattioli, *Amazon Scooped up Data from Its Own Sellers to Launch Competing Products*, WALL ST. J. (Apr. 23, 2020, 9:51 PM), https://www.wsj.com/articles/amazon-scooped-up-data-from-its-own-sellers-to-launch-competing-products-11587650015.

[110] *Id.*

[111] INVESTIGATION, *supra* note 80, at 263.

[112] Sarah Lacy, *Amazon Buys Zappos; The Price is $928m., Not $847m.*, TECHCRUCH+ (July 22, 2009, 4:21 PM), https://techcrunch.com/2009/07/22/amazon-buys-zappos/.

[113] INVESTIGATION, *supra* note 80, at 262.

[114] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 769 (2017).

compete with Amazon's low prices.[115] Amazon bled over $200 million in losses on diapers in one month, all to acquire a competitor.[116]

2. The Two-Part Test as Applied to Amazon

Under the proposed two-part test, Amazon has violated antitrust laws. Under the first step of the test, Amazon is a monopoly as defined by statute and through the market share theory.[117] Amazon's 49 percent market share is not immediately jarring, but through an analysis of the market, it is clear that the company controls prices, new entrants, and continues to crush would-be competition.[118] With its closest competitor at 6.6%, Amazon has created such a gap in competition.[119] Moreover, the e-commerce market alone has an overwhelming number of participants.[120] Even with so many participants, Amazon captures fifty cents of every dollar spent on e-commerce in the United States.[121] This does not account for Amazon's participation in numerous other markets.[122] In an attempt to not only control the ecommerce market but also the infrastructure it operates on, Amazon now controls 44 percent of the world's cloud web services.[123] Amazon's insistence on market leadership over revenue is what has allowed the company to control market forces and maintain a monopoly, despite other competitors' attempts to win back market share.[124] Because Amazon has clearly cemented themselves as the market controller in their market, the company violates the first step of the proposed test.

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[115] *Id.*

[116] INVESTIGATION, *supra* note 80, at 264.

[117] U.S. v. E. I. du Pont de Nemours & Co. (Cellophane), 351 U.S. 377, 391 (1956).

[118] Khan, *supra* note 114, at 746–47, 786.

[119] Dayton, *supra* note 104.

[120] *E-Commerce Market to be Worth $16,215.6 Billion by 2027-Exclusive Report Covering Pre and Post COVID-19 Market Analysis and Forecasts by Meticulous Research*, BLOOMBERG (Apr. 7, 2021, 8:30 AM), https://www.bloomberg.com/press-releases/2021-04-07/e-commerce-market-to-be-worth-16-215-6-billion-by-2027-exclusive-report-covering-pre-and-post-covid-19-market-analysis-and.

[121] Spencer Soper, *Amazon Makes 50 Cents on Every Dollar Spent Online in the U.S. Is That Too Much Market Dominance?*, PHILA. INQUIRER (last updated Apr. 17, 2019), https://fusion.inquirer.com/business/amazon-online-sales-market-share-dominance-break-up-20190417.html.

[122] *See supra* notes 80, 101 and accompanying text.

[123] Stacy Mitchell, *Amazon Is Trying to Control the Underlying Infrastructure of Our Economy*, VICE (June 25, 2017), https://www.vice.com/en/article/7xpgvx/amazons-is-trying-to-control-the-underlying-infrastructure-of-our-economy.

[124] Khan, *supra* note 114, at 749–50.

Additionally, Amazon violates antitrust laws under the second step of the proposed test because it commits anticompetitive business practices in an attempt to gain dominance and stamp out competition. In the case of Diapers.com, as well as many other companies, Amazon practices predatory profits and bleeds money to take over any competitors it deems a threat.[125] Amazon is displaying anticompetitive behavior against third party sellers on its site by controlling their prices and penalizing them when they offer better prices on other sites.[126] The company uses the sellers' data against them to undercut and beat out the competition.[127] Moreover, Amazon ties its marketplace and logistics services together, forcing sellers to use their expensive logistics services to sell on the marketplace.[128] It is clear that Amazon has participated in anticompetitive conduct in an attempt to monopolize the industry and stamp out competition. In turn, it violates the second step of the proposed two-part test.

B. Facebook

1. Overview

Founded in 2004, Facebook is now the largest social networking platform in the world.[129] Facebook has five primary

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[125] *Id.* at 769.

[126] Enrique Dans, *If Amazon Is Guilty of Anti-Competitive Practices, Who Did It Learn Them From?*, FORBES (June 13, 2020, 3:30 PM), https://www.forbes.com/sites/enriquedans/2020/06/13/if-amazon-is-guilty-of-anti-competitive-practices-who-did-it-learn-themfrom/#4fcae3a33223. Jeff Bezos has even admitted that, while they have a policy against using seller's data to aid their own private business, he "can't guarantee . . . that the policy has never been violated." Devin Coldewey, *Bezos 'Can't Guarantee' No Anti-Competitive Activity as Congress Catches Him Flat-Footed*, TECHCRUNCH+ (July 29, 2020, 4:52 PM), https://techcrunch.com/2020/07/29/bezos-cant-guarantee-no-anti-competitive-activity-as-congress-catches-him-flat-footed/ [https://perma.cc/JEZ5-H2ZC].

[127] Jason Del Rey, *Amazon May Soon Face an Antitrust Probe*, VOX (June 4, 2019, 6:40 PM), https://www.vox.com/recode/2019/6/4/18651694/amazon-ftc-antitrust-investigation-prime.

[128] Spencer Soper, *Amazon Accused of Forcing Up Prices in Antitrust Complaint*, TRANSPORT TOPICS (Nov. 8, 2019, 10:30 AM), https://www.ttnews.com/articles/amazon-accused-forcing-prices-antitrust-complaint. As previously discussed, tying agreements are anticompetitive and often per se illegal. *See* Khan, *supra* note 114, at 779 ("[S]ellers who use FBA have a better chance of being listed higher in Amazon search results than those who do not, which means Amazon is tying the outcomes it generates for sellers using its retail platform to whether they also use its delivery business.").

[129] INVESTIGATION, *supra* note 80, at 133.

products: Facebook, Instagram, Messenger, WhatsApp, and Oculus.[130] Facebook acquired both Instagram and WhatsApp in an attempt to keep any direct competition within its control.[131] Across these networks, Facebook has 2.47 billion daily active users and 3.14 billion monthly active users.[132] In 2019, the company collected approximately $70 billion in revenue.[133] Facebook's Chief Operating Officer has stated that Facebook controlled 95 percent of all social media in the United States in terms of monthly minutes of use.[134] Other sources estimate Facebook's market share at 71.8%, however, this is only for the social media industry.[135] Additionally, the social networking market faces high barriers to entry. The exorbitant amount of time users spend building their social networks leads to a high switching cost.[136] When users switch from Facebook platforms, they must rebuild entirely from Facebook, learn a new service, and lose any accumulated data.[137] Facebook has also managed to tip the market in its favor, making smaller social applications unlikely to gain any traction due to its dominance.[138] Facebook's Chief Executive Officer, Mark Zuckerberg, has stressed that being first is how you build a brand and a network effect.[139] Since Facebook and its family of products were first, and therefore created a network effect, they effectively made it much harder for would-be competitors to create a presence within the market.

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[130] *Id.* Facebook and Instagram are social media platforms, messenger is a messaging application for Facebook users, WhatsApp is a messaging app, and Oculus is a virtual reality gaming system. *Id.*

[131] *Id.* at 141. Instagram is in direct competition with Facebook as they are both social media apps. *Id*. WhatsApp is in direct competition with Messenger as they are both messaging apps. *Id.* at 133, 141. In internal memoranda, Zuckerberg stated that companies like Instagram and WhatsApp are "brands [that] are already meaningful and if they grow to a large scale they could be very disruptive to us." *Id.* at 152–53.

[132] *Id.* at 133.

[133] FACEBOOK INC., Annual Report (Form 10-K), at 83 (Jan. 28, 2021).

[134] INVESTIGATION, *supra* note 80, at 139. This includes comparisons to Twitter, Tumblr, Snapchat, and other social media platforms. *Id.*

[135] J. Clement, *U.S. Market Share of Leading Social Media Websites 2020*, STATISTA (June 18, 2020), https://www.statista.com/statistics/265773/market-share-of-the-most-popular-social-media-websites-in-the-us/#:~:text=Market%20leader%20Facebook%20accounted%20for,U.S.%20social%20media%20site%20visits.

[136] INVESTIGATION, *supra* note 80, at 145.

[137] *Id.* at 145–46.

[138] *Id.* at 144.

[139] Production of Facebook, to H. Comm. on the Judiciary, FB-HJC-ACAL-00046826–34 (Dec. 13, 2013), https://judiciary.house.gov/uploadedfiles/0006322000063223.pdf.

Facebook has a pattern of anticompetitive and monopolistic conduct.[140] Facebook utilizes its social network to collect internal data about their users' engagement, usage, and time spent on apps.[141] The company would be unable to collect this level of data without its hold on the market. This data allows Facebook to identify competition and then buy, crush, or duplicate these competitors.[142] This practice is played out in the example of Snapchat and Instagram. Snapchat allows users to upload pictures and videos to their "Snapchat story," which can be seen by the users' friends.[143] Snapchat's co-founder turned down an offer to be acquired by Facebook, and shortly after, Instagram introduced the Instagram Stories feature, which essentially duplicates Snapchat's social media feature.[144]

2. The Two-Part Test as Applied to Facebook

Facebook is a monopoly under the first part of the proposed two-part test. Facebook holds 71.8% of market share within the social media industry.[145] Its closest competitor is Pinterest with 12.4% market share.[146] In 2012, the company boasted that they are 95 percent of all social media in the United States.[147] Even under the FTC's own standards, 95 percent of all social media would certainly establish a presumption of monopoly status.[148] By tipping the market so much in its favor, Facebook has effectively made it impossible for new social media applications to gain footing in the market.[149] This evidences that Facebook's market share is so high that it dominates and controls the market and any potential entrants. On top of its social media dominance, Facebook's acquisition of the ad service Atlas allowed it to host half of all online advertising.[150] While this is more of an oligopoly,

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[140] INVESTIGATION, *supra* note 80, at 161.

[141] *Id.* at 162.

[142] *Id.* at 163.

[143] Christine Elgersma, *Everything You Need to Know About Snapchat*, PHYS.ORG (June 18, 2018), https://phys.org/news/2018-06-snapchat.html.

[144] INVESTIGATION, *supra* note 80, at 165.

[145] Clement, *supra* note 135.

[146] *Id.*

[147] Rob Price, *Mark Zuckerberg Told Congress That Facebook is Not a Monopoly*, BUS. INSIDER (July 29, 2020, 4:24 PM), https://www.businessinsider.com/facebook-2012-95-percent-of-all-social-media-us-2020-7.

[148] *Competition and Monopoly*, *supra* note 58.

[149] INVESTIGATION, *supra* note 80, at 141.

[150] Kate Cox, *House: Amazon, Facebook, Apple, Google Have "Monopoly Power," Should Be Split*, ARS TECHNICA (Oct. 7, 2020, 4:16 PM), https://arstechnica.com/tech-

the same principle holds: markets cannot be controlled by a few large participants without violating antitrust laws.[151]

Facebook also violates antitrust laws under the second step of the two-part test. Facebook has a history of buying up competing companies to lessen its competition.[152] It is clear from Facebook's internal memoranda that Instagram and WhatsApp were acquired purely to keep any competition to its own applications within the corporate family.[153] Additionally, it uses these acquisitions to collude, "but within an internal monopoly."[154] Instagram's growth threatened to overtake Facebook as a social media platform, so Facebook worked internally to ensure its dominance.[155] To gain more information on how consumers used competitors' products, Facebook "systematically spied on its rivals."[156] All of this amounts to a pattern of anticompetitive business practices, evidencing Facebook's intent to continue growing and entrenching its monopoly in violation of the second step of the two-part test.

C. Google

1. Overview

Google is an online search engine that uses an algorithm to rank webpages based on their relevance to the search.[157] The company has grown to such a massive scale that using a search

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policy/2020/10/house-amazon-facebook-apple-google-have-monopoly-power-should-be-split/. Facebook has since shuttered Atlas and has integrated Atlas's products and clients into Facebook's own advertising products. Tim Peterson, *Facebook to Phase Out Atlas Brand, Shift Tools & Clients to Facebook's Products*, MARTECH (Mar. 7, 2017, 11:00 AM), https://martech.org/facebook-phase-out-atlas-brand/ [https://perma.cc/DM7N-EN6R].

[151] Thomas Piraino, *Regulating Oligopoly Conduct Under the Antitrust Laws*, 89 MINN. L. REV. 9, 11 (2004).

[152] INVESTIGATION, *supra* note 80, at 141.

[153] *See supra* notes 139 and accompanying text.

[154] Mike Isaac, Steve Lohr, Jack Nicas & Daisuke Wakabayashi, *12 Accusations in the Damning House Report on Amazon, Apple, Facebook and Google*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/technology/amazon-apple-facebook-google-antitrust-report.html.

[155] *Id.*

[156] David Cicilline, *The Case for Investigating Facebook*, N.Y. TIMES (Mar. 19, 2020) https://www.nytimes.com/2019/03/19/opinion/facebook-antitrust-investigation.html.

[157] Google Inc., Registration Statement (Form S-1), at 1 (Apr. 29, 2004), https://www.sec.gov/Archives/edgar/data/1288776/000119312504073639/ds1.htm.

engine is now colloquially known as "Googling" it.[158] In 2019, Google reported a revenue of $160.7 billion and $33 billion net income.[159] Apart from its search engine, Google is the largest provider of digital advertising; a leading web browser; a large mobile operating system; and a major provider of digital maps, email, and data storage services.[160] Congress' findings put Google's market share at over 87 percent in the United States and 92 percent worldwide.[161] Much of this dominance in market share can be attributed to Google's access to data and its aggressive tactics to crush competition.[162] Google has used its Android operating system to pre-install Chrome and Google Search, and has an agreement with Apple to set Google as the search default across iOS devices.[163] Google has a policy of withholding some output and results from search ads unless the ads were created through Google's demand-side ad platform.[164] Through this, Google controls the market by controlling what users see when searching. In 2019, the European Commission ordered Google to pay roughly $1.7 billion for "abusive practices in online advertising."[165] "The Commission determined that Google . . . 'cement[ed] its dominant market position' with its AdSense program," and discovered restrictive clauses in contracts,

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[158] Suzanne Choney, *No Googling, Says Google – Unless You Really Mean It*, NBC NEWS (Mar. 26, 2013, 3:43PM), https://www.nbcnews.com/technolog/no-googling-says-google-unless-you-really-mean-it-1c9078566 [https://perma.cc/8A5Q-5577].

[159] Alphabet Inc., Annual Report (Form10-K), at 26–30 (Feb. 3, 2020), https://www.sec.gov/Archives/edgar/data/1652044/000165204420000008/goog10-k2019.h. As of January 2020, Google is worth $1 trillion. Jon Swartz, *Google Becomes Third U.S. Tech Company Worth $1 Trillion*, MARKETWATCH (Jan. 16, 2020, 5:21 PM), https://www.marketwatch.com/story/google-parent-alphabet-joins-1-trillion-in-market-value-for-first-time-2020-01-16.

[160] INVESTIGATION, *supra* note 80, at 174.

[161] *Id.* at 177.

[162] *Id.*

[163] *Id.* at 178. Google currently faces a $5 billion fine in Europe based on anticompetitive Android bundling. Russell Brandom, *The Monopoly-Busting Case Against Google, Amazon, Uber, and Facebook*, VERGE (Sept. 5, 2018, 8:14 AM), https://www.theverge.com/2018/9/5/17805162/monopoly-antitrust-regulation-google-amazon-uber-facebook.

[164] Julia Cusick, *CAP Brief Finds Evidence of Anti-Competitive Behavior by Amazon, Apple, Facebook, and Google*, CTR. FOR AMERICAN PROGRESS (July 28, 2020), https://www.americanprogress.org/press/release/2020/07/28/488194/release-cap-brief-finds-evidence-anti-competitive-behavior-amazon-apple-facebook-google/ [https://perma.cc/PN47-FVM4].

[165] Matt Binder, *Google Hit with $1.7 Billion Fine for Anticompetitive Ad Practices*, MASHABLE (Mar. 20, 2019), https://mashable.com/article/google-eu-antitrust-fine-ads/#:~:text=The%20Commission%20determined%20that%20Google,2006%20to%202016%20in%20Europe.

which blocked Google's advertising rivals from competing in the market.[166] These contractual restrictions on third parties contained exclusivity clauses, premium placement clauses, and approval clauses.[167]

2. The Two-Part Test as Applied to Google

Under the first step of the proposed two-part test, Google would find itself in violation of antitrust laws. An 87 percent market share clearly allows Google to control and dominate the market and exclude potential competition.[168] Google's dominant market share gives it access to large amounts of data, allowing it to strategically gain more market share and cement its existing share.[169] Through Google's search engine, Google Maps, the Android operating system, and other maps, Google has access to location data, search histories, and information about almost everything consumers do.[170] This access to data allows Google to target consumers and exclude competition.[171] One analyst of online advertising has stated that Google has:

> [A] dominant, near chokehold position on the market . . . . They don't just have a buying platform, or the ad-serving market, or a content asset in YouTube, or the search market. They have all those things. There are companies that can compete on a piece, . . . [b]ut nobody can compete on all of that.[172]

It does not take an economist to understand that Google's control of the market through its market share has created a monopoly that allows it to set prices and push out competitors.

Additionally, Google violates antitrust laws under the second step of the proposed two-part test. Google's practice of withholding

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[166] *Id.*

[167] *Id.*

[168] Fiona M. Scott Morton & David C. Dinielli, *Roadmap for a Monopolization Case Against Google Regarding the Search Market*, OMIDYAR NETWORK (June 2020), https://omidyar.com/wp-content/uploads/2020/09/Roadmap-for-a-Monopolization-Case-Against-Google-Regarding-the-Search-Market.pdf [https://perma.cc/5YSV-7NA4].

[169] *Id.*

[170] *Id.*

[171] *Id.* With so much location data that competitors do not possess, Google is effectively the only big advertising service. *Id.* This allows Google to charge high prices for well-targeted ads. *Id.*

[172] Leah Nylen, *Google Dominates Online Ads — And DOJ May Be Ready to Pounce*, POLITICO (June 4, 2020, 9:55 PM), https://www.politico.com/news/2020/06/04/google-doj-ads-302576 [https://perma.cc/D7K4-JZNR].

ad results not created through Google's ad platform amounts to a penalization of advertisers who go through competitors.[173] Also, Google participates in contractual tying agreements by requiring smartphone companies to pre-install Google apps and give them default status.[174] On October 20th, 2020, the United States Justice Department filed a lawsuit against Google alleging, among other things, that Google has contractually paid Apple billions of dollars to place Google as the search default on iPhones.[175] The company has other restrictive clauses with third-party websites that keep its advertising competition from gaining a foothold in the market.[176] Google drafts exclusivity clauses within its contracts, which prohibit publishers from "placing any search adverts from competitors on their search results pages."[177] Also, it has included premium placement clauses, requiring publishers to "reserve the most profitable space on search result pages for Google's adverts and [to] request a minimum number of Google adverts."[178] This prevents competitors from placing their advertisements in more visible parts of the website's search result pages.[179] Finally, Google has contractual clauses that require publishers to "seek written approval from Google before making changes to the way in which any rival adverts were displayed."[180] This effectively allows Google to control how competing advertisements are seen and clicked on.[181] Through these anticompetitive practices, Google has kept competition out of the market in an attempt to keep and grow its monopoly and has therefore violated the second step of the two-part test.

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[173] Cusick, *supra* note 164.

[174] Lauren Feiner, *House Democrats Say Facebook, Amazon, Alphabet, Apple Enjoy 'Monopoly Power' and Recommend Big Changes*, CNBC (Oct. 6, 2020, 4:06 PM), https://www.cnbc.com/2020/10/06/house-democrats-say-facebook-amazon-alphabet-apple-enjoy-monopoly-power.html.

[175] David McCabe and Cecelia King, *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020, 10:27 AM), https://www.nytimes.com/2020/10/20/technology/google-antitrust.html.

[176] Binder, *supra* note 165.

[177] *Antitrust: Commission Fines Google €1.49 Billion for Abusive Practices in Online Advertising*, EUROPEAN COMM'N (Mar. 20, 2019), https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

CONCLUSION

When voting on his namesake piece of legislation, Senator Sherman declared, "[i]f we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessaries of life."[182] We cannot permit big tech companies to control our data, infringe upon our privacy, and continue to amass wealth and power while sitting idly by. Amazon has built dominance through its aggressive business tactics and its willingness to lose profit to gain market share. Facebook creates a network effect by utilizing its access to data and its many acquisitions to keep its chokehold on the market. Google maintains its influence on the market by dominating the market share and creating contractual restrictions that bind third parties and consumers. These companies are used by millions of consumers every day, yet the law allows them to harm competition and innovation.

Antitrust law has no teeth under the consumer welfare standard and subsequently permits monopolies to be above the law. To give antitrust the legal strength needed to increase competition, the courts should adopt the proposed two-part test, and return to enforcing antitrust laws as the framers of the Acts intended. Since the economy and technology have advanced, big tech is far more powerful than Standard Oil and Carnegie Steel. Without new and proper interpretation and enforcement of antitrust laws, there will be a negative effect on competition, the economy, and people's lives.

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[182] Attorney General Eric Holder, Speaks at the Sherman Act Award Ceremony (Apr. 20, 2010) (transcript available through U.S. Dep't. of Just.).