THE UNREASONABLE RULE OF REASON

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ABSTRACT

Over the last twenty-five years, the United States has experienced a consolidation of major companies that have raised social and legal concerns about a movement toward monopolies in multiple industries. This paper first examines the economic background for encouraging competition and avoiding monopolies, including analyzing the Sherman Act, Clayton Act, and Hart-Scott-Rodino Act. Part II reviews federal appeals court decisions that have permitted consolidations in many cases and prevented them in a few instances. A key focus will be on the Exxon-Mobile merger approved in the late 1990s, the American Express case in 2018, and the pending Google cases. Then, Part III reviews recent mega-mergers, including Aetna-CVS and T-Mobile-Sprint, and examine several pending mergers, including Microsoft's acquisition of Activision and Merck's acquisition of Prometheus Biosciences. Finally, Part IV presents a possible approach to guide court decisions in the future.

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INTRODUCTION

Over the last twenty-five years, the United States has experienced a consolidation of major companies that have raised social and legal concerns about a movement toward monopolies in multiple industries.[1] This paper first examines the economic background for encouraging competition and avoiding monopolies. Part II reviews federal appeals court decisions that have permitted consolidations in many cases and prevented them in a few instances. A key focus will be on the Exxon-Mobile merger approved in the late 1990s,[2] the American Express case in 2018,[3] and the pending Google cases.[4] Part III evaluates recent mega-mergers, including Aetna-CVS[5] and T-Mobile-Sprint[6], as well as proposed mega-mergers like Microsoft-Activision[7] and Merck-Prometheus Biosciences.[8] Finally, Part IV presents a possible approach to guide court decisions in the future.

I. THE ECONOMIC ARGUMENTS REGARDING COMPETITION AND MONOPOLIES

The famed philosopher Adam Smith became the father of economics with the release of his classic work, *An Inquiry into the Nature and Causes of the Wealth of Nations*, in 1776.[9] Even in this early period of the Industrial Revolution in England, there was concern about businesses conspiring to set high prices:

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them

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[1] Caleb N. Griffin, *The Hidden Cost of M&A*, 48 TEX. J. BUS. L. 70, 84 (2019).

[2] *See infra* note 56.

[3] *See infra* note 73.

[4] *See infra* note 83.

[5] *See infra* note 105.

[6] *See infra* note 112.

[7] *See infra* note 113.

[8] *See infra* note 118.

[9] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (London, Methuen & Co.1776).

necessary."[10]

Smith, indeed, sagely observes that the government should not do anything to assist businesses in such anti-consumer endeavors. Even 115 years before the United States enacted the Sherman Anti-Trust Act in 1890,[11] Smith was concerned about monopolies and the need for competition to control monopolies.[12]

In the United States, the industrial revolution blossomed after the Civil War. The industrial expansion was rapid, and even in the early stages, there was concern about the monopolization of various markets. As noted, this led to the enactment of the Sherman Act early in the American industrialization process, only 25 years after the end of the Civil War.[13] The Sherman Act prohibits monopolization and attempts to monopolize that would impact interstate commerce.[14] However, businesses devised ways to avoid the enforcement of the Sherman Act. In 1914, the United States enacted the Federal Trade Commission Act[15] and the Clayton Act[16] to further regulate commerce that restricted competition and trade. The FTC summarizes its present responsibility in this fashion:

> "Yet for over 100 years, the anti-trust laws have had the same basic objective: to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up."[17]

There is a legitimate concern that the FTC and the U.S. courts have yet to succeed in accomplishing these objectives in the modern era. The Clayton Act broadens the scope of the Sherman Act significantly:

> Most particularly, Section 7 of the Clayton Act prohibits mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may

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[10] *See id.* at 108.

[11] 15 U.S.C. §§ 1–7.

[12] *See* Smith, *supra* note 10.

[13] 15 U.S.C §§ 1–7.

[14] 15 U.S.C. § 1.

[15] 15 U.S.C. §§ 41–58.

[16] 15 U.S.C. §§ 12–27.

[17] *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [perma.cc/Y9ZT-3YHL].

> be substantially to lessen competition, or to tend to create a monopoly."[18]

Simply adding the plain meaning of the words 'substantially lessen competition' should have authorized regulators and the courts to block most major mergers in the United States over the last twenty-five years. In looking for a cause, the misuse of the Rule of Reason, discussed below, is a significant factor.

A. Hart-Scott-Rodino Act

The Hart-Scott-Rodino (HSR) Antitrust Improvements Act, enacted in 1976, provides a mechanism for the Federal Trade Commission (FTC) and the Department of Justice (DOJ) to scrutinize and potentially block proposed mergers before they are consummated, thereby preventing potential harm to competition. "The statute requires the prospective acquirer of an issuer's voting securities exceeding a certain amount to notify the FTC and Antitrust Division of the DOJ of the potential acquisition, pay a filing fee, and observe a thirty-day waiting period before proceeding."[19] The intention of the HSR Act is specifically to target transactions that would lessen competition.

Congress exempted some transactions from HSR, one of which is an "Investment Only" transaction.[20] However, this exemption comes at a cost. The FTC and DOJ essentially require radio silence between the acquirer and the acquiree at the time of the acquisition for the immediate foreseeable future. According to these agencies, when an acquisition is accompanied by discussions pertaining to the business, such as employee compensation, market customs, strategic priorities, and risk avoidance, it can potentially influence the executives of the acquired company. This suggests that the decision to acquire target corporation investment securities is not solely for investment purposes.[21]

By doing so, the agencies have inadvertently created an incentive, or rather a coercive force, for acquiring corporations to forgo meaningful conversations to avoid the fees and waiting periods associated with the HSR Act. However, this

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[18] FTC Horizontal Merger Guidelines, § 1 (2010).

[19] Scott E. Gant, Andrew Z. Michaelson & Edward J. Normand, *The Hart-Scott-Rodino Act's First Amendment Problem*, 103 CORNELL L. REV. ONLINE 1, 1 (2017).

[20] Investment Only (I-O) Transaction: an exemption that applies to acquisitions of voting securities solely for the purpose of investment. 15 U.S.C. § 18a(c)(9).

[21] Debbie Feinstein, Ken Libby & Jennifer Lee, *"Investment-only" Means Just That*, FED. TRADE COMM'N (Aug. 24, 2015), https://www.ftc.gov/enforcement/competition-matters/2015/08/investment-only-means-just [https://perma.cc/GU4B-2YAU].

approach violates the First Amendment unequivocally, as these conversations are often necessary and should be encouraged rather than discouraged. As Justice O'Connor stated, regulating speech must be "a last--not first--resort," and "if the Government could achieve its interests" without restricting speech, then it "must do so."[22]

B. Economic Analysis Related to Monopolies

The path of economic analysis from Adam Smith to the present has been far from smooth. The various schools of thought and the theories behind the development of the discipline of economics have produced many different theories of competition, as well as numerous social and societal observations. These theories span from Karl Marx's now-debunked socialist theories[23] to John Maynard Keynes and Keynesian economics,[24] which suggested a significant role for the government in managing the economy. Today, economic theory on competition primarily swings from Keynes to Milton Friedman and the "Chicago School,"[25] which advocate a reduced role for the government in the operation of the economy. While it is beyond the scope of this paper to explore all the various theories of economics, the following is a brief summary of some leading theories related to competition.

The early economist's view of competition was that it was possible to achieve "perfect competition."[26] In earlier times, this was theoretically possible, as the economy was dominated by farmers and small craft businesses. The idea was that many producers would create a natural control of the market. If any producer made too much profit, more producers would enter the market until the price and profits came down.[27] However, as mass production and larger increases in capital were required to supply the increasingly mechanized and urbanized societies in the developed world, the possibility of perfect competition became a quaint theory but

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[22] Thompson v. W. States Med. Ctr., 535 U.S. 357, 371–73 (2002).

[23] KARL MARX, DAS KAPITAL: A CRITIQUE OF POLITICAL ECONOMY (Friedrich Engels et al. eds., 1996).

[24] JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936).

[25] MILTON FRIEDMAN & ANNA JACOBSON SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867-1960 (1963).

[26] Paul J. McNulty, *A Note on the History of Perfect Competition*, 75 J. POL. ECON. 395, 398 (1967).

[27] *Id.* at 396.

not a very realistic one.[28] One of the current leading authorities in anti-trust law is Professor Herbert J. Hovenkamp, who holds joint appointments at the University of Pennsylvania Law School and Penn's Wharton School of Business. Due to his prominence in the field, several of his journal articles are cited in this article.

In the early 20th Century, new economic theories were developed to provide more realistic approaches to understanding the economy and competition. One of the early leaders was Ronald Coase through his article, *The Nature of the Firm*.[29] Ronald Coase transformed our understanding of the role of transaction costs in the economic and legal systems. In a way, it can be said that he invented the modern discipline of law and economics.[30]

Early economists assumed there were no transaction costs on either the seller's or the buyer's side of a transaction.[31] Such simplified approaches also failed to anticipate that goods would be sold by third parties and not directly by the manufacturers. These unrealistic assumptions made it challenging to develop models for markets and competition.[32] A series of economists in the United States and England attempted to develop theories that would better reflect the current realities in the shadow of the Great Depression.[33] English economist Joan Robinson proposed an alternative to perfect competition to more closely model the actual production of goods that were differentiated through design, advertising, and other features.[34] The concern about differentiation was that it would lead to higher costs and excess capacity in contrast to the perfect competition model.

As the developed economies began to recover following World War II, more advanced theories for explaining competition began to appear. Important details had to be resolved, however, and a significant debate ensued in the 1950s between Harvard's "structuralism" and a more behaviorist alternative developed mainly at the University of Chicago.[35]

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[28] Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 338 (2009).

[29] Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

[30] Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 Ind. L.J. 499, 499 (2010).

[31] Herbert Hovenkamp, *Harvard, Chicago and Transaction Cost Economics in Antitrust Analysis*, 55 ANTITRUST BULL. 613, 619 (2010).

[32] *See* Hovenkamp, *supra* note 29. *See also* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 1–16 (1960).

[33] *Id.* at 312.

[34] JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1938).

[35] *See* Hovenkamp, *supra* note 29 at 322.

However, these two primary schools of economic theory have been moving closer together, as noted by Hovenkamp:

> "Since the 1970s both the old Harvard and the traditional Chicago positions have moved from opposite directions toward the center, partly as a result of the influence of transaction cost analysis. Today their differences on many issues are not all that considerable."[36]

Economists are not the only ones who write about monopolies. Marketing Professor Shelby Hunt analyzed *The Theory of Monopolistic Competition*, originally developed by Edward Chamberlain,[37] to explore product differentiation and market segmentation.[38] This sharply contrasts the concept of perfect competition, where many small producers sell a homogenous product. He notes that given that product homogeneity is not the natural state for either suppliers or customers, a differentiated product is a more normal situation in the marketplace. The outcome of a differentiated product is that the product is generally produced in smaller quantities and at a higher price by a smaller number of producers instead of a homogenous product that is sold to customers.[39] Hunt also notes that differentiation of the product is a component of a marketing segmentation strategy, although it differs from segmentation in and of itself.[40] The term "monopolistic" is somewhat misleading in that the producer merely "monopolizes" the demand for its differentiated product through features, price, or advertising.[41]

Therefore, while perfect competition is not obtainable in any real market, having a reasonably competitive market is theoretically possible. At the same time, history has provided ample examples of markets that became monopolies or oligopolies in short order. Such markets have been divided into two groups: "natural monopolies," which generally result in government regulation, such as

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[36] *See* Hovenkamp, s*upra* note 32 at 617–18.

[37] EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933).

[38] Shelby D. Hunt, *The Theory of Monopolistic Competition, Marketing's Intellectual History, and the Product Differentiation Versus Market Segmentation Controversy*, 31 J. MACROMARKETING 73 (2011).

[39] *Id.* at 80.

[40] *Id.* at 81.

[41] *See* Chamberlin, *supra* note 38, at 3–10.

natural gas lines or electric distribution lines, or "industrial monopolies."[42]

The latter is best documented by the famed Standard Oil companies assembled by John D. Rockefeller with the unequivocal purpose of monopolizing the oil industry. A target of none other than President Theodore Roosevelt, it still took almost a decade beyond his presidency to dismantle Standard Oil.[43] Part of the bitter irony of the break-up of Standard Oil was that Rockefeller was worth more after the companies were divided. The vast wealth of Rockefeller is well documented at an estimated $900 million the year after the Supreme Court decision.[44] What is unclear is how the United States authorities have largely allowed the same companies to recombine in a clear reduction of competition less than 100 years later.[45]

II. ANTI-TRUST DECISIONS AND THE RULE OF REASON

Due to space limitations, it is not practical to list every federal court case regarding anti-trust which applied the rule of reason. This section will review some key decisions, starting with the Standard Oil case, discussed briefly above. American history recites the impressive Standard Oil empire built by Rockefeller over 40 years. It eventually controlled much of the refined oil and related products throughout the United States.[46] The Supreme Court decision upholding the disassembly of the numerous organizations that comprised Standard Oil's holdings could have been relatively simple. Rockefeller ruthlessly used almost every monopolistic and trust-related tool possible to build his empire. However, Justice White, writing the decision for the high court, explained that this was not just an illegal monopoly of a critical industry, but that the various contracts and trusts that made up Standard Oil were subject to a "rule of reason."[47]

Of more interest for this analysis are the words in the dissent filed by Justice

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[42] The Investopedia Team, *Natural Monopoly: Definition, How It Works, Types, and Examples*, INVESTOPEDIA (Apr. 20, 2024), https://www.investopedia.com/terms/n/natural_monopoly.asp [https://perma.cc/GDR6-Y2YM].

[43] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 77–82 (1911).

[44] DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER 97 (1991).

[45] Dan Eberhart, *Oil Sector Primed For Major Merger and Acquisition Activity*, FORBES (Jan. 14, 2019), https://www.forbes.com/sites/daneberhart/2019/01/14/oil-sector-primed-for-major-merger-and-acquisition-activity/#77e6af7c7759 [https://perma.cc/6DKA-35LF].

[46] *See* YERGIN, *supra* note 45, at 79.

[47] *See Standard Oil Co. of New Jersey*, 221 U.S. at 62.

Harlan. Harlan first notes the importance of the Sherman Anti-Trust Act to the United States by stating:

> "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery -- fortunately, as all now feel -- but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life."[48]

He goes on to cite the "mischievous" modifications that the majority decision made to the lower court's ruling.[49] Harlan specifically attacks the use of the "rule of reason" as being legislation by the Supreme Court and unnecessary to decide that the Standard Oil defendants were indeed involved in monopolizing the oil industry. He states:

> "On the contrary, I have a strong conviction that it will throw the business of the country into confusion and invite widely extended and harassing litigation the injurious effects of which will be felt for many years to come. When Congress prohibited every contract, combination, or monopoly in restraint of commerce, it prescribed a simple, definite rule that all could understand, and which could be easily applied by everyone wishing to obey the law, and not to conduct their business in violation of law. But now, it is to be feared, we are to have, in cases without number, the constantly recurring inquiry -- difficult to solve by proof -- whether the particular contract, combination, or trust involved in each case is or is not an "unreasonable" or "undue" restraint of trade."[50]

Roughly 110 years later, United States consumers are the victims of the mischief predicted by Justice Harlan caused by the irregular interpretation of the rule of reason, as discussed in more detail below.

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[48] *Id.* at 83.

[49] *Id.* at 82.

[50] *Id.* at 102–03.

In *Brown Shoe Co. Inc. v. United States* (1962), the Supreme Court reviewed an appeal from a district court ruling blocking the merger of Brown Shoe Company and Kinney shoes.[51] The Supreme Court agreed with the trial court that such a merger would be part of a continuing trend toward consolidation in the industry.[52] Such a consolidation "may substantially lessen competition in the manufacturers' distribution of 'men's,' 'women's,' and 'children's' shoes, considered separately, throughout the Nation."[53] In light of the mega-mergers to follow, this court decision was not followed in the many subsequent transactions.

In the *United States v. Phila. Nat'l Bank* (1963), the Supreme Court decision was consistent with *Standard Oil* and *Brown Shoe*, stating:

> This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.[54]

In a stunning change of direction and essentially a reversal of the 1911 *Standard Oil* decision, the United States Federal Trade Commission signed off on the Exxon-Mobil merger.[55] This was not just a merger of two large integrated oil companies, but also of two of the largest corporations in the United States, regardless of industry. While the FTC touted the divestiture of thousands of gas stations, a refinery, and assorted minor assets, the fact remains that this represented an incredible consolidation of the oil industry.[56] The numbers speak for themselves: "[d]uring fiscal year 1998, Exxon had worldwide revenues of

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[51] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[52] *Id.* at 297.

[53] *Id.* at 299.

[54] United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) (internal citation omitted).

[55] *Exxon Corporation and Mobil Corporation*, FED. TRADE COMM'N (Feb. 1, 2001), https://www.ftc.gov/legal-library/browse/cases-proceedings/9910077-exxon-corporation-mobil-corporation [https://perma.cc/Z53T-R9DK].

[56] *Id.*

approximately $115 billion and net income of approximately $6 billion."[57] Furthermore, "[d]uring fiscal year 1998, Mobil had worldwide revenues of approximately $52 billion and net income of approximately $2 billion."[58] The initial impact on employees in the first year alone was 14,000 jobs eliminated.[59]

In another high-profile case, the Court of Appeals for the 4th Circuit held that a more complex rule of reason analysis needed to be applied despite the obvious per se anti-trust actions of United Airlines and the other defendants.[60]

Although not a rule of reason case, the Supreme Court showed its hostility to civil complaints of anti-trust violations in *Bell Atlantic Corp. v. Twombly*.[61] The plaintiffs, phone customers in the geographic area, alleged that the two phone companies were conspiring to divide the market and control rates. The District Court dismissed the complaint. However, the 2nd Circuit Court of Appeals reversed. The ruling was appealed to the Supreme Court, which held that even though the plaintiff's allegations might be proved at trial, the plaintiffs had insufficient information to bring the current case.[62] The court applied a standard that would require most cases of potential collusion among defendants to be delayed until actual collusion could be established. Various appellate courts have distinguished *Twombly* to allow a plaintiff's actions to continue without meeting this standard.[63]

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc*., the plaintiff, PSKS, claimed that Leegin violated the Sherman Act by refusing to sell to retailers that discounted its goods below Leegin's suggested retail prices. The District Court applied the Sherman Act directly and refused to allow testimony that would address the rule of reason arguments raised by the defendant. The jury ruled in favor of PSKS. The 5th Circuit Court of Appeals affirmed the trial court's holding and agreed that the defendant's arguments related to the rule of reason need not be considered. However, the Supreme Court reasoned that vertical price-fixing may not necessarily inhibit competitive markets and thus held that courts should apply

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[57] *Id.*

[58] *Id.*

[59] Steve Liesman, *Exxon Mobil to Cut 14,000 Jobs, Expects $3.8 Billion in Savings*, WALL ST. J. (Dec. 16, 1999), https://www.wsj.com/articles/SB945267287165857943 [https://perma.cc/JPW9-JWA4].

[60] Continental Airlines, Inc. v. United Airlines, Inc.,277 F.3d 499, 499 (4th Cir. 2002).

[61] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007).

[62] *Id.* at 570.

[63] *See* In Re: Text Messaging Antitrust Litigation. Appeal of: Verizon Wireless, 630 F.3d 622, 625 (7th Cir. 2010); Dobyns v. U.S., 91 Fed. Cl. 412, 424 (Fed. Cl. 2010); Khalik v. United Air Lines, 671 F.3d 1188, 1191 (10th Cir. 2012).

the rule of reason when analyzing vertical price-fixing schemes.[64] By subjecting all vertical limitation schemes to the rule of reason,[65] *Leegin* requires courts to compare the market-promoting and market-suppressing effects of vertical limitation schemes. This unnecessarily complicates the analysis for anti-competitive actions and would appear to frustrate Congress's intent to enact the Sherman Act and the Clayton Act.

While massive national mergers continue, the FTC battles with proposed mergers that only impact large cities. For instance, in *F.T.C. v. Advocate Health Care Network*, the district court declined to issue an injunction, and the FTC appealed to the 7th Circuit Court of Appeals, which reversed and upheld the injunction against the merger of two health care systems.[66] "The FTC issued an administrative complaint alleging that the proposed merger of Advocate Health Care Network and NorthShore University HealthSystem will create the largest hospital system in the North Shore area of Chicago."[67] It raises issues of rationality and priorities when local mergers are blocked, but mega mergers are approved.

The rapidly changing market conditions have created inconsistent results regarding anti-trust analysis. In 1997, the FTC blocked the Office Supply Superstores (OSS) merger of Staples, Inc. and Office Depot.[68] However, in 2013, the FTC permitted Office Depot to acquire Office Max, the third-largest OSS in that industry.[69] In 2016, the FTC again successfully blocked the merger of Staples and Office Depot/Office Max.[70] Adding to the confusion, in 2001, the FTC blocked the acquisition of the third-largest bottled baby food producer, Beech-Nut, by the second-largest producer, Heinz.[71]

One of the most recent Supreme Court rule of reason cases is the 2018 decision

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[64] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007).

[65] *Id.*

[66] Fed. Trade Comm'n. v. Advocate Health Care Network, 841 F.3d 460, 476 (7th Cir. 2016).

[67] Advocate Health Care Network, FED. TRADE COMM'N, https://www.ftc.gov/legal-library/browse/cases-proceedings/1410231-advocate-health-care-network (last updated Mar. 22, 2017) [https://perma.cc/L5AT-AXQD].

[68] Fed. Trade Comm'n v. Staples, Inc., 970 F. Supp. 1066, 1093 (D.D.C. 1997).

[69] Fed. Trade Comm'n, Statement of the Federal Trade Commission Concerning the Proposed Merger of Office Depot, Inc. and OfficeMax, Inc. FTC File No. 131-0104 (Nov. 1, 2013), https://www.ftc.gov/sites/default/files/documents/closing_letters/office-depot-inc./officemax-inc./131101officedepotofficemaxstatement.pdf [https://perma.cc/89AN-NPBE].

[70] Fed. Trade Comm'n v. Staples, Inc., 190 F. Supp. 3d 100, 138 (D.D.C. 2016).

[71] Fed. Trade Comm'n v. H.J. Heinz Co., 246 F.3d 708, 715 (D.C. Cir. 2001).

in *Ohio v. American Express Co.* [72] regarding AMEX's anti-steering rule preventing retailers who accept AMEX cards from steering their customers to credit cards that charge retailers lower fees. The United States and several states sued AMEX, alleging that this violated Section 1 of the Sherman Act and that this policy resulted in higher charges for consumers. The district court agreed, reasoning that the market was two separate parts, one for the credit card companies and one for the retailers' customers.[73] The 2nd Circuit Court of Appeals reversed, holding that the credit card market was a single market and the anti-steering policy did not violate the Sherman Act.[74] The Supreme Court upheld the one market theory and the ruling from the 2nd Circuit under a rule of reason analysis.[75]

Professor Hovenkamp commented on the outcome of this case regarding the two-sided market and the rule of reason as follows:

> Careful fact-finding is essential to the rational administration of anti-trust under the rule of reason. Under anti-trust's *per se* rule, once a practice is shown to fall within a certain classification, such as naked price fixing, little additional evidence of anticompetitive effects is relevant and defenses are limited.[76]

In the *AMEX* case, a straightforward price-fixing decision under the *per se* rule morphed into an unnecessarily complex and anti-consumer outcome under the rule of reason. Hovenkamp goes on to criticize the market analysis by the 2nd Circuit and the Supreme Court majority, referring to it as "regressive"[77] and refers to the approach of combining the sellers and the buyers into one market as making a "coherent economic analysis of the relevant market impossible."[78]

Taking a similar position as Professor Hovenkamp is Professor Chris Sagers of Cleveland-Marshall College of Law. He states that the traditional mode of anti-trust analysis used by the courts here is ill-equipped to deal with the complexity of a multi-sided platform market, such as AMEX. According to Sagers, the decision made by the court in *Ohio v. American Express Co.* possesses a perilous characteristic as it has the potential to proliferate rapidly across various platform

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[72] Ohio v. Am. Express Co., 585 U.S. 529, 534 (2018).

[73] *Id.* at 539-40.

[74] *Id.* at 540.

[75] *Id.* at 552.

[76] Herbert J. Hovenkamp, *Platforms and the Rule of Reason: The American Express Case*, 2019 COLUM. BUS. L. REV. 35, 36 (2019).

[77] *Id.* at 51.

[78] *Id.* at 53.

contexts, which could lead to adverse repercussions for anti-trust enforcement on these platforms.[79]

Both professors' conclusions are shared by others, including *The New York Times*, which characterized the Supreme Court *AMEX* decision as: "Devastates Anti-Trust Law."[80] Among other criticisms in the opinion piece authored by a law professor, the article states:

> "The court offered a weak, highly abstract decision that masks the economic extremism of its ruling, which will further enrich Wall Street intermediaries at the expense of both merchants and consumers."[81]

The *AMEX* decision, flowing from the other recent decisions noted above, marks a low point in what should be a pro-competition and pro-consumer interpretation of the antitrust laws.

Currently, there is another significant instance of purported anti-trust law violation that is undergoing adjudication. In *United States v. Google LLC*, the issue presented is whether Google has violated anti-trust laws, establishing a monopoly and anticompetitive practices in digital advertising technology.[82] In January of 2023, the United States and several states filed an anti-trust action to challenge the online advertiser's alleged monopoly and anticompetitive practices in digital advertising technology, alleging: "monopolization of the publisher ad server market in violation of Section 2 of the Sherman Act (Count I), monopolization or attempted monopolization of the ad exchange market in violation of Section 2 of the Sherman Act (Count II), monopolization of the advertiser ad network market in violation of Section 2 of the Sherman Act (Count III), unlawful tying of Google's AdX and Doubleclick for Publishers in violation of Sections 1 and 2 of the Sherman Act (Count IV), and a claim for damages incurred by the United States as a result of Google's anti-trust violations under 15 U.S.C. § 15a (Count V)."[83]

Google filed a motion to transfer venue to the Southern District of New York, where over two dozen similar anti-trust actions had been transferred and

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[79] *See* Chris Sagers, *Platforms, American Express, and the Problem of Complexity in Antitrust*, 98 NEB. L. REV. 389 (2019).

[80] Tim Wu, *The Supreme Court Devastates Anti-Trust Law*, N.Y. TIMES (June 26, 2018), https://www.nytimes.com/2018/06/26/opinion/supreme-court-american-express.html [https://perma.cc/LCE8-J8XY].

[81] *Id.*

[82] United States v. Google LLC., 661 F. Supp. 3d 480, 484 (E.D. Va. 2023).

[83] *Id.* at 486.

consolidated by the Judicial Panel on Multidistrict Litigation (JPML) for pretrial proceedings. Following oral arguments, the court denied the defendant's motion to transfer venue to prioritize prompt enforcement of anti-trust laws by both federal and state governments.

The fourth count carries significance because of its relevance to the proposed merger between Google's ad servers, namely DoubleClick Ad Exchange and DoubleClick for Publishers. In 2019, Google merged AdX and DoubleClick For Publishers into Google Ad Manager. Around ten years ago, Google acquired DoubleClick, and the FTC approved the deal with a 4:1 vote.[84] More than a decade later, the courts are analyzing the anti-trust implications and whether the acquisition and merger severely harm the Ad market's competition. The next step in the DOJ's antitrust case against Google's ad servers is trial in March of 2024, and to win, the DOJ must prove two elements:

> 1) It must show that Google has monopoly power in a relevant ad-tech market; and
> 2) It must show that Google achieved this monopoly power by using anticompetitive conduct designed to exclude rivals and not simply through vigorous and effective competition.[85]

This 2023 case is only one of two anti-trust cases pending against Google. The earlier case, *U.S. and Plaintiff States v. Google LLC*, was initially filed in 2020.[86] The suit focuses on allegations that Google illegally monopolized the search engine and search advertising markets, especially on Android devices. This case was litigated in September and November 2023, and a decision is expected in May 2024.[87] Therefore, Google faces continued monopoly allegations. The ultimate issue is how such actions will impact the future of the online search industry and

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[84] Steve Lohr, *This Deal Helped Turn Google into an Ad Powerhouse. Is That a Problem?*, N.Y. TIMES (Oct. 20, 2020), https://www.nytimes.com/2020/09/21/technology/google-doubleclick-antitrust-ads.html [https://perma.cc/K3V3-3AHF].

[85] Jeffrey Westling, *The Department of Justice's Antitrust Case against Google's Ad Tech Business*, AM. ACTION F. (Sept. 19, 2023), www.americanactionforum.org/insight/the-department-of-justices-antitrust-case-against-googles-ad-tech-business/ [https://perma.cc/AR5C-KGGN].

[86] Dave Michaels, Jan Wolfe & Miles Kruppa, *Google Antitrust Judge Says He Has 'No Idea' How He Will Rule*, WALL ST. J. (Nov. 16, 2023, 6:24 PM), https://www.wsj.com/tech/google-antitrust-judge-says-he-has-no-idea-how-he-will-rule-4425642c# [https://perma.cc/7QJF-L2V3].

[87] *Id.*

the consumer experience and options.

Across the pond, EU Regulators have also decided to take on Google over their control of the ad market by ordering Google to sell some of their advertising business. Following a comprehensive two-year inquiry into Google's ad-tech operations, the regulatory body determined that the company had exploited its dominant position in online advertising. This was evident in its preferential treatment of its ad exchange, AdX, during auctions conducted by its ad server, DFP. Additionally, Google's ad-buying tools, known as Google Ads and DV360, were found to prioritize bids on these exchanges in a manner that favored its interests.[88]

Also in the tech sector, the FTC announced its suit with 17 other states against Amazon, alleging "the online retail and technology company is a monopolist that uses a set of interlocking anticompetitive and unfair strategies to illegally maintain its monopoly power."[89] The complaint alleges that Amazon has continuously violated antitrust laws through exclusionary conduct and impeded competitors from growing (and new ones from emerging). By stifling competition on various fronts, Amazon ensures its monopoly and prevents threats from rivals.[90]

A. Sports and Anti-Trust Considerations

Sports case law has also helped to scramble the interpretation of the rule of reason. In the landmark case of the *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents* (1984), the trial court found that the NCAA violated Section 1 of the Sherman Act by restricting access to televised college football games and enjoined the restrictive NCAA plan for televising live college football games.[91] The 10th Circuit Court of Appeals upheld the trial court injunction and found that the restrictions proposed by the NCAA on its member schools were *per se* violations of the Sherman Act.[92] Upon appeal to the Supreme Court, the high court upheld the injunction against the NCAA. However, it went out of its way to invoke the rule of reason despite the

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[88] Alex Hern & Lisa O'Carroll, *EU Regulator Orders Google to Sell Part of Ad-Tech Business*, THE GUARDIAN (June 14, 2023), https://www.theguardian.com/technology/2023/jun/14/eu-regulator-google-sell-ad-tech-business-competition-commission [https://perma.cc/ER9U-FDYK].

[89] *FTC Sues Amazon for Illegally Maintaining Monopoly Power*, FED. TRADE COMM'N (Sept. 26, 2023), www.ftc.gov/news-events/news/press-releases/2023/09/ftc-sues-amazon-illegally-maintaining-monopoly-power [https://perma.cc/CJ8Y-TW6J].

[90] *Id.*

[91] Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 95 (1984).

[92] *Id.* at 97.

lower court's finding of a *per se* violation of the Sherman Act.[93]

A more recent example of the confusion generated by the various court rulings invoking the rule of reason is *Marucci Sports, LLC v. National Collegiate Athletic Association.* [94] Marucci was a small company that manufactured non-wood baseball bats. The NCAA and the National High School Sports Confederation agreed on a new standard for non-wood baseball bats that would exclude the Marucci products.[95] The trial court rejected Marucci's first and second amended petition and denied the company an opportunity to further amend its complaint. The 5th Circuit Court of Appeals upheld the trial court's rejection of Marucci's complaint. In its analysis, the decision detailed how Sherman Act violations could be determined based on either the *per se* rule or the rule of reason. But, then continued by limiting the use of the *per se* rule and defining the rule of reason in such a way that the Marucci complaint, which might have been accepted by the court under a *per se* claim, would not be accepted under a rule of reason analysis.[96] The court relied on *Leegin* and *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents* in reaching this decision.[97] The court distinguished between the *Marucci v.* NCAA decision and the prior NCAA decision.[98]

In *NCAA v. Board of Regents,* the Supreme Court noted that "it is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive...."[99] The Court made a clear distinction between the restrictions discussed in the case, particularly those related to football telecasts, and rules that govern contest conditions, participant eligibility, or how members of a joint enterprise share responsibilities and benefits. The latter category is typically seen as procompetitive and isn't typically viewed as unlawful restraints on trade.[100]

Pro sports teams have taken full advantage of the limited number of sports franchises for each sport that are allowed to exist in the United States. The millionaire owners of these franchises have adopted anti-competitive practices that

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[93] *Id.* at 103–120.

[94] Marucci Sports, L.L.C v. Nat'l Collegiate Athletic Ass'n, 751 F.3d 368, 374 (5th Cir. 2014).

[95] *Id.* at 372–373.

[96] *Id.* at 374.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

would produce anti-trust prosecutions in any other industry.[101] Baseball has a specific exemption as referenced in *Federal Baseball Club of Baltimore v. Nat'l League of Prof. Baseball Clubs*.[102] Other sports do not have the same explicit exemption as baseball, however, due to interpretation by the courts: The practical effect has been that the other major pro sports teams enjoy a nearly *de facto* MLB level of exemption from the anti-trust laws when the "rule of reason" is applied to various challenges that have been raised in the courts over the years.[103]

There is merit to consideration of legislation to remove the exemption for all professional sports. A possible solution for the decline in the enforcement of anti-trust laws is examined in Part IV, below.

III. RECENT AND PROPOSED MEGA-MERGERS

An obvious result of the approval by the FTC, the DOJ, and the federal courts of larger mergers is that other large mergers are being proposed, including some mergers that have previously been blocked by either the FTC or the courts.

A. CVS ACQUISITION OF AETNA

One of the largest recent mergers was the acquisition of health insurer Aetna by drug store chain CVS in a $69 billion deal.[104] The proposed merger was announced in late 2017. In the past, unrelated companies in either vertical or conglomerate mergers have had less government opposition than horizontal mergers. A horizontal merger is one where both companies are in similar markets and product lines, like the Exxon-Mobil and Office Depot-Office Max mergers referenced above.

In the case of the CVS-Aetna deal, the Department of Justice approved the merger in late 2018, despite the impact on the overall healthcare industry. The approval by the DOJ was subject to the divestiture by Aetna of its Medicare Part D Individual Healthcare Unit. This is the only overlapping business unit between

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[101] David Schein, James Phillips & Caroline Rider, *American Cities Held Hostage: Public Stadiums and Pro Sports Franchises*, 20 RICH. PUB. INT. L. REV. 63, 84 (2017).

[102] Fed. Baseball Club of Balt. v. Nat'l League of Prof. Baseball Clubs, 259 U.S. 200, 208-09 (1922).

[103] *See* Schein, *supra* note 101, at 84.

[104] Bruce Japsen, *Justice Department Seeks More Information About CVS-Aetna Deal*, FORBES (Feb. 1, 2018), https://www.forbes.com/sites/brucejapsen/2018/02/01/justice-department-seeks-more-information-about-cvs-aetna-deal/#46d8cf94fad3 [perma.cc/2FBP-7TF6].

the two companies.[105] Expecting an easy approval, In February 2019, the DOJ asked Senior Judge Richard Leon of the DC Federal District Court to approve the merger.[106] However, to the surprise of the parties, in June 2019, Judge Leon put the merger on hold and told the attorneys involved to "cancel their summer vacation."[107] The deal originally approved at $69 billion was allowed to proceed at $70 billion after Judge Leon approved it in September, 2019. Opining, Judge Leon said the following:

> "The markets at issue are not only very competitive today, but are likely to remain so post-merger . . . [c]onsequently, the harms to the public interest the [opponents] raised were not sufficiently established to undermine the Government's conclusion to the contrary."[108]

Judge Leon is the same judge who overruled the government's objections to the AT&T merger with Time Warner, which the government then appealed.[109] However, Judge Leon's view of the merger prevailed when the Court of Appeals for the District of Columbia upheld his ruling approving the $85.4 billion merger.[110]

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[105] Press Release, U.S. Dep't of Just., Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger (Oct. 10, 2018), https://www.justice.gov/opa/pr/justice-department-requires-cvs-and-aetna-divest-aetna-s-medicare-individual-part-d [https://perma.cc/JPS8-9J8S].

[106] *Justice Department Asks Judge to Approve CVS/Aetna Deal*, MODERN HEALTHCARE (Feb. 25, 2019, 11:00 PM), https://www.modernhealthcare.com/article/20190226/NEWS/190229942/justice-department-asks-judge-to-approve-cvs-aetna-deal [https://perma.cc/Z7WN-UAHP].

[107] Dana Blankenhorn, *Can CVS Stock Overcome the Latest Wrench in Its Aetna Merger?*, INVESTOR PLACE (June 13, 2019, 10:22 AM), https://investorplace.com/2019/06/can-cvs-stock-overcome-the-latest-wrench-in-its-aetna-merger/ [https://perma.cc/7ETF-QHC6].

[108] Nathaniel Weixel, *Federal Judge Approves $70 Billion CVS-Aetna Merger*, HILL (Sept. 4, 2019, 6:18 PM), https://thehill.com/policy/healthcare/459996-federal-judge-approves-70-billion-cvs-aetna-merger/ [perma.cc/A2YK-6DDS].

[109] Joe Palazzolo, Ashby Jones & Rebecca Davis O'Brien, *Decoding Judge Leon's AT&T-Time Warner Decision*, WALL ST. J. (June 12, 2018, 8:05 PM), https://www.wsj.com/articles/decoding-judge-leon-s-at-t-time-warner-decision-1528845853 [https://perma.cc/DF8G-99PX].

[110] Edmund Lee & Cecilia Kang, *U.S. Loses Appeal Seeking to Block AT&T-Time Warner Merger*, N.Y. TIMES (Feb. 26, 2019), https://www.nytimes.com/2019/02/26/business/media/att-time-warner-appeal.html [https://perma.cc/EYA9-A8EH].

B. T-Mobile Merger with Sprint

The merger of T-Mobile and Sprint is also likely to adversely impact consumers, especially given the fact that T-Mobile and Sprint are the only national mobile phone full-service providers other than the industry leaders Verizon and AT&T. The DOJ, however, approved the merger in late July, 2019, although it did announce that it was requiring the companies to both divest certain assets to DISH and to provide other services and network access to DISH.[111] Notwithstanding these conditions, it will take years for DISH, a company with no prior experience in the mobile phone industry, to become a fourth-place rival to the remaining three national companies.

C. Microsoft Acquisition of Activision Blizzard

Microsoft is looking to make moves in the gaming industry with its proposed acquisition of Activision Blizzard for $69 billion. The FTC, however, is aiming to block the acquisition, stating: "The maker of Xbox would gain control of top video game franchises, enabling it to harm competition in high-performance gaming consoles and subscription services by denying or degrading rivals' access to its popular content."[112]

Activision Blizzard is a renowned game development company, which has created popular franchises like Call of Duty, Guitar Hero, World of Warcraft, Overwatch, and others. The FTC has expressed apprehensions that the proposed acquisition of Activision by Microsoft could potentially result in a reduction of competition from rival consoles such as PlayStation and Nintendo. The acquisition may lead to increased monopolization by making some games exclusive to Xbox and other Microsoft-owned consoles, something the company has done in the past. The FTC's concern is significant and valid, given Activision's status as a top-tier game developer responsible for producing iconic and noteworthy games.

One recent development in this proposed acquisition came in the form of

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[111] Press Release, U.S. Dep't of Just., Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019), https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package [https://perma.cc/4YW4-64L6]; *see also* Christian de Looper, *T-Mobile and Sprint have merged. Here's what subscribers should know*, DIGITALTRENDS (April 25, 2023), https://www.digitaltrends.com/mobile/t-mobile-sprint-merger/ [https://perma.cc/GX4M-8XEW].

[112] *FTC Seeks to Block Microsoft Corp.'s Acquisition of Activision Blizzard, Inc.*, FED. TRADE COMM'N (Dec. 8, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-seeks-block-microsoft-corps-acquisition-activision-blizzard-inc [perma.cc/WL6V-TG44].

Britain's Competition and Markets Authority ("CMA") announcement on April 26, 2023, in which the CMA stated that it did not approve of the proposed acquisition of Activision by Microsoft. "[T]he merger could make Microsoft even stronger in cloud gaming, stifling competition in this growing market."[113] Since the announcement did not come from the U.S. Department of Justice, the FTC, or the federal courts, this marks an interesting crossroads in the battle to control monopolies and monopolistic competitors. Namely, these three institutions, who have traditionally been the source of authority on large mergers, may not be the ultimate authority in future mergers that touch upon an increasingly international marketplace.

In contrast to the CMA's disapproval of the acquisition, the European Union voted in favor of the merger.[114]

In the United States, the FTC has opposed the merger, citing that it would reduce competition in the gaming industry. However, when the FTC moved for a Temporary Injunction to delay the merger, the U.S. District Court for the Northern District of California determined:[115]

> "Microsoft's acquisition of Activision has been described as the largest in tech history. It deserves scrutiny. That scrutiny has paid off: Microsoft has committed in writing, in public, and in court to keep *Call of Duty* on PlayStation for 10 years on parity with Xbox. It made an agreement with Nintendo to bring *Call of Duty* to Switch. And it entered several agreements to for the first time bring Activision's content to several cloud gaming services."

And the court continued:

> "This Court's responsibility in this case is narrow. It is to decide if, notwithstanding these current circumstances, the merger should be halted—perhaps even terminated—pending resolution of the FTC administrative action. For the reasons explained, the Court finds the FTC has not shown a likelihood it will prevail on its

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[113] Gene Park, *Here's What U.K.'s Blocking of the Microsoft-Activision Deal Means*, WASH. POST (Apr. 26, 2023, 4:48 PM), https://www.washingtonpost.com/arts-entertainment/2023/04/26/microsoft-activision-blizzard-xbox-uk/ [https://perma.cc/PM2P-QYQW].

[114] Foo Yun Chee, *Microsoft Wins EU Antitrust Approval for Activision Deal Vetoed by UK*, THOMSON REUTERS (May 16, 2023, 3:50 AM), https://www.reuters.com/markets/deals/eu-antitrust-regulators-clear-69-bln-microsoft-activision-deal-2023-05-15/ [https://perma.cc/4ELM-98HH].

[115] Fed. Trade Comm'n v. Microsoft Corp., 681 F. Supp. 3d 1069, 1101 (N.D. Cal. 2023).

> claim this particular vertical merger in this specific industry may substantially lessen competition. To the contrary, the record evidence points to more consumer access to *Call of Duty* and other Activision content. The motion for a preliminary injunction is therefore DENIED."[116]

The ruling defies common sense considering the sheer size of this merger. The simple fact is that rather than acquiring a competitor, Microsoft could have embarked on creating its own position in the gaming industry due to its vast assets and market position.

D. Merck Acquisition of Prometheus Biosciences

In the pharmaceutical industry, Merck is looking to strengthen its position in the immunology market and improve its portfolio of inflammatory bowel disease therapies by acquiring Prometheus Biosciences. However, the FTC will closely scrutinize this transaction due to the potential it has to consolidate Merck's market share and harm competition in the pharmaceutical market. The FTC will evaluate the impact this transaction will have on competition based on the specific products at issue and the competitive environment in the marketplace. An anti-trust review conducted by the FTC may require Merck to divest certain assets or make other concessions to address any potential antitrust concerns to ensure that the acquisition does not harm competition or consumers.[117]

A variety of other acquisitions have taken place by major companies with near-monopolies in their industries with little opposition from the government. For instance, Facebook acquired Instagram in 2012,[118] an acquisition that should have set off alarm bells with the regulators in Washington. However, the FTC only recently announced that it would be investigating the acquisition of Instagram and other companies by Facebook.[119] Analogously, the DOJ announced in July 2019

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[116] *Id.*

[117] *Merck Strengthens Immunology Pipeline with Acquisition of Prometheus Biosciences, Inc.*, BUS. WIRE (Apr. 16, 2023, 6:00 AM), https://www.businesswire.com/news/home/20230416005034/en/Merck-Strengthens-Immunology-Pipeline-with-Acquisition-of-Prometheus-Biosciences-Inc [https://perma.cc/U6SH-322W].

[118] *Facebook Buys Instagram For $1 Billion, Turns Budding Rival Into Its Standalone Photo App*, TECHCRUNCH (Apr. 9, 2012, 10:06 AM), https://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/ [perma.cc/AS9T-JWZV].

[119] Josh Kosman, *FTC Probing Facebook for Snapping up Instagram, Others to*

that it would begin an anti-trust investigation into what is referred to as "Big Tech."[120] The DOJ review targets Amazon, Facebook, and Google and the question to be answered is whether competition must exist in Big Tech for these companies to be divided into smaller business units that would allow more competition in their business lines.[121] Likely delayed by maneuvering by the potential defendants and shut-downs due to COVID-19, the *Google* litigations, discussed above, is an apparent result.[122]

E. Kroger's Acquisition of Albertsons

Supported by the Offices of the Attorneys General from nine different states, the FTC filed a lawsuit to block The Kroger Company's ("Kroger's") proposed $24.6 billion acquisition of Albertsons Companies, Inc., claiming that the combination would be anti-competitive.[123] The petition alleges that eliminating competition between Kroger and Albertsons would lead to higher prices for groceries and household items. In addition to higher prices, such a loss of competition could result in lower quality products and services, while simultaneously reducing consumer choices for grocery shopping. Erasing competitive conditions would also negatively affect wages, benefits, and working conditions for employees. The FTC's petition challenges the adequacy of Kroger and Albertsons' proposed divestitures and asserts that the deal would harm consumers by increasing prices and diminishing incentives for quality competition.

IV. RECOMMENDATIONS FOR A COMPETITIVE FUTURE

Indeed, the U.S. government has occasionally ruled against proposed mega-mergers, despite a trend toward approval. Although Judge Leon opposed the CVS

Squash Rivals, N.Y. POST (July 2, 2021, 12:23 PM), https://nypost.com/2019/08/01/ftc-probing-facebook-for-snapping-up-instagram-others-to-squash-rivals/ [perma.cc/75AR-FUW4].

[120] Tony Romm, Elizabeth Dwoskin & Craig Timberg, *Justice Department Announces Broad Antitrust Review of Big Tech*, WASH. POST (July 23, 2019, 7:34 PM), https://www.washingtonpost.com/technology/2019/07/23/justice-department-announces-anti-trust-review-big-tech-threatening-facebook-google-with-more-scrutiny/ [https://perma.cc/L4EJ-KW4N].

[121] *Id.*

[122] *See generally* United States v. Google LLC., 661 F. Supp. 3d 480 (E.D. Va. 2023) (denying defendants motion for transfer of venue).

[123] Press Release, Fed. Trade Comm'n, *FTC Challenges Kroger's Acquisition of Albertsons*, (Feb. 26, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/02/ftc-challenges-krogers-acquisition-albertsons [https://perma.cc/KWU9-FEVE].

acquisition of Aetna, he ultimately approved it. When the more sizable merger of AT&T and Time Warner were under review, Judge Leon approved it. Although the number two and three baby food companies were blocked from merging, the number three and number four national cell phone carriers, representing 30% of that industry, received approval to merge.[124] As referenced above, the merger of Exxon and Mobil in 1998 was the *coup de grâce* of the mega-mergers, serving as proof that there is little reason in the rule of reason. It makes little sense that the government dithers about the merger of a couple of local hospitals in the Chicago suburbs but approves a merger that specifically undoes part of the most significant anti-trust case of all time, the deconstruction of *Standard Oil*.

As discussed above, the main culprit in this mega-merger mania has been the judge-made rule of reason.[125] It is time for Congress, acting on something that should have bipartisan support, to pass a law restating the Sherman and the Clayton Acts, making it clear that the current rule of reason is not the law of the land. For the benefit of both consumers and businesses that are not multi-national mega businesses, Congress must act to restrain the monopolistic practices that now dominate business in the United States.

An amendment to the Sherman Act and the Clayton Act could place the burden of proof on large businesses that are attempting to merge with other large businesses or acquire businesses of any size. A proposed standard for large businesses of $10 billion in gross assets or market value, subject to annual adjustment for inflation, would set a realistic tone. Ideally, businesses with assets of at least $10 billion that wish to merge with another business or acquire another business would have to defend its proposed transaction with the assumption that the transaction will indeed limit competition and harm consumers. Such a requirement would have altered the outcomes in acquisitions like Facebook's acquisition of Instagram in 2012, which served as a means to eliminate competition rather than spur further innovation.

V. MEGA MERGERS FROM 1996 – 2024

The addendum provides a thorough overview of corporate mergers and acquisitions spanning from 1996 to the present, encompassing details such as announcement and completion years, transaction values in billions, and involved corporations. Notably, it includes regulatory decisions from entities like the FTC, DOJ, FCC, and the European Commission. Despite tailoring the dataset to national transactions, various foreign corporations and regulatory bodies are nevertheless

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[124] U.S. Dep't of Just., *supra* note 112.

[125] For a further discussion of this litigation approach, *see* Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81 (2018).

included to analyze trends and patterns in the corporate landscape over two and a half decades. This comprehensive resource unveils the dynamic interplay between companies, regulatory bodies, and global market forces, showcasing strategic decisions that shape industries and enable corporations to thrive in a competitive marketplace.[126]

VI. CONCLUSION

The continuing investigation of the impact on competition of the major online companies [127] indicates that there may finally be some resolve in the U.S. government to block monopolies in the United States. Justice Harlan, quoted above, said it best when he stated that monopolization caused "the slavery that would result from aggregations of capital in the hands of a few individuals and corporations."[128] It is time for Congress to act, as the courts, the DOJ, and the FTC cannot adequately protect American consumers and businesses.

[126] Access the resource at https://perma.cc/DHE7-4GWQ.

[127] Palazzolo, *supra* note 110.

[128] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 83 (1911).