Consumer Welfare of the Future: Harm to Innovation as an Antitrust Injury

BRENTON GUTKOWSKI*

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* © 2023 Brenton Gutkowski. J.D. Candidate 2023, University of San Diego School of Law; B.S. 2019 (Public Policy Analysis), The Ohio State University. I would like to extend my sincerest thanks to Professor Shawn Miller, and the entire *San Diego Law Review* for making this Comment possible. Additionally, I want to thank my grandparents for their love, guidance, and wisdom, for which I am eternally grateful. Finally, to my late Father who challenged me to never stop learning, this is for you.

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I. INTRODUCTION: ANTITRUST & BIG TECH: HARM TO INNOVATION IS HARM TO CONSUMER WELFARE

Americans fear the centralization of power.[1] In today's modern age, a collection of companies, commonly known as Big Tech, have garnered an unfathomable amount of power in the American economy.[2] Big Tech has amassed an amount of control over the American economy not seen since the era of Rockefeller[3] and has remained unchecked.[4] Big Tech firms,

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1. *See* Lee Rainie & Andrew Perrin, *Key Findings About Americans' Declining Trust in Government and Each Other*, PEW RSCH. CTR. (July 22, 2019), https://www.pewresearch.org/fact-tank/2019/07/22/key-findings-about-americans-declining-trust-in-government-and-each-other/ [https://perma.cc/ERV6-2VW8]. Research shows America's distrust of government is based off a fear of government power. *See id.* These fears extend beyond the government and into the economy. *Id.*

2. *See* Ari Levy & Lorie Konish, *The Five Biggest Tech Companies Now Make Up 17.5% of the S&P 500—Here's How to Protect Yourself*, CNBC (Jan. 28, 2020, 4:00 PM), https://www.cnbc.com/2020/01/28/sp-500-dominated-by-apple-microsoft-alphabet-amazon-facebook.html [https://perma.cc/95BT-9586].

3. *See The Gilded Age*, *The New Tycoons: John D. Rockefeller*, U.S. HIST., https://www.ushistory.org/us/36b.asp [https://perma.cc/C32N-YURN] ("At the turn of the century, when the average worker earned $8 to $10 per week, Rockefeller was worth millions."). Mr. Rockefeller acquired power by purchasing smaller companies that were in direct competition with his own company, Standard Oil. *See id.* Eventually, Mr. Rockefeller's business became the largest company in the world, allowing Standard Oil to dictate oil price and control the output of supply. *See id.* Mr. Rockefeller's power was so immense that he was called a "robber baron," a term defined as "[a]n American capitalist at the turn of the 19th century who . . . possessed unfair government influence." *Id.*

4. Victor Luckerson, '*Crush Them': An Oral History of the Lawsuit That Upended Silicon Valley*, RINGER (May 18, 2018, 6:30 AM), https://www.theringer.com/tech/2018/5/18/17362452/microsoft-antitrust-lawsuit-netscape-internet-explorer-20-years [https://perma.cc/SVQ3-23KJ] ("The tech industry in the United States had always been monopolized by a company. First it was AT&T, then it was IBM, then it was Microsoft. . . . Their basic dominance was almost a suffocating dominance. There wasn't a feeling that there was anybody that would or could compete with them from Silicon Valley."). While Big Tech

such as Facebook, Google, Amazon, and Microsoft, rose to their preeminence in the American economy over the past two decades.[5] Critics of Big Tech's dominant market position argue there are several ways to rein in Big Tech's control, such as repealing Section 230,[6] passing legislation requiring social media companies to be considered publishers,[7] and deeming social media companies public utilities.[8] However, these solutions require congressional legislation, which requires extensive political capital to combat Big Tech's special interest lobby.[9] Given political gridlock plaguing Congress,[10] a legislative solution to restricting Big Tech's power seems

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refers to a collection of companies, the power of Big Tech in the American economy dominates many aspects of life. *Id.*

5. For a discussion on Big Tech's rise to power, see Shira Ovide, *Why is Big Tech Under Assault? Power.*, N.Y. TIMES (June 14, 2021), https://www.nytimes.com/2021/04/21/technology/big-tech-power.html [https://perma.cc/UB7C-BSED].

6. For a discussion on the importance of Section 230 in regulating Big Tech, see Casey Newton, *Everything You Need to Know About Section 230: The Most Important Law for Online Speech*, VERGE (Dec. 29, 2020, 4:50 PM), https://www.theverge.com/21273768/section-230-explained-internet-speech-law-definition-guide-free-moderation [https://perma.cc/C7UN-SDAX]. Section 230 of the Communications Decency Act sets rules for free speech on social media platforms. *Id.* The section states that interactive computer services cannot be treated as publishers or speakers of third-party content. *Id.*; 47 U.S.C. § 230(c)(1). This means the website or platform cannot be held responsible for the statements or content posted by its users. *See* Newton, *supra*. Thus, Section 230 protects interactive computer services from lawsuits in situations where users post illegal content. *Id.*

7. For a discussion on why Big Tech firms, that publish content, should be consider publishers under the law, see Michael Shapiro, *For Democracy's Sake, Social Media Platforms Must Be Deemed Publishers Under Section 230*, ED. & PUBLISHER (Nov. 20, 2020, 12:46 PM), https://www.editorandpublisher.com/stories/for-democracys-sake-social-media-platforms-must-be-deemed-publishers-under-section-230,180554 [https://perma.cc/6924-DAUZ]. The article outlines an argument for making Big Tech firms publishers to limit their growth by exposing the firms to potential liability. *See id.* It is important to note that this solution would only apply to Big Tech companies that operate in the social media market. *See id.*

8. 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 [https://perma.cc/24JE-YW9Q]. This solution would only apply to Big Tech firms that publish content. *See id.* Efforts to curb Big Tech's power are often aimed at social media firms. *See id.*

9. For a discussion on the impact of Big Tech's special interest lobby on Congress, see Jane Chung, *Big Tech, Big Cash: Washington's New Power Players*, PUB. CITIZEN (Mar. 24, 2021), https://www.citizen.org/article/big-tech-lobbying-update/ [https://perma.cc/M7DJ-B47L].

10. For a conversation on the gridlock plaguing Congress and its ramifications on the legislature's ability to pass meaningful legislation, see Sarah A. Binder, *Going Nowhere: A*

unlikely. The government's feeble attempts to check Big Tech's power have been futile.[11] Currently, antitrust law is the only weapon at the government's disposal to limit Big Tech's growth.[12] However, federal courts' current interpretation of antitrust law limits the government's enforcement power.[13] The courts can expand the enforcement capabilities of the government's antitrust arsenal by changing the current interpretation of antitrust jurisprudence. This Comment will argue that the most effective way to limit Big Tech's dominant market position is to reform antitrust jurisprudence.

First, this Comment will discuss pertinent background information regarding American antitrust jurisprudence. Second, this Comment will define Big Tech and discuss its rise to a dominant market position in the American economy. Third, this Comment will break down the District of Columbia District Court's decision in *United States v. Microsoft Corp.*[14] and will discuss how the courts' reasoning can establish a new standard of harm to innovation under the consumer welfare standard. Fourth, this Comment will discuss two different situations in which the harm to innovation standard works to espouse antitrust goals. In summation, this Comment will address objections to the proposed harm to innovation standard.

II. FROM FEAR TO FEDERAL LEGISLATION: AN OVERVIEW OF AMERICAN ANTITRUST JURISPRUDENCE

Nothing reflects America's attempt to prevent the centralization of economic power more than antitrust law. During the Gilded Age, America's transformational economic developments drove sweeping changes in antitrust law.[15] Congress first passed antitrust legislation in 1890 to protect

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Gridlocked Congress, BROOKINGS (Dec. 1, 2000), https://www.brookings.edu/articles/going-nowhere-a-gridlocked-congress/ [https://perma.cc/J5YF-6AT6].

11. *See infra* Part VI.

12. *See* Jon Swartz, *Big Tech Heads for 'A Year of Thousands of Tiny Tech Papercuts,' But What Antitrust Efforts Could Make Them Bleed?*, MARKETWATCH (Jan. 1, 2022), https://www.marketwatch.com/story/big-tech-heads-for-a-year-of-thousands-of-tiny-tech-papercuts-but-what-antitrust-efforts-could-make-them-bleed-11640640776 [https://perma.cc/ZL4A-J58K].

13. *See* David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law*, N.Y. TIMES (June 20, 2019), https://www.nytimes.com/2019/06/20/technology/tech-giants-antitrust-law.html [https://perma.cc/3BUC-8P8Z].

14. United States v. Microsoft Corp. (*Microsoft I*), 87 F. Supp. 2d 30 (D.D.C. 2000).

15. *See Gilded Age*, HISTORY (May 31, 2022), https://www.history.com/topics/19th-century/gilded-age [https://perma.cc/3VU4-LKED]. The Gilded Age was a period of American history that took place between the years following the Civil War and the turn of the 20th century. *Id.* This time was defined as an era of unprecedented growth in the American economy. *Id.* This unprecedent growth was brought on by rapid advancements in technology, which helped industry develop new products at cheaper prices. *See id.* However, considering this rapid economic growth, America saw more

the principles of the American free market.[16] Since its inception, antitrust jurisprudence changed drastically through judicial interpretation.[17] This Comment will explore the history of antitrust jurisprudence and the courts' development of antitrust standards under stare decisis. Furthermore, this Comment will discuss the contours of the courts' current antitrust standard, the consumer welfare standard, and its impact on the government's recent attempts to enforce antitrust law. This Comment will attempt to answer the question: Does the courts' focus on the consumer welfare standard prevent the government from espousing the goals of antitrust law in the era of Big Tech?

Currently, the courts scrutinize antitrust actions under the consumer welfare standard.[18] From 1890 to the 1970s, the courts scrutinized antitrust actions under the rule of reason.[19] In the 1970s, the courts modified their analysis for determining whether a company's market action violated antitrust law by developing the consumer welfare standard.[20] In broad terms, the consumer welfare standard focuses on whether market actions harm consumers.[21]

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corrupt and greedy industrialists who assumed extraordinary levels of wealth. *Id.* Income inequality between Americans of elite wealth and those in poverty grew to levels never seen before and spurred politicians to take action to rein in the power of the corporate elite. *Id*.

16. U.S. DEP'T OF JUST., *Antitrust Enforcement and the Consumer*, https://www.justice.gov/atr/file/800691/download [https://perma.cc/MK2H-YKJK] ("Antitrust laws protect competition. Free and open competition benefits consumers by ensuring lower prices and new and better products. In a freely competitive market, each competing business generally will try to attract consumers by cutting its prices and increasing the quality of its products or services."). When the free market is operating effectively, government intervention is not necessary. *Id.* Competition and the profit opportunities stimulate business to find innovative and more efficient methods of production. *See id.* Antitrust law was created to be used in circumstances where the government had to intervene to protect the free market. *Id.* For an overview of antitrust law, see John J. Miles, *Overview and History of the Antitrust Laws*, 1 HEALTH CARE AND ANTITRUST L. § 1:3 (2022).

17. *See infra* Parts III–V.

18. *See infra* Part V.

19. Ryan Young, *Antitrust Basics: Rule of Reason Standard vs. Consumer Welfare Standard*, COMPETITIVE ENTER. INST. (July 8, 2019), https://cei.org/blog/antitrust-basics-rule-of-reason-standard-vs-consumer-welfare-standard/ [https://perma.cc/N343-WAD3]. The rule of reason standard was used for several decades despite the fact its less defined than the preponderance of the evidence standard and reasonable doubt standard. *Id.* Antitrust experts argue the rule of reason "gives weaker protections to defendants." *Id.*

20. *See id.*

21. *See* Gregory J. Werden, *Antitrust's Rule of Reason: Only Competition Matters*, 79 ANTITRUST L.J. 713, 715–16 (2014). Monopolies tend to raise prices above cost

Significant advancements in the tech economy resulted in the emergence of Big Tech,[22] which dominates not only the technology sector but also the global economy and civil society. Big Tech firms control dominant market positions by acquiring rising startups in direct competition with Big Tech.[23] Several Big Tech firms offer services to their consumers at no cost,[24] begging the question: How could any market action by one of these firms harm consumers? The government has attempted to regulate Big Tech by bringing antitrust lawsuits against Facebook, Apple, and Google.[25] However, changes in antitrust jurisprudence hindered the government's ability to effectively pursue antitrust actions against Big Tech.[26] In recent litigation, courts have consistently held that the government failed to prove Big Tech's market actions harmed consumers.[27] Due to

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therefore causing consumer surplus to be less than what it normally would be under competition. *Id.* The consumer welfare that is lost becomes producer surplus to the benefit of the monopolies. *Id.* at 716. Under a monopoly, competition dissipates and results in higher prices and lower quality products. *Id.* The complex economic jargon used by antitrust experts in explaining antitrust law demonstrates the difficulty companies have in complying with antitrust law. *See, e.g.*, *id.* at 715–16.

22. For a discussion on how Big Tech was formed due to technological advancements in the last two decades, see Will Ormeus, *Big Tobacco. Big Pharma. Big Tech?*, SLATE (Nov. 17, 2017, 8:00 AM), https://slate.com/technology/2017/11/how-silicon-valley-became-big-tech.html [https://perma.cc/G2CS-D3LQ].

23. *See infra* Part VI.

24. Steven Overly, *'It Will be Fascinating': Silicon Valley Faces an Antitrust Reckoning*, POLITICO (July 26, 2019, 7:22 PM), https://www.politico.com/story/2019/07/26/silicon-valley-anti-trust-1619256 [https://perma.cc/FF22-HYUX].

25. *See Factbox: How Big Tech is Faring Against U.S. Lawsuits and Probes*, REUTERS (Dec. 7, 2021, 2:42 PM), https://www.reuters.com/technology/big-tech-wins-two-battles-fight-with-us-antitrust-enforcers-2021-06-29/ [https://perma.cc/2B5A-B4ZE]. Since 2000, the government has filed four separate antitrust lawsuits against Google. *Id.* Furthermore, thirty-eight states Attorneys Generals have banned together to file a separate lawsuit against Google claiming Google abused "its market power to try to make its search engine as dominant inside cars, TVs and speakers as it is in cellphones." *Id.* In 2019, the Federal Trade Commission launched a probe into Apple for potential antitrust violations. *Id.* Despite these government actions, none have been successful in regulating Big Tech. *See id.*

26. *See infra* Part III.

27. *See* Diane Bartz & Nandita Bose, *FTC Says Facebook 'Bought and Buried' Rivals in Renewed Antitrust Fight*, REUTERS (Aug. 19, 2021, 12:35 PM), https://www.reuters.com/legal/litigation/us-ftc-expected-file-amended-complaint-against-facebook-2021-08-19/ [https://perma.cc/6HP4-75M2] ("The amended complaint comes after Judge James Boasberg of the U.S. District Court for the District of Columbia said in June that the FTC's original complaint filed in December failed to provide evidence that Facebook had monopoly power in the social-networking market."). In 2021, the government filed over five different lawsuits against Big Tech firms following public outrage over the companies' power in the economy. *See* Diane Bartz & Elizabeth Culliford, *Facebook Hits $1 Trillion Value After Judge Rejects Antitrust Complaints*, REUTERS (June 28, 2021, 4:42 PM), https://www.reuters.com/technology/us-judge-tells-ftc-file-new-complaint-against-facebook-2021-06-28/ [https://perma.cc/AD5X-L574]. However, none of these lawsuits

the difficulty of proving harm to consumers when Big Tech offers products at little to no cost, the government has had difficulty moving antitrust lawsuits past the pleading stages of trial.[28]

For example, the Department of Justice's (DOJ) recent antitrust lawsuit against Facebook failed to make it past the pleading stage.[29] The federal court judge held that the government failed to prove that Facebook held a monopoly position in the social media market.[30] Given heightened pleading standards,[31] there must be changes to existing antitrust standards to allow the government to bring antitrust actions against the rapidly growing Big Tech firms.

The government's inability to regulate Big Tech is now a focal point in political discussions, and antitrust issues are now at the forefront of public debate.[32] While many critics have pushed Congress to pass new antitrust legislation, a simpler solution may be within judicial reach.[33] Instead of Congress passing federal legislation, courts could alter the consumer welfare standard to take harm to innovation into consideration. As this Comment will explore, more antitrust actions will satisfy pleading requirements and move forward to trial when harm to innovation is a factor under the

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have made significant headway and none of the lawsuits have resulted in any judgements against the Big Tech firms. *See id.*

28. *See* Overly, *supra* note 24. In June 2021, the Federal Trade Commission filed a complaint under the Clayton Antitrust Act regarding Facebook's acquisition of rivals, Instagram and WhatsApp. *Factbox: How Big Tech is Faring Against U.S. Lawsuits and Probes*, *supra* note 25. However, a Federal District Court dismissed the claims stating the government failed to provide enough evidence to meet pleading standards. Bartz & Culliford, *supra* note 27.

29. *See* Bartz & Culliford, *supra* note 27.

30. *See* Cecilia Kang, *Judge Throws Out 2 Antitrust Cases Against Facebook*, N.Y. TIMES (Oct. 4, 2021), https://www.nytimes.com/2021/06/28/technology/facebook-ftc-lawsuit.html [https://perma.cc/ZP5W-H3VQ] ("The judge eviscerated one of the federal government's core arguments, that Facebook holds a monopoly over social networking, saying prosecutors had failed to provide enough facts to back up the claim."). The court's decision is a major blow to the movement to regulate Big Tech's power, leading to criticism that "century-old antitrust laws needed updating for the internet sector." *Id.*

31. For a discussion on today's heightened pleading standards, see generally Adam N. Steinman, *The Rise and Fall of Plausibility Pleading?*, 69 VAND. L. REV. 333 (2016).

32. For examples of how pleading standards have kept the government from being able to bring antitrust actions against Big Tech companies, see *Factbox: How Big Tech is Faring Against U.S. Lawsuits and Probes*, *supra* note 25.

33. *See* Cecilia Kang & David McCabe, *Efforts to Rein In Big Tech May Be Running Out of Time*, N.Y. Times (Jan. 20, 2022), https://www.nytimes.com/2022/01/20/technology/big-tech-senate-bill.html [https://perma.cc/TR6V-9X7K] (discussing a recent push for new antitrust reform aimed at Big Tech).

consumer welfare standard. Without considering harm to innovation, the government will continue struggling to satisfy the consumer welfare standard. To espouse the goals of antitrust law in the world of Big Tech, courts must change the consumer welfare standard. The following section will discuss the background and history of antitrust jurisprudence to demonstrate changes in the courts' antitrust analysis and how the courts currently analyze antitrust actions under the consumer welfare standard.

III. OIL BARONS TO TECH TYCOONS: THE BEGINNING OF ANTITRUST JURISPRUDENCE

Americans' fears of the centralization of power drove legislators to pass antitrust laws protecting the American free market. After the Civil War, large corporations formed, controlling entire industries and making it difficult for small businesses to compete in the marketplace.[34] For example, in 1882, John Rockefeller established an oil trust,[35] called Standard Oil, which gave Rockefeller the ability to dictate oil supply and price while avoiding taxes and corporate regulations.[36] The government responded to the creation of trusts, like Standard Oil, by passing antitrust legislation.[37]

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34. *See* FED. TRADE COMM'N, FTC FACT SHEET: ANTITRUST LAWS: A BRIEF HISTORY, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf [https://perma.cc/HCG4-2U25]. Large corporations controlled whole sections of the economy which gave the people in charge of the corporations tremendous power. *Id.* During this time, many Americans were struggling to earn living wages which drove public support to regulate these large corporations. *Id.*

35. Alexandra Twin, *Guide to Antitrust Laws*, INVESTOPEDIA (June 8, 2022), https://www.investopedia.com/terms/a/antitrust.asp#:~:text=The%20%22trust%22%20in%20antitrust%20refers,pricing%20in%20a%20particular%20market [https://perma.cc/ADU3-XE2X] ("The 'trust' in antitrust refers to a group of businesses that team up or form a monopoly in order to dictate pricing in a particular market."). Under a monopoly a company is in control of an entire market. *See id.* Therefore, the company, which holds the monopoly, has the power to set prices and dictate the level of supply in that market for a specific product. *See id.*

36. Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 2 (Harv. Bus. Sch., Working Paper No. 19-110, 2019), https://www.hbs.edu/ris/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf [https://perma.cc/K5XE-CKG9] ("In 1882 S. C. T. Dodd, an attorney for John Rockefeller's Standard Oil Co., created a trust to facilitate a tight combination of oil refiners that could dictate price and supply while also avoiding state-level taxes and corporate regulations."). One reason companies merged to form trusts was to avoid taxes and regulations. *See id.* These large trusts were able to structure their corporations in a manner which helped the trust avoid tax liability. *See id.*

37. *Id.* ("The use of trusts for industrial consolidation multiplied throughout the 1880s, and in response, several states and the federal government passed antitrust laws to regulate business competition, focusing on coordination among firms and business tactics used to monopolize industries."). At the time these anticompetitive actions were not illegal despite the fact they were viewed as anticompetitive. *See id.*

Legislators were concerned that a trust's anticompetitive behavior would deteriorate capitalism and the free market.[38] At the time, Congress had yet to pass a single piece of antitrust legislation.[39] States were responsible for passing their own antitrust laws.[40] However, the scope of state antitrust laws were limited to intrastate business.[41] Therefore, federal legislation was necessary to ensure a broad spectrum of enforcement throughout the country.[42] During debate in Congress, legislators talked at length about the need to protect small businesses, given the belief that small businesses are capitalism's lifeblood.[43] Free market principles stand for the proposition that competition between businesses leads to the innovation of better products at cheaper costs.[44] Allowing companies to work in concert to dictate market prices and bully small businesses into leaving the market reduces market competition.[45] Public support was strong for Congress to pass federal antitrust legislation.[46] Members of Congress knew something

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38. *See* Christopher Grandy, *Original Intent and the Sherman Antitrust Act: A Re-examination of the Consumer-Welfare Hypothesis*, 53 J. ECON. HIST. 359, 359 (1993) ("Congress seemed more concerned with producer, rather than consumer, welfare.").

39. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/D7QB-Y9LC].

40. *See* Sawyer, *supra* note 36 ("Ensuring market competition had once been the province of judges through their enforcement of common law prohibitions against 'restraints of trade,' as well as state corporation laws regulating business actions and internal governance.").

41. *Id.* ("[A]s new communication and transportation technologies facilitated business combinations that traversed state lines, state laws appeared increasingly inadequate.").

42. Coryanne Hicks, *The Sherman Antitrust Act is the First in a Line of Federal Laws Protecting Consumers from Unfair Prices*, BUS. INSIDER (Aug. 2, 2022, 11:09 AM), https://www.businessinsider.com/sherman-antitrust-act [https://perma.cc/RFL6-4LS9] ("Some states had already passed similar laws, but their scope was limited to intrastate business, whereas the Sherman Antitrust Act was applied across the country."). The Sherman Antitrust Act was the first antitrust legislation passed by Congress, but the interpretation of the Act has changed dramatically since its passage. *See id.*

43. *See generally* Andrew N. Kleit, *Beyond the Rhetoric: An Inquiry into the Goal of the Sherman Act* (Bureau of Econ., Fed. Trade Comm'n, Working Paper No. 195, 1992) (discussing whether the purpose of the Sherman Act is to maximize economic efficiency or the welfare of consumers).

44. *See generally* Heather Boushey & Helen Knudsen, *The Importance of Competition for the American Economy*, WHITE HOUSE: BLOG (July 9, 2021), https://www.whitehouse.gov/cea/written-materials/2021/07/09/the-importance-of-competition-for-the-american-economy/ [https://perma.cc/TG3E-5DZH].

45. *See id.*

46. FED. TRADE COMM'N, *supra* note 34 ("While the rich, trust-owning businessmen got richer and richer, the public got angry and demanded the government take action."). Public

had to be done, so Senator John Sherman took action by submitting the Sherman Antitrust Act to the floor of the Senate.[47]

Congress passed the Sherman Antitrust Act on July 2, 1890.[48] The purpose of the Sherman Antitrust Act is to curb concentrations of power that adversely impact American free-trade principles and reduce competition between market participants.[49] The Sherman Antitrust Act prohibits any agreement to restrain trade or fix prices within the market.[50] The Act prohibits companies from holding monopoly positions in the market, but the Act does not explicitly define what constitutes a monopoly.[51]

The U.S. Supreme Court in *Brown Shoe Co., Inc. v. United States*[52] held that "the protection of viable, small, locally owned businesses" was a priority under the Sherman Antitrust Act even if the outcome of antitrust litigation results in "occasional high costs and prices."[53] The Supreme Court interpreted the Sherman Antitrust Act as making it illegal for corporations to enter into agreements that hurt competition or form monopoly positions in the market.[54] The DOJ enforces the provisions of the Sherman Antitrust Act in the federal courts.[55] The language in the Sherman Antitrust Act is

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outcry against the consolidation of economic power led to the passage of antitrust legislation. *See id.*

47. Senator Sherman represented Ohio in the United States Senate and was regarded as an expert on the regulation of commerce. *Sherman Antitrust Act*, BRITANNICA, https://www.britannica.com/event/Sherman-Antitrust-Act [https://perma.cc/T9CN-YZT5].

48. *Sherman Anti-Trust Act (1890)*, NAT'L ARCHIVES (Mar. 15, 2022), https://www.archives.gov/milestone-documents/sherman-anti-trust-act [https://perma.cc/6EWC-DA2W] ("The Sherman Anti-Trust Act passed the Senate by a vote of 51–1 on April 8, 1890, and the House by a unanimous vote of 242–0 on June 20, 1890. President Benjamin Harrison signed the bill into law on July 2, 1890."). Given the overwhelming votes supporting passage of the legislation in the Congress, the Sherman Antitrust Act had wide-ranging bipartisan support. *See id.* This shows just how pervasive the problem of trusts was in the economy given the legislation's broad political support. *See id.*

49. *Sherman Antitrust Act*, *supra* note 47.

50. 15 U.S.C. § 1 ("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 declared to be illegal.").

51. *See id.* § 2 ("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 among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

52. Brown Shoe Co., v. United States, 370 U.S. 294 (1962).

53. *Id.* at 344.

54. *See id.*

55. *Sherman Antitrust Act*, *supra* note 47 ("[Section 1 and 2], which constitute the heart of the Sherman Act, are enforceable by the U.S. Department of Justice through litigation in the federal courts. Firms found in violation of the act can be ordered dissolved by the courts, and injunctions to prohibit illegal practices can be issued.").

broad, stating general principles rather than specifying prohibited conduct.[56] This broad language required the courts to determine through judicial interpretation which conduct is lawful and unlawful under the Sherman Antitrust Act.[57] Therefore, the courts have been central in shaping antitrust law since the passage of the Sherman Antitrust Act.

In the years following the passage of the Sherman Antitrust Act, corporations found ways to sidestep violations by merging with other corporations to control prices and means of production.[58] The vague language of the Sherman Antitrust Act permitted corporations to engage in business practices that were seen as anticompetitive but not per se illegal under existing law.[59] For example, Andrew Carnegie established a monopoly in the steel market by merging companies at every level involved

56. *See* 15 U.S.C. §§ 1–7. Notice that Congress did not include definitions to any of the terms of conduct in the Act.

57. Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 471 (2012) ("Since its inception, the Sherman Act's broad language has required judicial interpretation to separate lawful and unlawful conduct under its terms. It is one thing to broadly proscribe collusion and monopolize behavior, but quote another to apply these broad prohibitions in specific circumstances."). The Supreme Court interpreted the Sherman Antitrust Act, which resulted in certain actions becoming unlawful per se. *Id.* While judicial interpretation of legislation is common, it seems contrary to ensuring free trade in the market by having laws that are ambiguous. *See id*. at 471–73. The goals of antitrust law are to help make markets efficient, therefore the prohibited conduct in antitrust laws is too ambiguous to serve as an efficient deterrent. *See id.*

58. FED. TRADE COMM'N, *supra* note 34 ("With the Sherman Act in place, and trusts being broken up, business practices in America were changing. But some companies discovered merging as a way to control prices and production . . . ."). After the passage of the Sherman Antitrust Act, companies started working around the law in order to maintain the power they held in the economy. *See id.* Companies started merging into one single entity to control means and production. *Id.*

59. *Clayton Antitrust Act*, BRITANNICA, https://www.britannica.com/event/Clayton-Antitrust-Act [https://perma.cc/6S8H-XN8T] ("The vague language of the [Sherman Act] had provided large corporations with numerous loopholes. Enabling them to engage in certain restrictive business arrangements that, though not illegal per se, resulted in concentrations that had an adverse effect on competition."). Despite trust-busting activities by both the Roosevelt and Taft administrations, big business continued to grow. *Id.* Congress knew that supplemental legislation to the Sherman Antitrust Act was necessary to combat the centralization of economic power. *See id.*

in steel production,[60] which is a process known as vertical integration.[61] While this behavior was not explicitly prohibited under the Sherman Antitrust Act, it was anticompetitive and contrary to American free market principles.

In response to the rise of anticompetitive conduct, Congress passed more antitrust legislation in 1914 in the form of the Clayton Antitrust Act[62] and the Federal Trade Commission Act (FTC Act).[63] The Clayton Antitrust Act is a civil statute that includes no criminal penalties but prohibits mergers and acquisitions that decrease competition.[64] The Clayton Antitrust Act allows the government to stop mergers that would lead to increased prices for consumers.[65]

The FTC Act bans "unfair methods of competition" and "unfair or deceptive acts or practices."[66] The FTC Act established the Federal Trade Commission (FTC) to enforce antitrust laws.[67] The U.S. Supreme Court

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60. *Andrew Carnegie*, HIST. CENT. (Nov. 19, 2021), https://www.historycentral.com/Bio/rec/AndrewCarnegie.html#:~:text=Gradually%2C%20he%20created%20a%20vertical,industry%20in%20the%20United% [https://perma.cc/CFU9-NATU] ("Gradually, [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 had the capital necessary to acquire all the means of steel production which demonstrates the immense power these tycoons had in the American economy. *See id.*

61. Evan Tarver, *Horizontal Integration vs. Vertical Integration: What's the Difference?*, INVESTOPEDIA (June 13, 2022), https://www.investopedia.com/ask/answers/051315/what-difference-between-horizontal-integration-and-vertical-integration.asp [https://perma.cc/92M8-GSHJ] ("Vertical integration is a corporate strategy that involves growth through streamlining operations. This occurs when one company acquires a producer, vendor, supplier, distributor, or other related company within the same industry."). The company attempting to vertically integrate will attempt to acquire all means of production to streamline efficiencies and reduce the price of making its products. *Id.*

62. 15 U.S.C. §§ 12–27.

63. 15 U.S.C. §§ 41–58.

64. *Antitrust Laws and You*, U.S. DEP'T JUST. (Jan. 5, 2017), https://www.justice.gov/atr/antitrust-laws-and-you [https://perma.cc/7HPT-N52Q].

65. *Id.* ("Under this Act, the Government challenges mergers that are likely to increase prices to consumer. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division and the Federal Trade Commission."). The Clayton Antitrust Act prohibits companies from engaging in market actions that hinder competition under specific circumstances. *Id.*

66. *E.g.*, 15 U.S.C. § 45(a)(1). Given the broad language in this statute, there is ample room for the courts to interpret undefined terms like "unfair or deceptive acts or practices." *See id.* § (a)(4).

67. *Guide to Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws [https://perma.cc/HU4G-SB52] ("The FTC's competition mission is to enforce the rules of the competitive marketplace—the antitrust laws."). The FTC was created to advocate on behalf of the American consumers. *Id.* The FTC's core mission is to ensure aggressive competition between market participants

ruled that any violation of the Sherman Antitrust Act is also a violation of the FTC Act, allowing the FTC to bring actions for violations of the Sherman Antitrust Act.[68] Accordingly, the government's swift passage of antitrust legislation shows the importance Congress placed on preventing the centralization of corporate power in the American economy.

IV. JUST THINK ABOUT IT! (DEVELOPMENT OF THE RULE OF REASON)

After Congress passed the Sherman Antitrust Act, the courts developed the rule of reason to determine the viability of antitrust actions brought under the Act.[69] The rule of reason became the governing standard in antitrust law in 1911 with the U.S. Supreme Court's decision in *Standard Oil Co. v. United States.*[70]

A. Use Logic & Reason (Standard Oil Co. v. United States)

In 1911, the government brought antitrust charges against oil magnates, William and John Rockefeller, for violating the Sherman Antitrust Act.[71] The government alleged that the Rockefellers engaged in a conspiracy to standardize oil prices by establishing an oil trust and restricting competitors from entering the marketplace.[72] The trial court held that Standard Oil violated the Sherman Antitrust Act.[73] However, the Rockefellers appealed the verdict based on the argument that the agreement between companies

because competition drives "higher quality products and services . . . and greater innovation." *Id.*

68. *The Antitrust Laws*, *supra* note 39 ("The Supreme Court has said that all violations of the Sherman Act also violate the FTC Act. Thus, although the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against the same kinds of activities that violate the Sherman Act."). The Supreme Court enabled the government to have more antitrust enforcement power by giving the FTC the ability to bring actions for violations of the Sherman Antitrust Act. *See id.*

69. For a discussion on the origins of the rule of reasons, see generally William H. Rooney & Timothy G. Fleming, *William Howard Taft, The Origin of the Rule of Reason, and the* Actavis *Challenge*, 2018 COLUM. BUS. L. REV. 1 (2018).

70. Standard Oil Co. v. United States, 221 U.S. 1, (1910).

71. *Financier's Fortune in Oil Amassed in Industrial Era of 'Rugged Individualism,'* N.Y. TIMES (May 24, 1937), https://archive.nytimes.com/www.nytimes.com/books/98/05/17/specials/rockefeller-fortune.html?scp=20&sq=Farm%2520Aid%2520%252798&st=Search [https://perma.cc/2K4Y-PAGR].

72. *See Standard Oil Co.*, 221 U.S at 31.

73. *Id.* at 30.

in the trust did not amount to an unreasonable restraint on trade as prohibited by the Sherman Antitrust Act.[74]

The Supreme Court interpreted the Sherman Antitrust Act as a codification of the common law prohibition on the restraint of trade.[75] Under common law, agreements between companies that result in unintended restraints on trade but are necessary to protect the interests of the parties involved are legal market actions.[76] However, in *Standard Oil Co*., the government argued that the Sherman Antitrust Act prohibited any restraint of trade.[77] The Supreme Court disagreed with the government's argument and found that the Sherman Antitrust Act only prohibits unreasonable restraints of trade.[78] The Supreme Court's decision rested on the view that Congress intended for the rule of reason to govern the outcome of claims brought under the Sherman Antitrust Act.[79]

The Supreme Court reasoned that antitrust cases simply must be decided by reason.[80] The Court established the test for the rule of reason, requiring that judges use logic and reason to determine whether a restraint on trade is unreasonable and a violation of the Sherman Antitrust Act.[81] This test,

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74. *See id.* at 47–49.

75. *Id.* at 60 ("[I]t follows that it was intended that the standard of reason which had been applied at common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used."). The Court's codification of the common law as the governing standard under the Sherman Antitrust Act was based on a review of congressional intent of the legislation. *See id.*

76. *See* Cincinnati Packet Co. v. Bay, 200 U.S. 179, 181 (1906) (holding that companies which enter into a contract resulting in some interference with competition, but the interference is insignificant and incidental to the dominant purpose of the contract, does not violate the Sherman Antitrust Act).

77. *Standard Oil Co*., 221 U.S. at 63 ("In substance, the propositions urged by the government are reducible to this: That the language of the [Sherman Antitrust Act] embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgement."). The Court held the Sherman Antitrust Act applied to all market actions even though the legislation did not define the scope of the law. *See id.* at 63–64.

78. *See id.* at 88 (Harlan, J., concurring in part and dissenting in part) ("We are asked to read into the act by way of judicial legislation an exception that is not placed there by the lawmaking branch of the government . . . . This we cannot and ought not to do." (emphasis omitted)).

79. *See id.*

80. *See id.* at 60 (majority opinion). The Court held that Congress intended for the Sherman Antitrust Act to be a codification of the common law. *Id.* Therefore, judges were to determine using their own logic whether they were convinced that an antitrust violation occurred under the Sherman Antitrust Act. *See id.* A common law antitrust action only prohibited unreasonable restraint of trade. *Id.* at 88 (Harlan, J., concurring in part and dissenting in part).

81. *See id.* at 62 (majority opinion) ("The criteria [under the Sherman Act] to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed, is the rule of reason guided by the established law and by

which guided the courts for decades to follow, primarily determined whether market actions were unreasonably restrictive of competition.[82] Given the complexity of antitrust actions, such a simple standard gave the courts great deference in determining which market actions were considered unreasonably restrictive of competition.

B. Solidifying the Rule (United States v. American Tobacco Co.)

The Court solidified the rule of reason in *American Tobacco Co.* v. United States.[83] In *American Tobacco Co.*, the government brought antitrust claims against the largest tobacco companies for violations of Section II of the Sherman Antitrust Act.[84] The government claimed that the companies in the tobacco market were colluding to sell cigarettes at the same price in a conspiracy to establish a monopoly.[85] The government furnished evidence that one tobacco company increased its cigarette prices in 1931 despite tobacco plant prices being at the lowest point in three decades.[86] The company's decision to increase cigarette prices caused its competitors to increase their cigarette prices the next day.[87] The government presented

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the plain duty to enforce the prohibitions of the act."). The Court conducted an analysis of the text and legislative history of the Sherman Antitrust Act to ascertain that reason should be the governing principle in determining whether market actions were in violation of antitrust law. *Id.* at 66.

82. Lee Loevinger, Assistant Att'y Gen., The Rule of Reason in Antitrust Law, Address Before the American Bar Association Section of Antitrust Law, at 3 (Aug. 7, 1961) (transcript available at https://www.justice.gov/atr/speech/file/1237731/download [https://perma.cc/CWR4-5SP6]) ("[T]he Court said in fairly explicit terms both that the Sherman Act prohibited only contracts or acts which were unreasonably restrictive of competence and also that the standard of reasonableness had been applied to all restrains of trade at the common law."). While the Court codified the common law, the standard of reasonableness was still vague making it difficult for corporations to comply with antitrust law. *See id.* at 2–3.

83. Am. Tobacco Co. v. United States, 328 U.S. 781 (1946).

84. *See id.* at 784; 15 U.S.C. § 2 ("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 among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .").

85. *Am. Tobacco Co.*, 328 U.S. at 803. The tobacco companies had employees whose responsibility it was to surveil competitor's prices to ensure their prices were similar. *Id.* If these employees noticed that prices differed between companies, they would alter their prices to conform with the competition. *Id.* The government alleged these market actions were a conspiracy to engage in a monopoly. *See id.* at 803–04.

86. *See id.* at 794–800.

87. *Id*. at 805.

evidence that no economic factors supported the increase in cigarette prices.[88]

In this case, the Supreme Court reaffirmed the rule of reason as the governing test for determining a violation of the Sherman Antitrust Act.[89] The rule of reason requires plaintiffs to demonstrate that defendants have market power and used such power to engage in anticompetitive conduct.[90] The rule of reason relies heavily on judicial discretion to determine whether a restraint is reasonable.[91] Given the fact judges are analyzing market actions using their individual logic and reason, market actions deemed legal by one judge may be illegal in the eyes of another judge.[92] Judicial discretion created substantial problems for corporations because it was difficult to know if a market action violated the law before the action was litigated in court.[93] Given these problems, the Supreme Court developed a new standard to analyze antitrust actions.[94]

V. It Is All About Consumers! (Development of the Consumer Welfare Standard)

The consumer welfare standard has been the governing standard of antitrust law for the past five decades and is currently utilized by the courts. The term consumer welfare standard became a fixture in antitrust

88. *Id.*

89. *See id.* at 814–15.

90. Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 83 (2018) ("Courts evaluate most antitrust claims under a 'rule of reason,' which requires the plaintiff to plead and prove that defendants with market power have engaged in anticompetitive conduct. To conclude that a practice is 'reasonable' means that it survives antitrust scrutiny."). Depending on a judge's background and experience, the interpretation of reasonableness standard could be different depending on the jurisdiction of the lawsuit. *See id* at 90. This could result in similar cases ending with different results. *See id.* at 166.

91. *Id.* at 93.

92. Young, *supra* note 19 ("During the rule of reason era, a company could never be quite sure if it was violating the law or not. An acceptable practice one year might not be if power changes hands in the next election, or if a new judge rules differently on a case than his predecessor [did]."). Given the fact that acceptable practices could change over time, companies had difficulty knowing whether a market action was going to be investigated by the government for a potential antitrust violation. *See id.*

93. *See id.*

94. *See* Chris Marchese, *Chapter 2. What's the Sherman Act & the Consumer Welfare Standard?*, NETCHOICE (May 20, 2021), https://netchoice.org/chapter-2-whats-the-sherman-act-the-consumer-welfare-standard/ [https://perma.cc/59G2-2JNA]; *see also* Honorable Douglas H. Ginsburg, Remarks on the Consumer Welfare Standard on the Occasion of Receiving the 2020 Sherman Award (Oct. 23, 2020) (transcript available at https://www.justice.gov/opa/speech/honorable-douglas-h-ginsburg-delivers-remarks-consumer-welfare-standard-occasion [https://perma.cc/TPM8-3DYQ]).

jurisprudence through the writings of Professor Robert Bork.[95] Professor Bork argued the goal of antitrust law was to promote consumer welfare and protect consumers from anticompetitive actions.[96] The consumer welfare standard calls for competitive markets that yield the highest outputs and goods due to fair competition, producing the lowest possible prices.[97] Professor Bork argued that consumer welfare is greatest when economic resources permit consumers to satisfy their wants as much as technology and innovation permit.[98] Professor Bork's arguments underline the importance of innovation in analyzing consumer welfare. The courts measured Bork's theory of consumer welfare by looking at the effect of a market action on consumer prices.[99]

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95. For a discussion on Professor Robert Bork's contributions to the development of the consumer welfare standard, see Werden, *supra* note 21, at 718–26.

96. *Id.* at 720. When explaining consumer welfare, Professor Robert Bork stated, "the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare." *Id.* (quoting ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 91 (1978)).

97. Hebert Hovenkamp, *Antitrust Remedies for Big Tech*, REGUL. REV. (Jan. 18, 2021), https://www.theregreview.org/2021/01/18/hovenkamp-antitrust-remedies-big-tech/ [https://perma.cc/3FGR-QGXR] ("Under antitrust's consumer welfare principle, the goal of antitrust law is competitive markets, which produce the highest output of goods and services consistent with sustainable competition. High economic output delivers low prices to consumers."). However, competitive markets do not ensure that there are no large firms. *Id.* Economies of scale can make production of products by large firms cheaper which will drive large firms to continue to grow. *Id.*

98. Werden, *supra* note 21, at 720 ("Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of the nation." (quoting BORK, *supra* note 96, at 90)).

99. *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720 (2017); ("Robert Bork asserted that the sole normative objective of antitrust should be to maximize consumer welfare, best pursued through promoting economic efficiency. Although Bork used 'consumer welfare' to mean 'allocative efficiency,' courts and antitrust authorities have largely measured [consumer welfare] through effects on consumer prices." (footnote omitted) (citing BORK, *supra* note 96, at 7, 405)). The courts were persuaded by Robert Bork's theory, but the standard adopted by the courts was slightly different than Bork's original theory. *See id.* at 720–21. The court seemingly simplified Professor Bork's complex economic analysis into a layman standard that could be administered by judges. *See id.*

A. The Consumer Strikes Back (Reiter v. Sonotone Corp.)

In 1979, the consumer welfare standard replaced the rule of reason in the U.S. Supreme Court's decision in *Reiter v. Sonotone Corp*.[100] In *Reiter*, a consumer brought a class action lawsuit against the Sonotone Corporation for alleged antitrust violations due to price-fixing of hearing aids.[101] The plaintiffs alleged that Sonotone's price-fixing schemes caused consumers to overpay for hearing aids and thus constituted illegal market actions.[102] Sonotone brought a motion to dismiss the claims arguing that the plaintiff's lacked standing to bring an antitrust action against them.[103]

In *Reiter*, the Supreme Court grappled with the issue of whether consumers, who paid a higher price for products because of alleged antitrust violations, suffered an antitrust injury.[104] In making its decision, the Supreme Court cited congressional debates of the Sherman Antitrust Act to "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription.'"[105] The Supreme Court held that "consumers who pay a higher price for goods purchased for personal use as a result of antitrust violations sustain an [antitrust] injury."[106] Thus, the Supreme Court's decision in *Reiter* adopted the consumer welfare standard and gave consumers standing to file lawsuits for antitrust violations.

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100. *See* Reiter v. Sonotone Corp., 442 U.S. 330, 342–44 (1979).

101. *Id.* at 335 ("Petitioner brought a class action on behalf of herself and all persons in the United States who purchased hearing aids manufactured by five corporations, respondents here. Her complaint alleges that respondents have committed a variety of antitrust violations, including vertical and horizontal price fixing.").

102. *Id.* ("[P]etitioner and the class of persons she seeks to represent have been forced to pay illegally fixed high prices for the hearing aids and related services they purchased from respondents' retail dealer.").

103. *Id*. ("[R]espondents argued that Reiter, as a retail purchaser of hearing aids for personal use, lacked standing to sue for treble damages under § 4 of the Clayton Act because she had not been injured in her 'business or property' within the meaning of the act."). This was the first case under which a consumer had brought an action under the Clayton Antitrust Act, a civil statute, for an alleged antitrust injury. *See id.* Therefore, the Court had to grapple with the issue of whether a consumer had standing to bring an antitrust claim against a corporation. *See id.*

104. *Id.* at 335. In analyzing this case, the Supreme Court utilized statute construction. *Id.* at 337. Beyond looking at the language of the Clayton Antitrust Act, the Supreme Court looked to previous cases which interpreted the Clayton Antitrust Act as well as the legislative history of the Sherman Antitrust Act to ascertain Congress's purpose in passing the Clayton Antitrust Act. *Id.* at 337–38.

105. *Id.* at 343 (quoting BORK, *supra* note 96, at 66). In analyzing the purpose of the Sherman Antitrust Act, the Court looked to floor debates in Congress. *Id.* From floor debates of Congress, the Court found that it was apparent that the goal of the Sherman Antitrust was to protect consumer welfare. *See id.* ("At no time, however, was the *right* of a consumer to bring an action for damages questioned.").

106. *Id.* at 334.

B. Defining the Standard (Rebel Oil Co. v. Atl. Richfield Co.)

The consumer welfare standard was refined in *Rebel Oil Co. v. Atl. Richfield Co*.[107] In 1990, Rebel Oil Company claimed Atlantic Richfield Company engaged in a price-fixing scheme to sell gasoline below the market cost to drive competitors out of the market.[108] The Ninth Circuit Court of Appeals held market actions are per se unreasonable and anticompetitive "only when it harms both allocative efficiency *and* raises the prices of goods above competitive levels or diminishes their quality."[109] Furthermore, the appeals court held that "reduction of competition does not invoke the Sherman Act until it harms consumer welfare."[110] The appeals court even went as far as reasoning that the "Sherman Act's concern is consumer welfare," therefore, an antitrust injury only occurs when the alleged harm impacts consumers.[111] To this day, the courts continue to apply the consumer welfare standard, laid out in *Rebel Oil Co.*, as the test for determining whether a market action is a violation of antitrust law.[112]

Under the consumer welfare standard, the courts consider whether a market action creates a reasonable inference of lower market wide-outputs and higher prices, hurting consumers.[113] A market that negatively impacts consumers is presumptively unlawful, and this standard applies to all

107. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421 (9th Cir. 1995).

108. *See id.* ("The plaintiffs contend that the defendant engaged in predatory pricing between 1985 and 1989, selling self-serve, cash-only gasoline below marginal cost."). The plaintiffs were able to allege several antitrust violations arising out of the same market action. *Id.* The plaintiffs brought actions under § 1 and § 2 of the Sherman Antitrust Act. *Id.* By filing several causes of action, the plaintiffs created different opportunities to win relief for their alleged antitrust harms. *Id.*

109. *Id.* at 1433.

110. *Id.* (citing Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663 (7th Cir. 1982)).

111. *Id.* at 1445 ("For example, because the Sherman Act's concern is consumer welfare, antitrust injury occurs only when the claimed injury flows from acts harmful to consumers.").

112. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (determining the first step in analyzing the plaintiff's claim was to determine "that the challenged restraint [on trade] has a substantial anticompetitive effect that harms consumers in the relevant market").

113. *See* Christine S. Wilson, Comm'r, Fed. Trade. Comm'n, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium (Feb. 15, 2019) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/TE2V-XPV7]).

antitrust legislation.[114] The courts have found the consumer welfare standard easy to administer because any harm to consumers due to "reduced output, decreased product quality, or higher prices" violates antitrust law.[115] In short, under the consumer welfare standard, a plaintiff is required to show harm to consumers by an increase in prices or limitations in product supply.[116]

For decades, antitrust legislation has been used against industrial corporations.[117] However, the rapid advancements of the digital age have altered the power structure of the American economy. Now, the largest corporations are in the technology sector.[118] These cutting-edge innovative companies are unlike the industrial conglomerates of the Rockefeller Era. Before attempting to solve this challenging issue, it is important to define Big Tech.

VI. CHALLENGES OF ENFORCING ANTITRUST LAW IN THE ERA OF BIG TECH

Big Tech refers to a collection of technology companies: Facebook, Amazon, Apple, Microsoft, and Google.[119] These companies are known as Big Tech because they represent 20% of the stock market's total worth.[120] The five companies control 23% of market capitalization in the

114. *Id.* ("Under a simple rule of reason test employing the consumer welfare principle, one would have to consider whether the challenged practice creates a sufficient inference of lower market-wide outputs and higher prices."). A sufficient inference does not mean there has to be explicit evidence that the market action caused the higher price. *See id.* The plaintiff only needs to provide evidence that shows there is a "sufficient inference" which is a lower burden of evidence. *Id.*

115. *Id.* Defendants have the opportunity to demonstrate to the court that the harms alleged ignore efficiencies produced by the market action. *Id.*

116. *See Am. Express Co.*, 138 S. Ct. at 2278.

117. Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement [https://perma.cc/PDK7-5NPN].

118. *See* Nicolas Lekkas, *GAFAM: The Big Five Tech Companies*, GROWTHROCKS (May 19, 2022), https://growthrocks.com/blog/big-five-tech-companies-acq [https://perma.cc/W4BU-2Z97].

119. *Id.* The acronym, "GAFAM," represents the companies Facebook, Apple, Google, Amazon, and Microsoft. *Id.* Goldman Sachs came up with the acronym because these companies are conducting sociocultural evolution at a big scale and occupy a large portion of the S&P 500. *Id.*

120. Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights*, N.Y. TIMES (Aug. 19, 2020), https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html [https://perma.cc/8H4Z-FUZ5]. Big Tech's growth has rapidly increased during the COVID-19 pandemic. *Id.* While most companies have struggled to during the pandemic, investors flocked to Big Tech given their increasing market share. *Id.*

technology sector.[121] Big Tech's domination over the technology sector and the American economy has not been seen in seventy years.[122] Big Tech has grown so large that it took over the S&P 500.[123] Last year, Big Tech accounted for 17.5% of the S&P 500 index.[124] Apple alone accounts for 4.9% of the S&P 500 index.[125] Projections showed that by as early as 2022, Big Tech's annual sales would exceed the entire GDP of Australia.[126] It is apparent: Big Tech has a dominant market position not only in the technology sector but also in the American economy.

Over the last two decades, America has seen Big Tech grow to dominate the rapidly evolving economy.[127] Given this domination, one would logically think the government would file antitrust actions to curb Big Tech's

121. Nick Sargen, *Why Big Tech Market Leadership Is in Question*, FORBES (Jan. 12, 2021, 7:58 AM), https://www.forbes.com/sites/nicksargen/2021/01/12/why-big-tech-market-leadership-is-in-question/?sh=3f12a2da654b/ [https://perma.cc/J73G-QDF2]. For comparison, the technology sector accounts for 6% of United States GDP and 2% of total United States employment. *Id.* Comparing Big Tech's market capitalization to its percentage of GDP demonstrates Big Tech's dominance in the economy. *See id.*

122. *See supra* note 15 and accompanying text.

123. *See* Ari Levy & Lorie Konish, *The Five Biggest Tech Companies Now Make Up 17.5% of the S&P 500—Here's How to Protect Yourself*, CNBC (Jan. 28, 2020, 4:00 PM), https://www.cnbc.com/2020/01/28/sp-500-dominated-by-apple-microsoft-alphabet-amazon-facebook.html [https://perma.cc/95BT-9586]. The S&P 500 index represents the top five hundred largest publicly traded companies. Will Kenton, *The S&P 500 Index: Standard & Poor's 500 Index*, INVESTOPEDIA (Jan. 24, 2022), https://www.investopedia.com/terms/s/sp500.asp [https://perma.cc/DZ57-UWZF].

124. Levy & Konish, *supra* note 123 ("[I]nvestors passively putting money into the most popular exchange-traded fund, the SPDR S&P 500 ETF, are heavily, and perhaps unintentionally, wagering on U.S. tech companies.").

125. *Id.* Big Tech's growth drove the S&P 500 to climb over 31% in 2020. *Id.* Microsoft now makes up 4.6% of the S&P 500, and Microsoft's own stock value rose by 55% in 2020. *Id.*

126. Therese Poletti & Jeremy C. Owens, *Big Tech is Headed for its Biggest Year Yet, and It Isn't Even Close*, MARKETWATCH (July 31, 2021, 9:37 AM), https://www.marketwatch.com/story/big-tech-is-headed-for-its-biggest-year-yet-and-it-isnt-even-close-11627609688 [https://perma.cc/8DQZ-D2RF]. For a brief explanation on gross domestic product (GDP), see Jason Fernando, *Gross Domestic Product (GDP)*, INVESTOPEDIA (July 29, 2022), https://www.investopedia.com/terms/g/gdp.asp [https://perma.cc/WJY8-2B2D] ("Gross domestic product (GDP) is the total monetary or market value of all finished goods and services produced within a country's borders in a specific time period. As a broad measure of overall domestic production, it functions as a comprehensive scorecard of a given country's economic health."). GDP is commonly used as a metric for comparing the size of countries' economies. *Id.*

127. *See* Shira Ovide, *Big Tech Has Outgrown This Planet*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/07/29/technology/big-tech-profits.html [https://perma.cc/PSK6-9EQ7].

power. However, since the rise of Big Tech, the government has filed only a handful of antitrust actions attempting to curb Big Tech's dominant market position.[128] Recently, the government brought actions against Apple and Facebook, but a federal district court dismissed the complaints because the plaintiffs failed to prove enough facts to satisfy pleading standards.[129]

In the government's latest antitrust action against Big Tech, a federal district court dismissed two lawsuits against Facebook.[130] The government alleged Facebook engaged in monopolistic activities while acquiring Instagram and WhatsApp, rival social media firms.[131] The court dismissed the complaints, reasoning that the government failed to offer enough facts to assert Facebook established a monopoly in the social media market.[132] The dismissal of the complaints spurred public debate about modernizing antitrust legislation to give the government more tools to go after Big Tech.[133] Politicians criticized the courts for failing to apply existing antitrust legislation

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128. For a discussion of recent antitrust actions filed by the government, see Sheelah Kolhatkar, *What's Next For The Campaign To Break Up Big Tech?*, NEW YORKER (July 6, 2021), https://www.newyorker.com/business/currency/whats-next-for-the-campaign-to-break-up-big-tech [https://perma.cc/EH2W-LYKX].

129. David McLaughlin, *FTC Goes After Facebook Once Again in New Antitrust Suit*, FORTUNE (Aug. 19, 2021, 9:22 AM), https://fortune.com/2021/08/19/ftc-files-new-antitrust-suit-facebook/ [https://perma.cc/F5ND-5GGH].

130. Dave Gershgorn, *The FTC Fumbles its Big Antitrust Case Against Facebook*, FORTUNE (June 29, 2021, 8:57 AM), https://fortune.com/2021/06/29/the-ftc-fumbles-its-big-antitrust-case-against-facebook/ [https://perma.cc/P9V2-JN2B].

131. David McLaughlin, *Facebook Sued by FTC and States Over Antitrust*, FORTUNE (Dec. 9, 2020, 12:11 PM), https://fortune.com/2020/12/09/facebook-sued-ftc-states-antitrust/ [https://perma.cc/G223-7XPF] ("The Federal Trade Commission and state attorneys general led by New York filed antitrust complaints against Facebook Wednesday, alleging conduct that thwarted competition from rivals in order to protect its monopoly. The FTC lawsuit seeks a court order unwinding Facebook's acquisition of Instagram and WhatsApp."). This is an example of a state joining the federal government in pursuing antitrust claims against Big Tech. *See id.* Even state regulators have become concerned with the size of Big Tech and have attempted to initiate antitrust actions. *See id.*

132. *See generally* Cat Zakrzewski & Rachel Lerman, *Court Says FTC Hasn't Provided Evidence Facebook Is A Monopoly, Dismisses Lawsuit*, WASH. POST. (June 28, 2021, 7:00 PM), https://www.washingtonpost.com/technology/2021/06/28/ftc-facebook-antitrust-complaint-dismissed/ [https://perma.cc/59V8-WXA5] (describing how the government was unable to provide sufficient facts that Facebook constituted a monopoly under its antitrust claims).

133. *Id.* ("'Today's development in the FTC's case against Facebook shows that antitrust reform is urgently needed,' Ken Buck (Colo.), the top Republican on the House Judiciary antitrust subcommittee, tweeted. 'Congress needs to provide additional tools and resources to our antitrust enforcers to go after Big Tech companies engaging in anticompetitive conduct.'"). Furthermore, this article illuminates how politicians on both sides of the aisle understand the need for comprehensive antitrust reform. *See id.*

in a way that allows the government to bring actions against Big Tech to espouse the goals of antitrust.[134]

VII. CONSUMER WELFARE OF THE FUTURE: REORIENTATING THE CONSUMER WELFARE STANDARD TO ACCOUNT FOR THE RISE OF BIG TECH

Antitrust law aims to protect competition and the free market.[135] In order to protect the free market, the consumer welfare standard must change to account for the rapid rise of Big Tech. The courts' strict adherence to the consumer welfare standard allowed Big Tech companies to grow to immense size and power.[136] Currently, antitrust experts are pushing to expand the consumer welfare standard to include a broader definition of consumer harm.[137] Even Congress is looking to enlarge the consumer welfare standard to allow the DOJ and FTC to bring successful antitrust actions against Big Tech.[138]

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134. David McCabe & Steve Lohr, *Congress Faces Renewed Pressure to 'Modernize Our Antitrust Laws*,*'* N.Y. TIMES (June 29, 2021), https://www.nytimes.com/2021/06/29/technology/facebook-google-antitrust-tech.html [https://perma.cc/2283-EZ6E] ("The decisions underlined how cautious and conservative courts could slow an increasingly aggressive push by lawmakers, regulators and the White House to restrain the tech companies, fueling calls for Congress to revamp the rules and provide regulators with more legal tools to take on the tech firms.").

135. *See id.*

136. Streitfeld, *supra* note 13 ("For decades, antitrust regulation has been overwhelmingly focused on the welfare of the consumer. No cost to the consumer, no problem. That opened the door for Google, Facebook, Apple, Amazon—which offered digital services that were cheap or free—to become immensely profitable and powerful."). The rapidly changing economy has produced companies which have found alternative revenue streams. *See id.* Companies can now make revenue without charging money for their products, raising concerns that the consumer welfare standard will be a barrier to antitrust enforcement. *See id.*

137. Nandita Bose, *Facebook Lawsuits Don't Show Much Consumer Harm But Must They?*, REUTERS (Dec. 10, 2020, 3:48 PM), https://www.reuters.com/article/us-tech-antitrust-facebook-harm/facebook-lawsuits-dont-show-much-consumer-harm-but-must-they-idUSKBN28K3FV [https://perma.cc/5USD-SGUM] ("Some antitrust experts have pushed back against the idea of seeking to prove harm to consumers and argued that new antitrust lawsuits must focus on a much broader definition of harm."). Furthermore, in a recent speech, Makan Delrahim, the Justice Department official in charge of antitrust, "reject[ed] the consumer welfare standard as the sole determinant of harm." Streitfeld, *supra* note 13. Delrahim argued that "diminished quality" can be enough to cause harm to competition. *Id.*

138. Bose, *supra* note 137 ("A House panel released a wide-ranging report on tech companies earlier this year in which it called for establishing a legal standard 'designed to

Antitrust enforcement of Big Tech is a challenging endeavor given the difficulty of proving consumer harm when Big Tech firms' products are free.[139] Because Big Tech often offers products at little to no cost to the consumer, it is hard to imagine any market action taken by a Big Tech company that would result in any priced-based violation of the consumer welfare standard. The consumer welfare standard is not concerned with the size of a corporation but rather whether the corporation's actions negatively impact consumers.[140] It is vital that the government prevent Big Tech from acquiring developing companies to stop Big Tech from dominating the economy. In order to ensure that the courts apply the consumer welfare standard effectively to espouse the goals of antitrust laws, the consumer welfare standard must change.

The consumer welfare standard must include a consideration of harm to innovation. Under the harm to innovation standard, a plaintiff must present facts showing that a company's market action is restricting innovation. Hindering the advancement of innovation and technology harms consumers over time because innovation provides diversity in consumer choice and higher-quality products. Therefore, the courts must recognize harm to innovation as an antitrust injury under the consumer welfare standard. The government argued harm to innovation as an antitrust injury in nearly one-third of merger enforcement actions this decade, but the court refused to accept harm to innovation as factor under the consumer welfare standard.[141]

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protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.'"). Congress has been grappling with reforming antitrust legislation but has struggled with defining how to define an antitrust injury in the modern age. *See id.*

139. Adam Thierer & Jennifer Huddleston, *Facebook and Antitrust, Part 2: Where is the Consumer Harm?*, MERCATUS CTR. GEO. MASON UNIV. (June 12, 2019), https://www.mercatus.org/bridge/commentary/facebook-and-antitrust-part-2-where-consumer-harm [https://perma.cc/2BPT-VEUT]. For example, bringing an antitrust action against Facebook, who provides a free social media product, would be a daunting endeavor because the government would be required to prove harm to consumers in a situation where consumers are using a free product. *Id.* ("Facebook offers consumers many benefits that almost certainly outweigh any alleged harms. Many of these harms are quite amorphous and lie outside the realm of traditional antitrust policy.").

140. McCabe & Lohr, *supra* note 134 ("Under current norms, which have been solidified by decades of business-friendly court rulings, companies tend to be judged to have violated competition laws if their behavior has hurt the welfare of consumers. The main measure of that harm has been whether companies have charged people higher prices."). Therefore, under the consumer welfare standard, the size of business does not come under scrutiny unless there is a monopoly claim under Section II of the Sherman Antitrust Act. *See id.*

141. Khan, *supra* note 99, at 721–22 ("The Federal Trade Commission (FTC) has alleged potential harm to innovation in roughly one-third of merger enforcement actions in the last decade. Still, it is fair to say that a concern for innovation or non-price effects rarely animates or drives investigations or enforcement actions—especially outside the

The courts consistently decline to consider innovation because they consider economic factors easier to measure.[142] Thus, economic factors are outcome determinative under the consumer welfare standard.[143] The courts must take innovation into account when analyzing the consumer welfare standard to espouse the goals of antitrust law in the world of Big Tech.

If the courts were to include harm to innovation as a factor under the consumer welfare standard, the government could bring more antitrust actions against Big Tech. One of the issues facing antitrust enforcers is the broad antitrust legislation,[144] which leaves the courts to fill in the gaps in antitrust legislation. Nowhere in the Sherman Antitrust Act or other relevant antitrust legislation is the consumer welfare standard defined by legislators.[145] Therefore, a change to include harm to innovation as a factor under the consumer welfare standard could occur through judicial interpretation of antitrust legislation. While the courts have been somewhat persuaded by harm to innovation arguments in the past, a more defined standard of harm

merger context." (footnote omitted) (citing Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Remark at 10th Annual Global Antitrust Enforcement Symposium (Sept. 20, 2016) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/985423/ramirez_-_global_antitrust_enforcement_symposium_keynote_remarks_9-20-16.pdf [https://perma.cc/F9KK-XLWC]))). The government has consistently alleged that harm to innovation is an antitrust harm in merger challenges, however, innovation has never been the primary argument for challenging a merger under an antitrust cause of action. *See id.* Therefore, it is unclear how the court would react to an argument that made innovation the primary antitrust injury. *See id.*

142. *See generally* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (discussing the challenges judges face when analyzing economic issues in antitrust cases). The courts are overly optimistic about experts' ability to quantify economic harm in these sorts of cases. *See id.* at 2 ("The effects-based structure of modern antitrust law requires economic expert testimony in large part because the Sherman Antitrust Act's (15 U.S.C. 1–7 [2006]) broad language delegates to the judiciary the task of identifying unreasonable restraints of trade."). Identifying what actions are unreasonable is a complicated endeavor for generalist judges. *Id.* Judge Richard Posner argues that "econometrics is such a difficult subject that it is unrealistic to expect the average judge or juror to be able to understand all the criticisms of an econometric study, no matter how skillful the econometrician is in explaining a study to a lay audience." *Id.* (quoting Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. ECON. PERSP., Spring 1999, at 91, 96).

143. *See* Khan, *supra* note 99, at 722 ("Economic factors that are easier to measure—such as impacts on price, output, or productive efficiency in narrowly defined markets—have become 'disproportionately important.'" (quoting MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 108 (2016))).

144. *See* Blair & Sokol, *supra* note 57 and accompanying text.

145. *See supra* note 56 and accompanying text.

to innovation is needed for the courts to easily adopt the factor into its consumer welfare analysis.

The challenge lies in creating a standard for the courts to analyze harm to innovation. This is especially true given that the rule of reason standard and the consumer welfare standard are not defined by legislation but rather are products of judicial review. In fact, the history of antitrust jurisprudence shows that the courts have frequently developed broad and vague standards, causing corporations to be unsure whether a market action complies with the law. Luckily, a federal district court defined specific instances in which harm to innovation can impact consumer welfare. The following section explores a case in which the District of Columbia District Court opened the door to using harm to innovation as a consideration under the consumer welfare standard.

VIII. Adopting the *Microsoft* Standard

The District of Columbia District Court decision in *United States v. Microsoft Corp.* paves the way for adopting harm to innovation as a factor under the consumer welfare standard.[146] While the courts do not recognize harm to innovation as a distinctive factor under the consumer welfare standard, the government argued that harm to innovation negatively impacts consumer welfare. In *Microsoft*,[147] the government argued that Microsoft's actions, as a leader in the computer operating software and internet browser marketplace, harmed innovation resulting in harm to consumer welfare.[148] To uphold the goals of antitrust law and effectively combat Big Tech's control over the economy, the courts must adopt the harm to innovation rationale in *Microsoft* as an antitrust injury under the consumer welfare standard.

A. The Origin of Harm to Innovation

In 1998, Microsoft dominated the software marketplace and its rise in the personal computer marketplace was concerning to federal regulators.[149] At the time, Microsoft was America's most valuable company and carried significant power within the marketplace.[150] Given Microsoft's power,

146. *Microsoft I*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part*, *rev'd in part*, 253 F.3d 34 (D.D.C. 2001).
147. *Id.*
148. *See* Andrew Beattie, *Why Did Microsoft Face Antitrust Charges in 1998?*, INVESTOPEDIA (Oct. 25, 2021), https://www.investopedia.com/ask/answers/08/microsoft-antitrust.asp [https://perma.cc/V395-88XX].
149. *See id.*
150. *See* Luckerson, *supra* note 4.

the FTC launched an investigation to determine whether Microsoft held a monopoly in the personal computer industry due to Microsoft's rapidly increasing market share.[151] The FTC's investigation found Microsoft bundled its services into its operation system, meaning if customers wanted to buy a particular computer service from Microsoft, they had to own Microsoft's operating system.[152] The FTC's investigation revealed that Microsoft allowed customers to use Microsoft's internet browser, Internet Explorer, for free as a way of hurting the only competition in the market, Netscape.[153] Following the FTC's investigation, the DOJ filed an antitrust action against Microsoft for violations of the Sherman Antitrust Act.[154]

In the complaint, the government alleged that Microsoft engaged in anticompetitive practices when Microsoft forced computer companies into exclusive contracts requiring the use of Microsoft's operating software and Microsoft's browser, Internet Explorer.[155] At the time, Netscape was a growing rival to Microsoft in the internet browser marketplace.[156] The government argued that if Microsoft did not engage in anticompetitive conduct to eliminate Netscape from the internet browser marketplace, competition between the two firms would have spurred innovation resulting in higher quality products at lower prices.[157]

B. Defining Harm to Innovation

The government defined five ways that Microsoft's anticompetitive conduct adversely affected innovation, including reducing innovation, hurting competitors ability to obtain funding for research and development, and

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151. *Microsoft Antitrust Case*, CORP. FIN. INST. (Feb. 25, 2022), https://corporatefinanceinstitute.com/resources/knowledge/strategy/microsoft-antitrust-case/ [https://perma.cc/D24A-TZ88]. Federal regulators were investigating whether Microsoft was trying to monopolize the computer marketplace because of its large market share. *Id.* Microsoft caught the eye of federal regulators because it was the leading software company but was making significant inroads in the personal computing marketplace. *Id.*

152. *Id.*

153. *Id.*

154. Beattie, *supra* note 148.

155. Complaint at 1–4, *Microsoft I*, 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part*, *rev'd in part*, 253 F.3d 34 (D.D.C. 2001) (Civ. No. 98-1232).

156. *Id.* at 3–4.

157. *Id.* at 4 ("Because of its resources and programming technology, Microsoft was well positioned to develop and market a browser in competition with Netscape. Indeed, continued competition on the merits between Netscape's Navigator and Microsoft's Internet Explorer would have resulted in greater innovation and the development of better products at lower prices.").

reducing competitors incentive to innovate.[158] A rival computer company executive testified that if there was true competition to Microsoft in the internet browser marketplace, "such competition 'would drive prices lower' and promote innovation."[159] Furthermore, the government alleged Microsoft violated the Sherman Antitrust Act, arguing that "[a] competitive browser market in which customers are free to choose among alternative Internet browsers or to choose no browser at all will lead to continuing innovation and price competition as suppliers compete on the merits for customers' favor."[160] The negative impact of stalled innovation on consumers was central to the government's argument that Microsoft violated the Sherman Antitrust Act.[161]

In analyzing the case, the district court considered whether Netscape posed a competitive threat to Microsoft in the future.[162] The district court agreed with the government's argument that competition between Microsoft and Netscape would have improved consumer choice and nurtured innovation.[163] The district court stated that Microsoft's actions were an attempt to "quash innovation" that threatened its monopoly position.[164] The district court's decision looked at the long-term effects of Microsoft's anticompetitive conduct and determined using non-economic qualitative factors that an injury to innovation hindering consumer welfare occurred.[165] The district court found the government's harm to innovation argument persuasive despite the fact the district court considered Netscape to be a minor threat to Microsoft.[166] However, the district court did not rule that harm to innovation is outcome determinative under the consumer welfare

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158. *Id.* at 12–13.
159. *Id*. at 20 (citation omitted).
160. *Id.* at 44.
161. *Id.* at 12–13.
162. Joshua D. Wright, Commissioner, Fed. Trade Comm'n, Presentation at the Washington Bar Association's 31st Annual Antitrust, Consumer Protection, and Unfair Business Practice Seminar, at 12 (Nov. 13, 2014) (transcript available at https://www.ftc.gov/system/files/documents/public_statements/599051/141117jdw_seminar.pdf [https://perma.cc/QGF8-83HM]) ("The question was whether those products posed a competitive threat to Microsoft in the future, despite not providing an alternative to customers in the present.").
163. *See id.* at 11.
164. *Microsoft I*, 87 F. Supp. 2d 30, 40 (D.D.C. 2000) (citing Findings of Fact at 95–96, *Microsoft Corp.*, 87 F. Supp. 2d 30 (Civ. No. 98-1232) ("Microsoft's decision to tie Internet Explorer to Windows cannot truly be explained as an attempt to benefit consumers and improve the efficiency of the software market generally, but rather as part of a larger campaign to quash innovation that threatened its monopoly position."), *aff'd in part*, *rev'd in part*, 253 F.3d 34 (D.D.C. 2001).
165. *Id.* at 44.
166. United States v. Microsoft Corp. (*Microsoft II*), 253 F.3d 34, 79 (citing Findings of Fact, *supra* note 164, at 35–39)).

standard.[167] Microsoft settled the case with the government after a circuit court overturned the district court's ruling on other grounds.[168] Nevertheless, the circuit court commented that harm to innovation is a potential consideration under the consumer welfare standard.[169] Unfortunately, the Supreme Court never had the opportunity to decide whether harm to innovation is a factor under the consumer welfare standard.

C. Adopting the Harm to Innovation Standard

Given the district court's holding in *Microsoft*, courts should adopt the harm to innovation standard defined by the government's complaint in that case. The following harms to innovation are common antitrust injuries found in Big Tech: (1) impairing the incentive of competitors to undertake research and development and impairing the ability of competitors to obtain financing for research and development; (2) inhibiting competitors that nevertheless succeed in developing promising innovations from effectively marketing their improved products to consumers.[170]

IX. HARM TO INNOVATION IMPAIRS THE INCENTIVE OF COMPETITORS TO UNDERTAKE RESEARCH & DEVELOPMENT

Big Tech's dominant market position has caused a substantial decrease in innovation funding. The harm to innovation standard will allow startups to bring antitrust actions against Big Tech for interfering with their ability to acquire innovation funding via venture capital and research and development (R&D) funding. Big Tech increases its dominant market position by consistently and ferociously acquiring up-and-coming startups.[171] Venture

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167. *See Microsoft II*, 87 F. Supp. 2d at 44.

168. Beattie, *supra* note 148. The Circuit Court overturned the District Court's ruling that Microsoft had violated Section II of the Sherman Antitrust Act and remanded the District Court's ruling that Microsoft had violated Section I of the Sherman Antitrust Act. *Id.* Instead of pursuing the charges, the government settled with Microsoft. *Id.*

169. *See Microsoft II*, 253 F.3d at 79 ("[S]uffice it to say that it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent . . . competitors at will . . . ." (citing Findings of fact, *supra* note 164, at 30–31)).

170. Complaint, *supra* note 155, at 12–13.

171. Chris Alcantara et al., *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/ [https://perma.cc/RJ8Y-7LA4]. Big Tech companies follow the same formula to grow in size. *Id.* Big Tech firm's dominant

capitalists[172] play a crucial role in the economy by providing funds which allow startups to scale in business and develop new products.[173]

Big Tech hinders innovation through its trend of acquiring startups because the trend disincentivizes venture capitalist investment in startups. Venture capitalist firms invest in startups they believe have the potential to be acquired by Big Tech.[174] The chance of startups reaching the milestone of an initial public offering and remaining independent of a Big Tech company is small.[175] In fact, Big Tech firms attained their dominant market position in the economy because of their consistent acquisition of startups.[176] Big Tech companies quickly absorb innovative and prospering startups in the beginning stages of their business development.[177] Research shows Big Tech's practice of buying competitive startups decreases venture

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their original business and then grow tentacles by making acquisitions in new sectors to add revenue streams and outflank competitors. *Id.*

172. Akhilesh Ganti, *Venture Capitalist Definition: Who Are They and What Do They Do*, INVESTOPEDIA (May 31, 2022), https://www.investopedia.com/terms/v/venturecapitalist.asp#:~:text=A%20venture%20capitalist%20(VC)%20is,have%20access%20to%20equities%20markets? [https://perma.cc/4V5C-HR9F] ("A venture capitalist (VC) is private equity investor that provides capital to companies with high growth potential in exchange for an equity stake. This could be funding startup ventures or supporting small companies that wish to expand but do not have access to equities markets."). Venture capitalist funding has rapidly increased over the last decade and has driven the development of new technologies. *Id.* Venture capital is now a hundred-billion-dollar industry and plays a critical role in the innovation economy. *Id.*

173. Bob Zider, *How Venture Capital Works*, HARV. BUS. REV. (1998), https://hbr.org/1998/11/how-venture-capital-works [https://perma.cc/9DPS-V3RF]. Venture capitalist investment is not long-term money for startups. *See id.* The idea behind venture capitalist investment is to invest in a company's infrastructure allowing it to build in size so it can be sold to another corporation or reach an initial public offering. *See id.*

174. Alexis C. Madrigal, *Silicon Valley Abandons the Culture That Made It the Envy of the World*, ATLANTIC (Jan. 15, 2020), https://www.theatlantic.com/technology/archive/2020/01/why-silicon-valley-and-big-tech-dont-innovate-anymore/604969/ [https://perma.cc/5WK4-MYBB]. When Facebook and Google were considered startups, their executives claimed that startups were vital to the economy. *See id.* Now these companies have a different stance; they claim that large companies serve important roles in the economy which has drawn a cynical response from competitors. *See id.*

175. Alcantara et al., *supra* note 171.

176. *See* Madrigal, *supra* note 174.

177. *See* Farhad Manjoo, *How the Frightful Five Put Start-Ups in a Lose-Lose Situation*, N.Y. TIMES (Oct. 18, 2017), https://www.nytimes.com/2017/10/18/technology/frightful-five-start-ups.html [https://perma.cc/6YMX-4ZV3] ("The best start-ups keep being scooped up by the big guys (see Instagram and WhatsApp, owned by Facebook). Those that escape face merciless, sometimes unfair competition (their innovations copied, their projects litigated against). And even when the start-ups succeed, the Five still win."). Big Tech has established a culture in Silicon Valley, where startups develop products for the sole purpose of being acquired by Big Tech. *See id.*

capitalists' funding of startups.[178] This means there is less capital to invest in startups, resulting in less innovation funding. Venture capitalists are weary of investing in startups attempting to enter in direct competition with Big Tech.[179] As a result, Big Tech's actions directly stifle investment in innovation. However, Big Tech's impact on startups does not end at venture capitalist funding: Big Tech also impacts competitor's incentive to undertake R&D.

Big Tech's actions have a consequential effect on innovative R&D by reducing competitors' incentive to fund innovative projects.[180] Big Tech's acquisitions of startups impact innovation because Big Tech has vastly different R&D priorities than startups. Big Tech companies focus their R&D on process improvements[181] whereas startups focus on product development.[182] Essentially, Big Tech focuses on improving existing products and increasing the synergies between those products. Because startups are attempting to enter the market, they are incentivized to create new products that they hope will compete in the marketplace.[183] Thus, the R&D focus of startups is quintessentially a focus on innovation.

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178. *See* James McLeod, *Inside the Kill Zone: Big Tech Makes Life Miserable for Some Startups, But Others Embrace its Power*, FIN. POST (Feb. 7, 2020), https://financialpost.com/technology/inside-the-kill-zone-big-tech-makes-life-miserable-for-some-startups-but-others-embrace-its-power [https://perma.cc/FX9Y-5TNJ] ("[T]he startup kill zone[is] a snappy way of saying that the world's biggest tech firms are so dominant they can easily crush the competition with predatory tactics, or simply avoid the hassle by buying any potential threats before they get big enough to become a full-fledged challenger."). Venture capitalists are reducing the capital they once invested in startups and are looking to Big Tech for advice on startup investment strategies. *See id.*

179. Luckerson, *supra* note 4 ("It was widely known that venture capital funds wouldn't fund you if you were going into an area where [Big tech] was involved."). Therefore, startups are disincentivized to develop products or services that would compete directly with Big Tech. *See id.*

180. *See id.*

181. Madrigal, *supra* note 174 ("Quantitative research suggests that big companies do different kinds of R&D than their more modest counterparts. Instead of coming up with new products, they come up with process improvements."). For a discussion on how Process Improvement works, see *What Is Process Improvement in Organizational Development*, APPIAN, https://appian.com/bpm/what-is-process-improvement-in-organizational-development-.html [https://perma.cc/68JE-S88U] ("Process Improvement is the proactive task of . . . improving upon existing business processes . . . .").

182. *See generally* Xin Fang et al., *The Nonlinear Effects of Firm Size on Innovation: An Empirical Investigation*, 30 ECON. INNOVATION & NEW TECH. 48 (2021) (discussing the correlation between a firm's size and its product innovation).

183. *See* Madrigal, *supra* note 174.

In contrast, the R&D focus of Big Tech is a focus on improving existing products.[184] Therefore, when Big Tech companies acquire startups, Big Tech is divesting funding from new products and pouring funding into existing products. There is a strong argument that R&D funding by Big Tech to improve already existing products does not benefit consumers but rather decreases consumer welfare by increasing the intrusiveness of advertising and decreasing privacy.[185] Furthermore, the reduction in R&D funding for startups adversely impacts consumers because R&D funding is siphoned away from developing innovative products. When startups are acquired by Big Tech, the motivation to innovate decreases due to the increased size of the bureaucracy of the Big Tech firm.[186]

Moreover, Big Tech's R&D focus hurts consumers because it limits consumer choice in the technology marketplace.[187] By reducing a startup's capacity to innovate new products, Big Tech companies are limiting consumers to the products Big Tech creates.[188] While it is difficult to determine a quantitative economic impact of this limitation of choice, one can understand the negative impact consumers experience due to the limitation of choice among products in the marketplace.

Another way Big Tech stifles innovation is by limiting the actions and independence of newly acquired startups. For example, after acquiring Instagram, Facebook prevented Instagram from using and creating features

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184. *See supra* note 181 and accompanying text.

185. For an argument that Big Tech's focus on product development hurts consumer welfare, see David Doty, *Would a Big Tech Breakup Really Benefit Consumers? Let the People Speak For Themselves!*, FORBES (July 3, 2019, 9:00 AM), https://www.forbes.com/sites/daviddoty/2019/07/03/would-a-big-tech-breakup-really-benefit-consumers-let-the-people-speak-for-themselves/?sh=7325ccba5d3f [https://perma.cc/G9PE-KHUF] ("Amazon, Facebook and Google, as well as the other big tech companies potentially on the chopping block, have incredible budgets for research and development . . . . But if that budget is broken up into smaller parts . . . then what? Our tech giants could produce fewer new products or products of lower quality."). *But see* Rani Molla, *Tech Companies Spend More on R&D Than Any Other Companies in the U.S.*, VOX (Sept. 1, 2017, 10:15 AM), https://www.vox.com/2017/9/1/16236506/tech-amazon-apple-gdp-spending-productivity [https://perma.cc/PN8K-SRWV] (arguing that Big Tech's R&D has numerous benefits to the American economy).

186. *See* Tom Relihan, *Will Regulating Big Tech Stifle Innovation?*, MIT MGMT. SLOAN SCH. (Sept. 27, 2018), https://mitsloan.mit.edu/ideas-made-to-matter/will-regulating-big-tech-stifle-innovation [https://perma.cc/8BHK-47LW] ("In any case, the outcome is determined by whether the acquisition gives the smaller firm access to better resources, technology, and financing, or if the increased bureaucracy of a larger company blunts that firm's motivation to innovate . . . ."). In cases where a Big Tech firm has a large bureaucracy, startups might be discouraged from innovating or engaging in product development given the difficulty of navigating the bureaucracy. *See id.*

187. *See* Luckerson, *supra* note 4.

188. *See id.*

for the application that competed with Facebook.[189] The restrictions placed on Instagram's ability to function as an independent and innovative firm caused Instagram's founders to leave the company.[190] By forcing Instagram not to compete with Facebook, Facebook essentially dictated that Instagram only work on process improvements, which reduces capital used to develop new technologies.[191] Overall, there are several different ways Big Tech hinders innovation by impairing competing firms' incentive to undertake R&D.

A. Rumble Case Study: Impairing the Ability to Acquire Venture Capital or R&D Funding

Rumble is a video streaming platform created to compete and serve as an alternative to YouTube.[192] Rumble is similar to YouTube because it allows users to upload videos and create content channels. In 2013, Chris Pavlovski created Rumble because he believed YouTube's algorithm made it difficult for content creators to reach new audiences and expose their content to the largest possible audience.[193] Specifically, Pavlovski believed YouTube's search algorithm prioritized content from professional video publishers.[194]

Despite the similarities between Rumble and YouTube, there are some distinct differences which demonstrate why Rumble is an innovative product in the video streaming marketplace. First, Rumble claims to use a simpler algorithm for recommending content to consumers.[195] YouTube's algorithm recommends videos to content consumers based on videos the consumer

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189. Elizabeth Dwoskin, *Silicon Valley Feared Facebook's Bullying Tactics Years Before They Came to the Attention of Regulators*, WASH. POST (Dec. 9, 2020, 11:38 PM), https://www.washingtonpost.com/technology/2020/12/09/facebook-antitrust-dominance/ [https://perma.cc/G724-JW2H]. Shortly after Facebook acquired Instagram, Facebook started forcing Instagram to implement Facebook features on the Instagram platform. *See id*. This caused an exodus of workers from Instagram given they no longer had any independence to operate in the way they saw fit. *See id.*

190. *Id.*

191. *See id.*

192. *See* Danielle Abril, *Meet Rumble, The YouTube Rival That's Popular with Conservatives*, FORTUNE (Nov. 30, 2020, 3:30 PM), https://fortune.com/2020/11/30/rumble-video-service-youtube-rival-popular-among-conservatives/ [https://perma.cc/3RRY-DUT5].

193. *Id.*

194. *Id.*

195. *Id.*

has recently watched and the general popularity of certain videos.[196] In contrast, Rumble displays videos in chronological order based on content creators the user follows.[197] Therefore, under Rumble's algorithm, there is no advantage for content creators with popular videos over content creators with smaller followings. Rumble claims their algorithm gives content creators a fair shake at gaining more followers.[198]

Second, Rumble has fewer restrictions on video content and imposes fewer regulations for banning videos compared to YouTube.[199] Rumble claims its product is a true representation of free speech, whereas YouTube has more stringent regulations on the content that can be posted to their platform.[200] As Rumble's CEO, Pavlovski describes the rationale behind their relaxed content standards by stating, "We're not involved in fact-checking; we're not the arbitrators of truth."[201]

Third, Rumble has only five employees who monitor the content on its site to ensure content complies with the platform's regulations.[202] This is a distinct difference from YouTube, which uses artificial intelligence to monitor the content on its platform to ensure content complies with platform regulations.[203] Accordingly, Rumble does not have the restrictions on speech that YouTube enforces on its content.

Fourth, Rumble distinguishes itself most from its competitor, YouTube, by not boosting content with high engagement, which gives content creators who are popular an advantage in making money.[204] Rumble's goal is to even the playing field by giving all content creators the same ability to reach consumers through its simplistic algorithm.[205] Rumble utilizes its own unique monetization method for content creators.[206] For reference, YouTube only offers content creators an advertisement revenue split of 10–15%.[207] This means that YouTube makes at least 85% of the revenue from advertisements on content while the content creator gets the remaining portion.[208] Rumble offers content creators a more lucrative share of advertisement revenue. Content creators can earn up to 60% of advertisement

196. *See id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *See id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *See id.*
205. *Id.*
206. Michael Hennessy, *What is Rumble? The Next Social Video Giant?*, IMGE (July 1, 2022), https://imge.com/what-is-rumble/ [https://perma.cc/8N3S-WW8S].
207. *Id.*
208. *See id.*

revenue.[209] Moreover, Rumble offers an alternative way for content creators to make money from their content by offering content creators lump sums of money in exchange for the rights to the content.[210] As shown by the stark differences between YouTube and Rumble, Rumble represents an innovative threat to YouTubes' dominant market position in the content publisher marketplace.

Rumble's ascent into direct competition with YouTube has not been easy given the funding challenges Rumble endured during its startup phase. Pavlovski, funded the startup venture himself.[211] In order to grow the company, Pavlovski reinvested profits back into the company with the hopes of being able to expand the enterprise given the difficulty in acquiring independent funding.[212] Pavlovski attempted to raise outside capital to fund Rumble, but investors were weary of investing in a company that was in direct competition with Big Tech.[213] Fortunately, Rumble is self-sustaining but that was not Pavlovski's first choice; he attempted to acquire outside funding but was unsuccessful.[214] Pavlovski struggled to sustain his innovative startup venture because he competed with Big Tech.

Over the past year, American conservatives have flocked to Rumble due to Rumble's unfiltered content.[215] Rumble's innovative platform suggests people want to consume more unfiltered content directly from content creators and Rumble's popularity tends to give credence to this assertion.[216] Recently, Rumble sued Google for violations of the Sherman Antitrust Act, claiming that Google has "willfully and unlawfully" engaged in monopolistic practices.[217] In the complaint, Rumble alleged Google "unfairly rigg[ed]

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209. *Id.*
210. *Id.*
211. Abril, *supra* note 192.
212. *Id.*
213. *Id.*
214. *Id.*
215. Hennessy, *supra* note 206.
216. *Id.* At the beginning of November 2020, Rumble had 80 million users and 72% of their referrals came from Parler. *Id.* Even as criticism of Big Tech grows, censorship shows no signs of slowing down in the future. *Id.*
217. Martin Coulter, *YouTube Rival Rumble is Suing Google for at Least $2 Billion, Saying the Search Giant Abuses Its Monopoly Power*, BUS. INSIDER (Jan. 12, 2021, 3:52 AM), https://www.businessinsider.com/rumble-sues-google-youtube-conservatives-2021-1 [https://perma.cc/8MF4-TJLH]; *see also* Lucas Downey, *Google's Incredible YouTube Purchase 15 Years Later*, INVESTOPEDIA (Sept. 2, 2021), https://www.investopedia.com/google-s-incredible-youtube-purchase-15-years-later-5200225 [https://perma.cc/ZAT2-A8JH] ("Google purchased YouTube for the hefty sum of $1.65 billion."). When YouTube

its search algorithm" to favor YouTube's video streaming platform by having YouTube's videos appear first in search engine results.[218] Rumble alleged Google's manipulation of search results deprived Rumble of consumer traffic to its platform, brand awareness, and potential revenue.[219] The following is an analysis of Rumble's antitrust claim under the harm to innovation standard to demonstrate the standards ability to espouse the goals of antitrust in cases against Big Tech.

When analyzing Rumble's claims against Google under the consumer welfare standard, it is hard to create a persuasive argument that consumers are harmed. Both Rumble and YouTube offer their content services at no cost. Therefore, Google's market action does not result in consumers paying higher prices. Thus, Rumble will have difficulty persuading a judge that an antitrust injury occurred. However, under the harm to innovation theory, Rumble will have a more compelling case of an antitrust injury.

Under the harm to innovation standard, Rumble will have two arguments that an antitrust injury occurred. First, Rumble may claim that Google's actions impair its incentive to undertake R&D. Second, Rumble could claim that Google's actions are impairing the ability of Rumble to obtain venture capitalist funding. The crux of Rumble's argument is that Google's dominant position is impairing Rumble's incentive to innovate and impairing Rumble's ability to obtain financing to continue its innovative venture. Rumble attempted to obtain outside venture capitalist funding to help develop their innovative video-streaming platform.[220] However, given YouTube's dominant position in the marketplace and the fact Google owns YouTube, venture capitalists were unwilling to enter into direct competition with a Big Tech firm.[221] Given Google's position in Big Tech, Rumble can argue under harm to innovation that it could not raise outside capital because of Google's market actions.

Allowing Rumble to use the harm to innovation argument would fulfill the goals of antitrust law. The fact that outside investors were unwilling to invest in Rumble because it was attempting to compete with Big Tech goes against the free market principles. Under the American free market system, investors should invest in products and companies they believe will be successful. When investors are deterred from investing in a product or company simply because it is in a market dominated by Big Tech,

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was purchased by Google, it had only existed for around two years. *Id.* YouTube did not have a large revenue at the time it was acquired but it was the dominant video streaming platform in the market. *See id.*

218. Coulter, *supra* note 217.
219. *Id.*
220. Abril, *supra* note 192.
221. *Id.*

competition dissipates. Antitrust law aims to protect competition in the marketplace and ensure fair competition between actors in a particular market.[222] Rumble's inability to obtain financing for research and development is the type of harm to consumers that the consumer welfare standard does not protect but the harm to innovation standard would protect.

X. HARM TO INNOVATION PROHIBITS COMPETITORS FROM EFFECTIVELY MARKETING IMPROVED PRODUCTS TO CONSUMERS

A harm to innovation standard will protect consumer choice by ensuring consumers have a wider choice of products in the marketplace. Big Tech's control of startups negatively impacts consumer choice by preventing new products from coming to market. In *Microsoft*, the court held that one aspect of harm to innovation is its impact on consumer choice.[223] This Part will apply the harm to innovation standard to recent antitrust litigation involving Big Tech.

A. Parler Case Study

Parler was founded in 2018 as an "unbiased social media" platform.[224] Parler describes itself as a place where individuals can "speak freely and express yourself openly, without fear of being 'deplatformed' for your views."[225] Leading up to the 2020 presidential election, Big Tech companies increased efforts to curb misinformation.[226] Critics of Big Tech's actions claim that the suppression of misinformation amounts to censorship because it leaves the power of classifying speech as misinformation in the hands of unelected corporate powers.[227] Parler branded itself as a free

222. *Sherman Antitrust Act*, *supra* note 47.
223. *See supra* Part VIII.
224. Kayla Yurieff, Brian Fung & Donie O'Sullivan, *Parler: Everything You Need to Know About the Banned Conservative Social Media Platform*, CNN BUS. (Jan. 10, 2021, 12:07 PM), https://www.cnn.com/2021/01/10/tech/what-is-parler/index.html [https://perma.cc/W3L8-LEA8]. Since its inception, many conservative politicians have become active on Parler. *Id.* The platform of Parler looks like a mixture of Twitter and Instagram. *Id.*
225. Lora Reis, *With the Return of Parler, Social Media Users Have More Choices*, THE HERITAGE FOUNDATION (Feb. 17, 2021) https://www.heritage.org/technology/commentary/the-return-parler-social-media-users-have-more-choices [https://perma.cc/3SKS-QNP7] (quoting Parler's home page).
226. Yurieff, Fung & O'Sullivan, *supra* note 224.
227. *See id.*

speech platform with no speech restrictions to appeal to individuals concerned with Big Tech's censorship of social media.[228] Following President Trump's indefinite ban on Twitter,[229] thousands of President Trump's supporters moved to Parler.[230] Subsequently, Big Tech companies prevented Parler from being downloaded on their platforms.[231] Big Tech's decision to remove Parler from their platforms forced Parler to shut down.[232] Following Big Tech's actions, Parler filed an antitrust lawsuit against Amazon claiming Amazon violated antitrust law by prohibiting Parler from using Amazon's platform.[233] Parler claims Amazon's action benefited Twitter and reduced competition in the social media market.[234] However, Parler quickly withdrew its lawsuit given the difficulty of establishing antitrust violations under the consumer welfare standard.[235] While commentators

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228. *See id.*

229. Brian Fung, *Twitter Bans President Trump Permanently*, CNN (Jan. 9, 2021, 9:19 AM), https://www.cnn.com/2021/01/08/tech/trump-twitter-ban/index.html [https://perma.cc/T7GD-XTT8]. However, due to Elon Musk's recent acquisition of Twitter and change in content moderation policy, President Trump's twitter account has been reinstated, but at the time of writing this Comment, the former president has currently chosen to not return to the platform and remain on his own social media platform, "Truth Social." Claire Duffy & Paul LeBlanc, *Elon Musk Restores Donald Trump's Twitter Account*, CNN BUS. (Nov. 20, 2022, 9:30 AM), https://www.cnn.com/2022/11/19/business/twitter-musk-trump-reinstate/index.html [https://perma.cc/X57N-FY5F].

230. Alex Newhouse, *The Rise, Fall, and Future of Parler: The Right-Wing Site That Amazon Shut Down*, FAST CO. (Jan. 16, 2021), https://www.fastcompany.com/90594015/history-of-parler [https://perma.cc/LZ34-K7LU] (describing how Parler "exploded in popularity, doubling its members to 10 million"). Parler's rapid rise in popularity occurred after President Trump announced he was joining the social media site. *Id.*

231. Rebecca Heilweil, *Parler, the "Free Speech" Social Network, Explained*, VOX (Jan. 11, 2021, 11:35 AM), https://www.vox.com/recode/2020/11/24/21579357/parler-app-trump-twitter-facebook-censorship [https://perma.cc/Z4RX-7ZD9] ("On Sunday, Amazon booted Parler from its Amazon Web Services, citing the risk to public safety. This followed Parler's app being removed from the Google Play Store and Apple App Stores for its role in inciting violence."). After these actions, there was no place for consumers to download the Parler app or even access Parler online. *See id.*

232. *Id.*

233. Parler LLC v. Amazon Web Servs. Inc., 514 F. Supp. 3d 1261 (W.D. Wash. 2021); *see also Cloud Computing with AWS*, AMAZON WEB SERVS., https://aws.amazon.com/what-is-aws/ [https://perma.cc/JG3T-9ASZ].

234. *Id.* at 1266 ("Parler alleges that AWS's termination of services is 'apparently designed to reduce competition in the microblogging services market to the benefit of Twitter,' and therefore violates Section 1 of the Sherman Act."). Note that Parler accused Amazon of engaging in anticompetitive behavior to benefit Twitter but did not bring any actions against Twitter for engaging in a conspiracy with Amazon. *See id.*

235. *See Parler has Dropped its Antitrust Lawsuit Against Amazon, Which it Filed After AWS Took it Offline in the Wake of the Capitol Riots*, BUS. INSIDER INT'L (Mar. 3, 2021, 8:03 AM), https://businessinsider.mx/parler-has-dropped-its-antitrust-lawsuit-against-amazon-which-it-filed-after-aws-took-it-offline-in-the-wake-of-the-capitol-riots-2/ [https://perma.cc/B4DZ-SU8L].

have categorized the shutdown of Parler as a free-speech issue, it is very much an antitrust issue.[236]

Under the consumer welfare standard, Parler's claim of an antitrust violation does not pass muster.[237] In Parler's antitrust action against Amazon, Parler claims that Amazon's removal of Parler from Amazon Web Services was intended to benefit Parler's competition, Twitter.[238] Parler claims that Twitter uses Amazon to deliver its product to consumers, and the fact that Amazon banned Parler prevents fair competition in the marketplace.[239]

When analyzing Parler's claim under the consumer welfare standard, there is no traditional harm to consumers because consumer prices are not affected by Amazon's action and there is no reduction in overall service output or quality. However, Amazon's action restricting Parler from entering the social media marketplace is contrary to American free market principles because it decreases competition. Amazon's market action negatively impacts consumer choice in the social media marketplace. In a free market, consumers choose among products and the product that offers consumers the greatest utility at the lowest price thrives while driving competitors to make a superior product.[240] It is evident from Parler's case that the consumer welfare standard is ineffective because it does not protect free market principles other than curbing consumer price increases.

Applying the harm to innovation standard in Parler's lawsuit protects consumer choice and upholds free market principles. Under harm to innovation, Parler can make the argument from *Microsoft* that Parler developed a promising innovation, but Amazon inhibited Parler from effectively marketing their improved products to consumers.[241] Parler can provide evidence that its product without regulations is a promising innovation because it is

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236. *See* Rachel Lerman, *The Conservative Alternative to Twitter Wants to Be a Place for Free Speech for All. It Turns Out, Rules Still Apply*, WASH. POST (July 15, 2020, 10:48 AM), https://www.washingtonpost.com/technology/2020/07/15/parler-conservative-twitter-alternative/ [https://perma.cc/LLP3-D7FY].

237. Alison Frankel, *The Hollow Core of Parler's Antitrust Case Against Amazon*, REUTERS (Jan. 14. 2021, 7:30 AM), https://www.reuters.com/article/legal-us-otc-parler/the-hollow-core-of-parlers-antitrust-case-against-amazon-idUSKBN29I309 [https://perma.cc/B8DR-ZKP3].

238. Complaint at 3, *Parler*, 514 F. Supp. 3d 1261 (No. 2:21-cv-00031-BJR) ("Thus, AWS is violating Section 1 of the Sherman Antitrust Act in combination with Defendant Twitter . . . . AWS is committing intentional interference with prospective economic advantage given the millions of users expected to sign up in the near future.").

239. *See id.*

240. *See* Boushey & Knudsen, *supra* note 44.

241. *See supra* Part VIII.

substantially different from Twitter. Parler has a strong and persuasive argument that Amazon's actions inhibited their ability to market their product because Amazon restricted users from downloading Parler. Not only could Parler not market their product to consumers, but Amazon prevented potential consumers from accessing the product entirely. Therefore, Parler has a strong argument under the harm to innovation standard that an antitrust injury occurred.

Parler's harm to innovation argument would uphold the antitrust goal of protecting consumer choice.[242] Amazon forced Parler to shut down its product, therefore, the thousands of users that flocked from Twitter to Parler were deprived of a choice in products in the social media marketplace. Essentially, Amazon dictated what social media products consumers could consume by restricting users from using Parler. Antitrust laws were founded on the principles of protecting competition among participants in the free market.[243] Amazon's decision to prohibit users from using Parler plainly reduced competition in the social media market. Furthermore, Amazon's action is anticompetitive because it allows Twitter to use Amazon Web Services to reach consumers but does not allow an innovative firm such as Parler to compete with Twitter. The harm to innovation standard would give Parler a persuasive argument that consumer choice was hindered even though prices did not change. Thus, the harm to innovation standard would allow Parler to bring an antitrust violation in a case where the consumer welfare standard would prevent such a lawsuit.

XI. DO NOT WORRY, YOUR OBJECTIONS ARE HEARD!

Objections to the harm to innovation standard are easily discounted when looking at the current application of antitrust law. First, critics of the harm to innovation standard may argue that it would generate unpredictability because, under the standard, it will be difficult for market participants to distinguish between legal and illegal conduct. However, this argument is a misnomer because predictability is already an issue with current antitrust law. Antitrust laws call on the courts to make predictions. Judges have always made judgment calls regarding predictions based on the evidence presented before them.[244] However, judges are not often well versed in the complexities of economics, which antitrust law requires in determining whether violations occurred under the consumer welfare standard.[245] Therefore, concerns that harm to innovation will have a predictability problem are a

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242. *See supra* note 19 and accompanying text.
243. *Sherman Antitrust Act*, *supra* note 47.
244. *See supra* note 142 and accompanying text.
245. *See supra* note 142 and accompanying text.

misnomer because antitrust jurisprudence has always had predictability concerns.

Furthermore, the types of judgments businesses will make under the harm to innovation standard seem less complicated than under the consumer welfare standard. Is it harder for an incumbent to determine whether a market action will restrict competing products with new features that consumers want and to determine whether the action will raise consumer prices? Throughout the history of American antitrust jurisprudence, market participants have always used their best judgment in determining whether an action is legal because antitrust law is a standard rather than a bright-line rule that can be easily analyzed.

Second, critics of harm to innovation may argue there are evidentiary problems with the standard. Critics will complain that the evidentiary threshold required to prove a cause of action under the harm to innovation standard will be difficult to meet modern pleading requirements.[246] However, this evidentiary issue is no different than the evidentiary issues under the consumer welfare standard. Currently, under the consumer welfare standard, proving a factual basis for the alleged antitrust injury is a difficult undertaking demonstrated by the government's recent antitrust action against Facebook.[247] Providing evidence of harm to innovation is easier because it allows plaintiffs to argue the general effects of market actions without becoming bogged down in the complexities of economic analyses. Judges will be able to use logic and reason in reviewing the evidence similar to the courts' prior analysis under the rule of reason.[248] Accordingly, the objection that harm to innovation will create an impossible evidentiary burden is easily discounted.

Third, critics of harm to innovation may argue that the standard gives judges too much discretion and will allow activist judges to have too much power in determining the outcome of antitrust actions. Once again, this criticism is similar to a criticism of the consumer welfare standard and does not hold much weight. Under the consumer welfare standard, judges may sometimes ignore the complexities of economic analysis and decide based on their own rationale that consumer prices increased or product

246. For a discussion on evidentiary standards in Civil Cases, see *Evidentiary Standards and Burdens of Proof in Legal Proceedings*, JUSTIA (Oct. 2021), https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/ [https://perma.cc/R638-CVBM].

247. *See supra* note 33 and accompanying text.

248. *See* Young, *supra* note 19.

output diminished.[249] Judges are not bound to make decisions based on economic analysis but rather make decisions based on their interpretation of the law and the facts.[250] This same type of logic and reason will be utilized by judges under the harm to innovation standard. It is apparent that the criticisms of the harm to innovation standard must be discounted, given they share striking similarities to the criticisms of the consumer welfare standard. As a matter of policy, the purpose of the harm to innovation standard is not to overturn the consumer welfare standard but to enlarge the scope of an antitrust injury to allow more actions against Big Tech to espouse the goals of antitrust law.[251]

XII. CONCLUSION: IT IS TIME FOR ANTITRUST TO INNOVATE

The current inability of the government to bring antitrust lawsuits against Big Tech is a looming threat to the free market. Antitrust legislation is at the forefront of public debate, given the continued rapid growth of social media giants and other technology companies. Legislators are locked in intense debate over new legislation to ensure that Big Tech does not hinder the free market. Given the current gridlock in Congress and the strong influence of Big Tech interests on legislators, it seems unlikely that a legislative solution will be achieved. However, a legislative solution is not imperative to solve this growing crisis. Throughout American history, antitrust jurisprudence has been reformed by the courts to ensure that the goals of antitrust law are achieved given the dynamic and rapid changes in the American economy. Therefore, the laws enacted by Congress are adequate to combat the rise of Big Tech if the courts were to adopt the harm to innovation standard.

The courts can use the government's argument in *Microsoft* as a building block for the harm to innovation standard. This new standard will allow antitrust lawsuits to be brought against Big Tech to espouse the goals of antitrust law. The solution to this challenging problem does not require any government action. In the words of Richard Schmalensee, an expert witness in *Microsoft,* "traditional methods of regulation aren't likely to work on big tech firms like they have in the past for other industries, and concerns about their chilling effect on the march to innovation are well-founded."[252] The courts must innovate antitrust law to protect America's free market.

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249. *See* Baye & Wright, *supra* note 142, at 3.
250. *See id.* at 2.
251. *See* Khan, *supra* note 99, at 737–46.
252. Relihan, *supra* note 186.