

## Comments

### Structure or Price: Does *United States v. Google LLC* Support Adopting Neo-Brandeisian Antitrust Theories Against Big Tech Companies?

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#### ABSTRACT

This Comment discusses whether American antitrust laws should address market structure or price harms caused by Big Tech dominators. The first, “structure” harm occurs when a dominator acts to keep businesses out of a market. The second, “price” harm occurs when a dominator raises the price of goods for consumers without a subsequent loss in demand. The second harm cannot happen without the first: dominators need to subdue competition before they can charge excessive prices.

The American government wavers in which of the two antitrust harms it regulates, fueling the “structure-price” debate. Since the 1970s, the United States has avoided regulating structure harms. However, “Neo-Brandeisian” scholars are challenging that policy. Neo-Brandeisians compare Big Tech companies to post-Industrial Revolution oil and

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railroad giants. Neo-Brandeisians advocate to expand antitrust policy because today, structure harms pervade technology markets, but price harms do not: Big Tech products are often free to use.

In *United States v. Google LLC*, the District Court of D.C. adopted Neo-Brandeisians' suggestions. The court held that even though the Big Tech giant Google could not manipulate market prices, it still violated the Sherman Act by acting to block competition. Following the decision, news sources predicted that *Google* would influence future courts to expand antitrust laws and redress structure harms.

This Comment examines whether *Google* will influence courts to adopt Neo-Brandeisian recommendations against Big Tech companies and what the economic implications would be if they did. Legally, this Comment concludes that regulating Big Tech companies' market-structure dominance is supported by existing, deeply-rooted law. Economically, this Comment concludes that the structure interpretation will remedy current Big Tech antitrust concerns.

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## I. INTRODUCTION

When the District Court of D.C. held that “Google is a monopolist,”<sup>1</sup> Google’s market capitalization almost equated to the 2023 annual gross domestic product of New York State.<sup>2</sup> The court supported its holding in *United States v. Google LLC* in-part by declaring that the law required courts to examine complex market structures, not just whether prices in relevant markets were excessive.<sup>3</sup> The court advanced a debate in antitrust enforcement: “Is antitrust law a tool to protect consumers from higher prices, or to defend small businesses against big ones?”<sup>4</sup>

For 125 years, courts and scholars have debated whether courts should interpret antitrust statutes to regulate “market structures” or “reductions in market outputs” that lead to high market prices.<sup>5</sup> Advocates of the former say the Sherman Antitrust Act of 1890 (“Sherman Act”) and its sister statutes should penalize companies that achieve market-structure dominance, blocking competition.<sup>6</sup> Conversely, advocates of the latter say the statutes should penalize companies that control market prices.<sup>7</sup> A court’s interpretation will change its holding when a defendant has achieved dominance but has not acted to control prices.<sup>8</sup> Today, some Big Tech companies dominate markets but do not control market prices, so the structure-price debate remains critical to settle.<sup>9</sup>

In *Google*, the Department of Justice (DOJ) persuaded the court to interpret the Sherman Act to tackle structural dominance.<sup>10</sup> By adopting

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1. *United States v. Google LLC*, 747 F. Supp. 3d 1, 32 (D.D.C. 2024).

2. *Compare id.* (acknowledging that Google had a market capitalization of more than \$2 trillion in 2024), with *GDP By State*, BEA, <https://perma.cc/53M2-A9UH> (last visited Mar. 2, 2025) (available under “Supplemental Information”) (reporting a \$2.172 trillion GDP for New York State in 2023).

3. *See Google*, 747 F. Supp. 3d at 117–18.

4. Matthew Yglesias, *Lina Khan’s Hipster Antitrust Policy Is Actually Conservative*, BLOOMBERG (June 9, 2024), <https://perma.cc/T5GC-WKUK>.

5. Thomas A. Lambert & Tate Cooper, *Neo-Brandeisianism’s Democracy Paradox*, 49 J. CORP. L. 347, 357 (2024), <https://perma.cc/UR6E-NEM2>; *see id.* at 352–53; Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (2017), <https://perma.cc/RRQ6-WQ65>.

6. *See The Sherman Act, 15 U.S.C. §§ 1–7 (1890)*; *see also Other People’s Money—Chapter VIII*, LOUIS D. BRANDEIS SCH. L. LIBR., <https://perma.cc/L78V-V9Y4> (last visited Nov. 19, 2024) (transcribing Louis D. Brandeis, *Other People’s Money and How Bankers Use It*, HARPER WKLY., Dec. 20, 1913) [hereinafter Brandeis, *Other People’s Money*]; Lina Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 738, 740–44 (2017).

7. *See* ROBERT BORK, *THE ANTITRUST PARADOX* 7 (1978); Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITR. L.J. 925, 926–29 (2001).

8. *See* Lambert & Cooper, *supra* note 5, at 353.

9. *See id.*; *see, e.g.*, *United States v. Google LLC*, 747 F. Supp. 3d 1, 117–24 (D.D.C. 2024).

10. *See Google*, 747 F. Supp. 3d at 117–18.

the “structure interpretation,” the court departed from fifty years of antitrust precedent.<sup>11</sup> Shortly after the decision, news sources predicted that *Google* would influence other courts to depart from precedent and adopt the structure interpretation.<sup>12</sup>

This Comment examines whether *Google* will influence courts to regulate structure dominance, and what the legal and economic implications would be if courts adopt that position.<sup>13</sup> Part II.A. explains why the structure-price debate matters for Big Tech antitrust.<sup>14</sup> Part II.B. illustrates how external factors played a role in courts’ historical stances on the structure-price debate.<sup>15</sup> Part II.C. examines the plain language of the antitrust statutes to determine whether either interpretation is plainly correct.<sup>16</sup> Part II.D. looks to prevailing legal and economic scholarship to help interpret antitrust statutes.<sup>17</sup> Part II.E. discusses recent case law regarding the structure-price debate.<sup>18</sup>

Part III.A. concludes that courts will regulate Big Tech market structures for the indefinite future.<sup>19</sup> Finally, Part III.B. argues that regulating market structures will address current Big Tech antitrust concerns.<sup>20</sup>

## II. BACKGROUND

The structure-price debate is about whether the courts should adopt the “structure” interpretation or the “price” interpretation of antitrust statutes.<sup>21</sup> The debate is long,<sup>22</sup> convoluted,<sup>23</sup> and important to resolve for Big Tech antitrust cases because Big Tech antitrust cases will be decided differently depending on which interpretation the courts choose.<sup>24</sup>

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11. See Stucke & Ezrachi, *supra* note 5.

12. See, e.g., João da Silva & Imran Rahman-Jones, *U.S. Considers Breaking Up Google After Landmark Case*, BBC (Oct. 9, 2024), <https://perma.cc/5S4P-HFNE>; David McCabe, “Google Is a Monopolist,” *Judge Rules in Landmark Antitrust Case*, N.Y. TIMES (Aug. 5, 2024), <https://perma.cc/2TNF-3LEX> [hereinafter McCabe, *Google*].

13. See *infra* Part III.

14. See *infra* Section II.A.

15. See *infra* Section II.B.

16. See *infra* Section II.C.

17. See *infra* Section II.D.

18. See *infra* Section II.E.

19. See *infra* Section III.A.

20. See *infra* Section III.B.

21. See *infra* Sections II.A–II.B.

22. See *infra* Section II.B.

23. See *infra* Section II.C.

24. See *infra* Sections II.D–II.E. In this Comment, “Big Tech” refers to the most prominent technology companies. See John Herrman, *We’re Stuck with the Tech Giants. But They’re Stuck With Each Other.*, N.Y. TIMES (Nov. 13, 2019), <https://perma.cc/7FQS-D4P9>. Companies considered “Big Tech” companies may change, but for the purposes of this Comment, Facebook (now Meta), Amazon, Apple, Microsoft, and Google (now Alphabet) are Big Tech companies. See *id.*

A. *Why the Structure-Price Debate Matters for Big Tech Antitrust*

The structure-price debate matters because American antitrust laws are meant to “maximize competition.”<sup>25</sup> The American economy is a free-market economy.<sup>26</sup> In theory, free-market competition incentivizes businesses to offer low-price, high-quality goods and services.<sup>27</sup> Problems arise when competitors dominate a market and create “barriers to entry” for new competitors.<sup>28</sup> Such barriers enable dominators to overcharge for goods.<sup>29</sup> Antitrust regulators strive to open dominated markets for competitors that provide consumers with other options for goods.<sup>30</sup> The structure-price debate concerns how courts should interpret antitrust laws to accomplish these goals.<sup>31</sup>

One dimension of the structure-price debate is economic.<sup>32</sup> Proponents of the interpretation of antitrust laws that punishes structural dominance (the “structure interpretation”) argue that domination blocks competition, so domination must be regulated.<sup>33</sup> Structure-interpretation proponents are concerned that dominators possess power to raise prices.<sup>34</sup> These proponents advocate for antitrust laws that stop domination before it harms fair competition.<sup>35</sup>

Critics of the structure interpretation advocate for the government to wait to intervene until dominators act to control prices.<sup>36</sup> Proponents of this second, alternative interpretation (the “price interpretation”) focus on consumers, who are burdened by anticompetitive prices.<sup>37</sup> These proponents argue that relaxing antitrust laws incentivizes competition to

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25. *H. A. Artists & Assocs., Inc. v. Actors’ Equity Ass’n*, 451 U.S. 704, 713 (1981).

26. *See Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 (1979).

27. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *Nat’l Soc. of Pro. Eng’rs v. United States*, 435 U.S. 679, 694, 695 (1978) (discussing that competition leads to the best allocation of production resources because consumers’ “free opportunity to select among alternative offers” tends to “force prices down”).

28. *See United States v. Google LLC*, 747 F. Supp. 3d 1, 117 (D.D.C. 2024); *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 44 (D.D.C. 2022).

29. *See Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) (defining “market power” as “the ability of a single seller to raise price and restrict output” to “force a purchaser” to buy).

30. *See Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (“The purpose of the [Sherman] Act is . . . to protect the public from the failure of a market.”).

31. *See Lambert & Cooper*, *supra* note 5, at 359–61.

32. *See id.* at 353.

33. *See, e.g., Brandeis, Other People’s Money*, *supra* note 6; *Khan*, *supra* note 6, at 740–44; *see also Google*, 747 F. Supp. 3d at 107 (describing the court’s analysis as a “structure approach”).

34. *See Lambert & Cooper*, *supra* note 5, at 353.

35. *See id.*

36. *See id.* at 352.

37. *See id.* at 359.

force dominators to lower prices.<sup>38</sup> The proponents argue that overbearing antitrust laws might penalize “socially acceptable” competition that free-market economies typically encourage.<sup>39</sup> For this reason, the structure interpretation’s critics focus on domination’s subsequent effect on market prices, not domination itself.<sup>40</sup>

Robert Bork, a legal scholar and vocal price-interpretation proponent, famously called strong antitrust laws a “paradox” because they both help and hurt competition.<sup>41</sup> While more regulation might open markets, it also might deter legitimate business tactics, reducing competition.<sup>42</sup> Conversely, while less regulation might encourage competition, it also might not lower barriers to entry in dominated markets, reducing competition.<sup>43</sup> Scholars on both sides of the debate offer historical and modern evidence to say that their interpretation solves economic problems.<sup>44</sup>

Another dimension of the structure-price debate is legal.<sup>45</sup> At a policy level, the structure interpretation regulates more conduct than the price interpretation.<sup>46</sup> By adopting the structure or price interpretation, the government will have either stronger or weaker control over markets, respectively.<sup>47</sup> Courts and scholars use statutory interpretative canons to

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38. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958); *Nat’l Soc. of Pro. Eng’rs v. United States*, 435 U.S. 679, 694, 695 (1978).

39. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440–41 (1978); see, e.g., *id.* (discussing “the distinct possibility of overdeterrence” that results in “businessmen who [choose] to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment”); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945) (Hand, J.) (“The successful competitor, having been urged to compete, must not be turned upon when he wins.”).

40. See Lambert & Cooper, *supra* note 5, at 352.

41. See BORK, *supra* note 7, at 1 (coining the term “antitrust paradox”); Lambert & Cooper, *supra* note 5, at 363 (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 216 (1978)) (discussing the “discretion” that courts have in interpreting antitrust laws). Antitrust paradoxes are now a motif for scholars discussing the structure-price debate. See, e.g., Khan, *supra* note 6, at 710.

42. See *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440–41 (1978) (discussing “the distinct possibility of overdeterrence” that results in “businessmen who [choose] to be excessively cautious in the face of uncertainty regarding possible exposure to criminal punishment”).

43. See Khan, *supra* note 6, at 738.

44. See, e.g., Posner, *supra* note 7, at 926–29 (discussing tech markets); Khan, *supra* note 6, at 774–80 (discussing Amazon).

45. See Lambert & Cooper, *supra* note 5, at 361 (considering the “democratic implications” of the debate).

46. See *id.* at 357; Stucke & Ezrachi, *supra* note 5.

47. See Lambert & Cooper, *supra* note 5, at 356–57 (purporting one “tenet” of the structure interpretation is “the government should enforce the antitrust laws more aggressively”). *But see id.* (arguing that the price interpretation is not as narrow its critics say).

support that Congress intended for their interpretation.<sup>48</sup> Both sides present valid arguments.<sup>49</sup>

The structure-price debate especially matters for Big Tech antitrust jurisprudence.<sup>50</sup> Some Big Tech companies dominate their product markets but do not charge a price to use their products.<sup>51</sup> Because some Big Tech companies dominate market structures but do not manipulate market prices,<sup>52</sup> Big Tech antitrust decisions depend on whether courts adopt the structure or price interpretation.<sup>53</sup> Thus, advocates for both the structure and price interpretations argue that their interpretation reflects the economic reality of Big Tech markets.<sup>54</sup>

### B. *The History of the Structure-Price Debate*

Abuse of market dominance poses severe harm to consumers and the economy.<sup>55</sup> The late 1800s brought a period of *laissez-faire* American economic policy that empowered dominators to monopolize markets.<sup>56</sup> By the end of the 1800s, dominators abused their market powers to block competition and control prices.<sup>57</sup> In response to market abuses, Congress enacted the Sherman Act.<sup>58</sup> The Sherman Act drafters believed that government intervention could promote “free and unfettered” competition by restricting market dominators that prevailed in the 1800s.<sup>59</sup>

Courts recognize that the Sherman Act drafters intended the act “to be adaptable to changing economic conditions.”<sup>60</sup> The United States Supreme Court recognized that both the Sherman Act and the Constitution

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48. See Robert Bork, *The Goals of Antitrust Policy*, 57 AM. ECON. REV. 242, 245 (1967), <https://perma.cc/R5TH-ZH9M> [hereinafter Bork, *Goals*] (examining that legislative history supports the price interpretation); Khan, *supra* note 6, at 737 (examining that the “undue focus” on price “betrays legislative history”).

49. See, e.g., Bork, *Goals*, *supra* note 48, at 245 (bringing “later statutes” into the legislative intent analysis); Khan, *supra* note 6, at 740 (quoting Sen. John Sherman).

50. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001); *United States v. Google LLC*, 747 F. Supp. 3d 1, 117 (D.D.C. 2024).

51. See Khan, *supra* note 6, at 738.

52. See Lambert & Cooper, *supra* note 5, at 353 (describing internet search and social networking as “zero-price markets”).

53. See *id.*

54. See Posner, *supra* note 7, at 926–29; Khan, *supra* note 6, at 740–44.

55. See *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 50 (1911) (concluding that Congress created an antitrust statute at a time when dominant firms would “oppress individuals and injure the public”); *State ex inf. Hadley v. Standard Oil Co.*, 116 S.W. 902, 1034 (Mo. 1908) (describing that dominance leads to higher prices and increased cost of living).

56. See Stucke & Ezrachi, *supra* note 5 (describing the “initial administrative neglect and judicial hostility” that “ushered the promise” to break up dominators).

57. See *Standard Oil*, 221 U.S. at 47–48, 72–74.

58. See The Sherman Act, 15 U.S.C. §§ 1–7 (1890).

59. See *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

60. *Wolf & Co. v. Orleans Lumber Co.*, 149 So. 322, 324 (La. Ct. App. 1933).

adapt to changing societal values.<sup>61</sup> Given the Sherman Act's flexibility, courts have interpreted the act differently in different time periods.<sup>62</sup> To demonstrate, Professors Maurice E. Stucke and Ariel Ezrachi categorized four historical periods in which courts "waxed and waned" with respect to the structure-price debate.<sup>63</sup>

The first period occurred between the 1900s and the 1920s.<sup>64</sup> In this period, courts were "vigorous" in their fight against dominators.<sup>65</sup> Courts broadly interpreted the Sherman Act to break up dominators that created poor economic conditions.<sup>66</sup> Antitrust decisions reflected society's aversion to corporate dominance.<sup>67</sup>

The second period occurred between the 1920s and 1930s.<sup>68</sup> At first, antitrust activity was "rare."<sup>69</sup> Economic prosperity defined the 1920s.<sup>70</sup> Later, in the 1930s, "unique economic conditions" presented social destitution.<sup>71</sup> Congress passed the National Industrial Recovery Act to authorize executive codes to regulate business.<sup>72</sup> Courts applied executive codes instead of legislation to remedy economic harms,<sup>73</sup> so courts rarely applied the Sherman Act.<sup>74</sup>

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61. *See id.* at 324; *see also* Bork, *Goals, supra* note 48, at 250 (comparing antitrust and constitutional law because some court decisions are "contrary" to others as a result of changing judicial values and principles).

62. *See* Stucke & Ezrachi, *supra* note 5; Lambert & Cooper, *supra* note 5, at 350, 352 (discussing that an "output-focused" antitrust regime that crafts antitrust tests "in light of economic learning" has been the "prevailing" regime since the 1970s).

63. Stucke & Ezrachi, *supra* note 5.

64. *See id.*

65. *Sherman Antitrust Act*, ENCYC. BRITANNICA, <https://perma.cc/3LCN-HXYE> (last visited Nov. 19, 2024).

66. *See, e.g.*, *FTC v. Gratz*, 253 U.S. 421, 432 (1920) (describing that Congress enacted an antitrust statute because "a great majority of the American people" regarded market concentration as "menacing" the general welfare).

67. *See* *N. Secs. Co. v. United States*, 193 U.S. 197, 346 (1904) (dissolving a railroad dominator); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 79–80 (1911) (oil dominator); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 187–88 (1911) (tobacco dominator).

68. *See* Stucke & Ezrachi, *supra* note 5.

69. *Id.*

70. *See* *Vale v. State Sch. Tax Dep't*, 173 A. 795, 799 (Del. Super. Ct. 1934).

71. *Mathias v. Jacobs*, 238 F. Supp. 2d 556, 576 (S.D.N.Y. 2002) (citing *In re Bd. Water Supply*, 14 N.E.2d 789, 789 (1938)).

72. *See* National Industrial Recovery Act, H.R. 5755, 73d Cong. (1933), <https://perma.cc/495F-EDXN>; 15 U.S.C. §§ 701 et. seq., *repealed by* 15 U.S.C. § 703; *see, e.g.*, *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 416 (1935).

73. *See* Stucke & Ezrachi, *supra* note 5.

74. *See id.*; *see, e.g.*, *United States v. Wilshire Oil Co.*, 9 F. Supp. 396, 402 (S.D. Cal. 1934).

The third period began in the late 1930s and ended in the 1970s.<sup>75</sup> The American public became concerned with “corporate gigantism.”<sup>76</sup> Legal commentators urged courts to “simplify” the Government’s burden of proof for antitrust laws.<sup>77</sup> Courts listened and revamped antitrust policy.<sup>78</sup> Between 1940 and 1949, the U.S. Supreme Court ruled for the Government in 16 out of its 20 antitrust appeals, signifying the United States’s return to a heightened antitrust policy.<sup>79</sup>

The fourth period started in the early 1970s and continued as late as the 2010s.<sup>80</sup> Prominent scholars urged courts to relax antitrust laws.<sup>81</sup> Accordingly, courts held consumers were the focus of antitrust, and only price control would be an antitrust violation.<sup>82</sup> As a result of the narrowed antitrust scope, courts dismissed “[n]early all” case-by-case antitrust actions, despite enforcers bringing hundreds of antitrust cases.<sup>83</sup>

Starting in the late 2010s, some antitrust scholars began urging courts to return to broader antitrust laws to address modern economic concerns.<sup>84</sup> Those scholars claim that a relaxed antitrust policy does not remedy modern economic concerns.<sup>85</sup> The tensions between the previous period’s price-focused scholars and the current period’s structure-focused scholars prompted courts recently to reconsider the structure-price debate.<sup>86</sup>

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75. See Stucke & Ezrachi, *supra* note 5.

76. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 49 (2000), <https://perma.cc/N9G3-VNVX>.

77. *Id.* at 50.

78. See *id.*; see, e.g., *Appalachian Coals v. United States*, 288 U.S. 344, 360 (1933) (calling for “vigilance” against “all” efforts to restrain commerce).

79. See Victor H. Kramer, *The Antitrust Division and the Supreme Court: 1890–1953*, 40 VA. L. REV. 433, 436 (1954); see, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212–15 (1940) (declaring a strong stance against market domination).

80. See Stucke & Ezrachi, *supra* note 5 (noting the possible “rise of the fifth cycle” of antitrust in 2017). *But see* Rodger D. Young & Anthony P. Cho, *The Impact of Kodak on Antitrust Litigation*, 72 MICH. B.J. 1278, 1278 (1993) (citing *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992)) (marking *Eastman Kodak* as the usher of a new era of antitrust).

81. See generally BORK, *supra* note 7; Posner, *supra* note 7.

82. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Rehnquist, J., concurring) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)) (using Chicago School scholar Robert Bork’s work to conclude that the intent of the Sherman Act was to focus on consumer harm); *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 281–82 (1978)).

83. *Nat’l Collegiate Athletic Ass’n v. Alston*, 594 U.S. 69, 97 (2021); see *id.* (noting that courts “disposed of” about 90% of Rule of Reason cases from 1977 to 2021); see Stucke & Ezrachi, *supra* note 5 (discussing that the Government has “rarely” challenged mergers since 1979).

84. See Stucke & Ezrachi, *supra* note 5.

85. See Khan, *supra* note 6, at 738, 740–44.

86. See, e.g., *United States v. Google LLC*, 747 F. Supp. 3d 1, 117–18 (D.D.C. 2024).

### C. Antitrust Statutes Underlying the Structure-Price Debate

Antitrust statutes give courts significant discretion to expand or not expand antitrust laws.<sup>87</sup> In the United States, antitrust laws are statutory.<sup>88</sup> The three federal antitrust statutes relevant to the structure-price debate are the Sherman Act, the Clayton Act, and the Federal Trade Commission (FTC) Act (“FTC Act”).<sup>89</sup> The statutes outlaw almost the same conduct.<sup>90</sup> They establish what antitrust violations are, what entities may bring criminal or administrative actions, and how plaintiffs can bring civil actions against market dominators.<sup>91</sup>

The Sherman Act is the oldest and most important of the three main antitrust statutes.<sup>92</sup> The drafters designed the act to be a “comprehensive charter of economic liberty” aimed at “preserving free and unfettered competition.”<sup>93</sup> Importantly, the act’s language is broad.<sup>94</sup> The act prohibits “any contract, combination, . . . or conspiracy, in restraint of trade” and acts or attempts to “monopolize . . . any part of trade.”<sup>95</sup> Interpreting the act’s breadth as intentional,<sup>96</sup> courts typically apply the act on a case-by-case basis.<sup>97</sup> Yet, courts do not have much congressional

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87. See 15 U.S.C. §§ 1, 2, 12, 18, 19, 45.

88. See Christopher J. Cifrano, Esq., *et. al.*, *Business Torts in Massachusetts: Antitrust Law*, BT MA-CLE 11-1 (2d ed. 2016) § 11.1.1 (showing most antitrust actions arise out of the Sherman Act, the Clayton Act, or the FTC Act and their subsequent amendments).

89. See *id.*; The Sherman Act, 15 U.S.C. §§ 1–7; The Clayton Act, 15 U.S.C. §§ 12–27; The FTC Act, 15 U.S.C. §§ 41–58.

90. See *N.J. Wood Finishing Co. v. Minn. Min. & Mfg. Co.*, 332 F.2d 346, 351–53 (3d Cir. 1964), *aff’d*, 381 U.S. 311 (1965) (discussing the relationship between the statutes).

91. See *In re Publ’n Paper Antitr. Litig.*, 690 F.3d 51, 62 (2d Cir. 2012) (describing that the Clayton Act establishes a private right of action for the Sherman Act); *FTC v. Vyera Pharms., LLC*, 479 F. Supp. 3d 31, 43 (S.D.N.Y. 2020) (citing 15 U.S.C. §§ 45(b), 53(b)) (acknowledging that the FTC can initiate administrative proceedings or sue to enforce the FTC Act).

92. See 15 U.S.C. §§ 1–7 (enacted July 2, 1890).

93. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

94. See *United States v. N. Secs. Co.*, 120 F. 721, 723 (D. Minn. 1903) (“The generality of the language employed [in the Sherman Act] is, in our judgment, of great significance.”); *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 784 (1984) (Stevens, J., dissenting) (emphasizing the “sweeping” breadth of Section 2 of the Sherman Act).

95. 15 U.S.C. §§ 1, 2; see *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 199 (2010); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 454 (1993).

96. See *Nat’l Soc. of Pro. Eng’rs v. United States*, 435 U.S. 679, 687 (1978) (discussing that the Sherman Act drafters expected courts to shape the statute’s meaning).

97. See *Appalachian Coals v. United States*, 288 U.S. 344, 360 (1933). Alternatively, courts recognize that some actions are “manifestly anticompetitive” and do not require a case-by-case inquiry. See *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49–50 (1977).

guidance for this analysis.<sup>98</sup> For example, courts manufactured the main test for determining Sherman Act violations, the Rule of Reason.<sup>99</sup>

Congress later enacted the Clayton Act in direct response to the Sherman Act's ambiguity.<sup>100</sup> The Clayton Act outlaws "price discrimination," "acquisitions in restraint of trade," and "interlocking directorates."<sup>101</sup> It also codifies a private right of action for Sherman-Act harms.<sup>102</sup>

Meanwhile, the FTC Act grants the FTC power to regulate commerce violations.<sup>103</sup> The FTC Act allows the FTC to impose administrative sanctions for Sherman Act, Clayton Act, and other violations.<sup>104</sup> Yet, neither the Clayton nor the FTC Act discusses the structure-price debate.<sup>105</sup>

#### *D. Theories Underlying the Structure-Price Debate for Big Tech*

Judges consider scholars' legal and economic theories when addressing the structure-price debate.<sup>106</sup> Two conflicting schools of

98. See *N. Secs. Co.*, 120 F. at 723; *McQuillan*, 506 U.S. at 454 ("Nor is there much guidance to be had in the [Section 2's] scant legislative history.").

99. See *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 235 (1899) (establishing the Rule of Reason); *Cont'l T.V.*, 433 U.S. at 49 (calling the Rule of Reason "familiar" to courts).

100. See The Clayton Act, 15 U.S.C. §§ 12–27; The FTC Act, 15 U.S.C. § 45; *FTC v. Staples, Inc.*, 239 F. Supp. 3d 1, 3 (D.D.C. 2017) ("Congress passed the Clayton Act to address provisions not covered by the Sherman Act."); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 355 (1922).

101. 15 U.S.C. §§ 12, 18, 19. "Price discrimination" occurs when a company sells a product at different prices to different consumers. See *Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 188 (1st Cir. 1996). "Acquisitions in restraint of trade" are when large companies merge, resulting in a substantial gain in market share that restrains trade. See *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). An "interlocking directorate" is a company director that joins another company's decision-making board. See *Bankamerica Corp. v. United States*, 462 U.S. 122, 124 (1983).

102. See *FTC v. Staples, Inc.*, 239 F. Supp. 3d 1, 3 (D.D.C. 2017) ("The FTC Act expanded the scope of illegal activities in restraint of trade."); *Julius M. Ames Co. v. Bostitch, Inc.*, 240 F. Supp. 521, 524 (S.D.N.Y. 1965).

103. See 15 U.S.C. § 45; *Staples*, 239 F. Supp. 3d at 3.

104. See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (describing an instance in which the FTC Act allows the FTC to regulate conduct that "may not actually violate" the Sherman Act or Clayton Act); see also *Chuck's Feed & Seed Co. v. Ralston Purina Co.*, 810 F.2d 1289, 1292 (4th Cir. 1987) (calling the FTC Act a "penumbra" of federal antitrust statutes).

105. See 15 U.S.C. §§ 12, 18, 19, 45; Bork, *Goals*, *supra* note 48, at 245 (observing that "later statutes" display "both" interpretations).

106. See *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1059 (D.C. Cir. 2008) (citing ROBERT BORK, *THE ANTITRUST PARADOX* (1978)) (Kavanaugh, J., dissenting); *Eric Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 144 (4th Cir. 2019) (Motz, J., concurring) (citing Lina Khan, *Amazon's Antitrust Paradox*, 126 *YALE L.J.* 710, 712–13 (2017)); see also *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 469, 476, 488 (1992) (citing 2 P. Areeda & D. Turner, *Antitrust Law* ¶¶ 404b1, 519a (1978); 3 P. Areeda & D. Turner, *Antitrust Law* ¶ 813 (1978)).

antitrust scholarship have emerged since the 1970s.<sup>107</sup> On one hand, Chicago School scholars believe in relaxed antitrust policy under the price interpretation.<sup>108</sup> On the other hand, Neo-Brandeisian scholars believe in stricter antitrust policy under the structure interpretation.<sup>109</sup> The schools have legal and economic arguments to support their interpretation.<sup>110</sup>

### 1. The Chicago School

The “consumer welfare standard” theory defines the Chicago School of antitrust and economics.<sup>111</sup> The consumer welfare standard proposes that antitrust laws should focus on price because market prices affect consumers.<sup>112</sup> Two scholars that advocated for the consumer welfare standard are Robert Bork and Richard Posner.<sup>113</sup>

Robert Bork pushed consumer welfare in the 1970s and 1980s.<sup>114</sup> Bork used economic principles and legal interpretative canons to support his theories.<sup>115</sup> Economically, he illustrated macroeconomic models to show that the consumer welfare standard addressed antitrust concerns.<sup>116</sup> Legally, he noted that antitrust statutes employ economic language like “combinations” and “monopolies,” demonstrating that interpreters should consider his economic arguments.<sup>117</sup> He also cited members of Congress and legal precedent to show that Congress intended the consumer welfare standard for the Sherman Act.<sup>118</sup> Using his economic and legal arguments, Bork convinced courts to adopt the price interpretation for decades.<sup>119</sup>

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107. See Stucke & Ezrachi, *supra* note 5.

108. See *id.*; see, e.g., BORK, *supra* note 7, at 81–89.

109. See Stucke & Ezrachi, *supra* note 5; see, e.g., Khan, *supra* note 6, at 740–44.

110. See *infra* Sections II.D.1–II.D.2.

111. See BORK, *supra* note 7, at 81–89; Jay L. Levine & Porter Wright, *1990s to the Present: The Chicago School and Antitrust Enforcement*, PORTERWRIGHT ANTITR. L. SOURCE (June 1, 2021), <https://perma.cc/M2SP-BPVJ> (describing the “consumer welfare standard” does not punish monopolistic firms selling at low prices or high prices without “egregious forms of conduct”).

112. See BORK, *supra* note 7, at 81–89; Posner, *supra* note 7, at 926–29.

113. See BORK, *supra* note 7, at 108–15; Posner, *supra* note 7, at 925.

114. See BORK, *supra* note 7, at 7.

115. See *id.* at 7 (proposing an antitrust reform “based upon a correct understanding of fundamental legal and economic concepts”); Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and The Goals of Antitrust Policy*, 79 ANTITR. L.J. 835, 838 (2014), <https://perma.cc/S6WP-M7JS>.

116. See BORK, *supra* note 7, at 108–16. *But see* Joseph E. Fortenberry, *The Antitrust Paradox: A Policy at War with Itself*, 78 COLUM. L. REV. 1347, 1349 (1978) (reviewing ROBERT BORK, *THE ANTITRUST PARADOX* (1978) and describing Bork’s failure to reconcile legislative history).

117. See Bork, *Goals*, *supra* note 48, at 242.

118. See *id.* at 242, 246 (arguing interpretative canons can “only” support his consumer welfare standard, and legal precedent supports the standard); BORK, *supra* note 7, at 57–67, 73–80.

119. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)) (adopting a price-focused antitrust

Richard Posner, who also propelled the consumer welfare standard, considered how the standard would apply specifically to tech markets.<sup>120</sup> In his article, *Antitrust in the New Economy*, he examined “new economy” industries.<sup>121</sup> The new economy denoted computer, internet, and communicative technology industries.<sup>122</sup> Posner concluded that new economy markets “markedly” differ from other markets because dominance in new economy markets required “very high” amounts of innovation and competitive pricing.<sup>123</sup> He argued that even in dominated markets, those features facilitated competition.<sup>124</sup>

Economically, Posner explained that new economy markets were highly competitive, which supported the consumer welfare standard.<sup>125</sup> He described new economy industries as “volatile,” or characterized by “quick and frequent [market] entry and exit.”<sup>126</sup> Volatile markets afforded smaller competitors a chance to position themselves in a market and outperform larger competitors.<sup>127</sup> Posner believed the opportunity to outperform dominators in a volatile market incentivized competition and, thereby, competitive prices.<sup>128</sup>

In 2001, Posner commented that features of the new economy “tug[ged] it toward” being illegal.<sup>129</sup> Decades later, new economy markets have changed to become an integral part of American life.<sup>130</sup> In 2021, internet users shared 250 trillion gigabytes of data.<sup>131</sup> Also in 2021, consumers spent approximately \$1.6 million online every “internet

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interpretation); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 889 (2007) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 288–91 (1978)) (same).

120. See Posner, *supra* note 7, at 926.

121. *Id.* at 925–26. See Peter R. Dickson & Philippa K. Wells, *The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared*, 20 J. PUB. POL’Y & MKTG. 1, 13 (2001), <https://perma.cc/8WC3-B325>.

122. See Posner, *supra* note 7, at 925.

123. See *id.* at 926.

124. See *id.* at 929; see also *United States v. Microsoft Corp.*, 253 F.3d 34, 56 (D.C. Cir. 2001) (entertaining Microsoft’s claim that software competition is “uniquely ‘dynamic’” to heighten the Government’s burden of proof).

125. See Posner, *supra* note 7, at 929.

126. See *id.* at 926, 929.

127. See Posner, *supra* note 7, at 938–39; see also Levine & Wright, *supra* note 118.

128. See Posner, *supra* note 7, at 938–39 (“The more protection from competition the firm that succeeds in obtaining a monopoly will enjoy, the more competition there will be to become that monopolist.”).

129. See *id.* at 929.

130. See *United States v. Google LLC*, 747 F. Supp. 3d 1, 31 (D.D.C. 2024) (explaining how Google’s dominance “has only grown” over the decades).

131. See Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES (Dec. 10, 2021), <https://perma.cc/W56K-FL8E>.

minute.”<sup>132</sup> In 2023, 92% of Americans owned cell phones.<sup>133</sup> Society relies on tech products, so dominators in new economy industries have “stood above” competitors.<sup>134</sup>

In *Antitrust in the New Economy*, Posner concluded that the antitrust paradox is “dissolved” by realizing that “competition to obtain a monopoly” is an important form of competition.<sup>135</sup> He noted the first companies to invent an “essential component of a new-economy product or service” will enjoy benefits that later market entrants will not.<sup>136</sup> Thus, he thought domination in new economy industries was “desirable,” provided that the means of achieving such domination were “socially acceptable.”<sup>137</sup>

Legally, Posner argued market volatility rendered antitrust actions moot before their conclusions.<sup>138</sup> Dominators could lose dominance, or as he described, “exit” a market, during lengthy antitrust litigation.<sup>139</sup> Because the Sherman Act cannot punish companies that do not hold dominant power,<sup>140</sup> an action becomes moot if companies lose and cannot regain dominance.<sup>141</sup> This risk looms in antitrust cases, which can have long, intense pretrial procedures.<sup>142</sup>

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132. See Claire Jenik, *A Minute on the Internet in 2021*, STATISTA (July 30, 2021), <https://perma.cc/6FPY-QR67>.

133. See Nyahne Bergeron & Collin Blinder, *How Many Americans Own a Smartphone? 2024*, CONSUMERAFFAIRS.COM, <https://perma.cc/9KMZ-Z8ST> (last updated Mar. 6, 2024).

134. *Google*, 747 F. Supp. 3d at 31.

135. Posner, *supra* note 7, at 929.

136. *Id.* at 928–29; see also *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, 868 F. Supp. 2d 359, 374 (D. Del. 2012), *aff'd*, 486 F. App'x 883 (Fed. Cir. 2012) (describing the disadvantages of not being a “first-mover,” including loss of reputation and business opportunities).

137. Posner, *supra* note 7, at 938; see also *Verizon Commc'ns Inc. v. L. Offs. of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004) (explaining the opportunity to charge monopoly prices is what attracts “business acumen” and is an “important element of a free-market system”).

138. See Posner, *supra* note 7, at 939 (“[A]n antitrust case involving a new-economy firm may drag on for so long relative to the changing conditions of the industry as to become irrelevant.”).

139. *Id.*; see *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) (discussing that the defendant’s antitrust violations “might be moot” five years after initiating the lawsuit).

140. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

141. See, e.g., *United States v. Clev. Tr. Co.*, 392 F. Supp. 699, 709–10 (N.D. Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975) (holding the antitrust case became moot when the defendant’s elimination of competition was “no longer possible”).

142. See, e.g., *United States v. Google LLC*, 747 F. Supp. 3d 1, 32 (D.D.C. 2024) (describing the discovery of “[m]illions of pages” and thousands of exhibits over three years); *United States v. Microsoft Corp.*, 253 F.3d 34, 49 (D.C. Cir. 2001) (noting that Microsoft acted to harm competition six years ago, “an eternity in the computer industry”).

## 2. The Neo-Brandeisian School

The Neo-Brandeisian School, also called the “Columbia School” or “New Brandeisians,” rejects the Chicago School’s consumer welfare standard.<sup>143</sup> Neo-Brandeisians argue that antitrust laws should stop market power, not price manipulation.<sup>144</sup> Courts that adopt Neo-Brandeisian views can stop market power before market power harms markets.<sup>145</sup>

Justice Louis Brandeis is the namesake for the Neo-Brandeisian School.<sup>146</sup> In the first period of antitrust law,<sup>147</sup> Brandeis fought to break up Industrial Revolution monopolies.<sup>148</sup> He observed that, at the time, corporate power had replaced government power.<sup>149</sup> However, unlike government power, corporate power did not uphold public interests.<sup>150</sup> Brandeis based his strong antitrust policy on these observations and the harms of dominators that later prompted Congress to enact the Sherman Act.<sup>151</sup>

In one of his famous essays, *Other People’s Money*, Brandeis observed that dominators, like railroads and banks, divested from property, plant, and equipment to operate their businesses.<sup>152</sup> Instead, the dominators invested in mergers and acquisitions, which helped them dominate competitors but did not improve prices or products for consumers.<sup>153</sup> Brandeis wrote that “size attained by [mergers and acquisitions], instead of natural growth . . . has contributed so largely to our financial concentration.”<sup>154</sup> He asserted that focus on becoming “big” disincentivized market participants from creating superior products and services.<sup>155</sup>

Brandeis pushed his aversion to “bigness” as a U.S. Supreme Court Justice, such as in *Federal Trade Commission v. Gratz*.<sup>156</sup> In *Gratz*, the majority limited the FTC Act’s scope.<sup>157</sup> Justice Brandeis dissented against

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143. See Stucke & Ezrachi, *supra* note 5.

144. See Lambert & Cooper, *supra* note 5, at 361–62.

145. See *id.* at 349, 365 (describing the Neo-Brandeisian reform agenda as an “abrogation of the [Chicago School] consumer welfare standard” and “promulgation of ex ante conduct rules”).

146. See *id.* at 347 n.1.

147. See *supra* Section II.A.

148. See 81 MICH. L. REV. 980, 981 (1983) (reviewing MELVIN I. UROFSKY, LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION (1981)).

149. See Brandeis, *Other People’s Money*, *supra* note 6.

150. See *id.*

151. See *id.*

152. See *id.*

153. *Id.*

154. Brandeis, *Other People’s Money*, *supra* note 6.

155. *Id.*

156. See *FTC v. Gratz*, 253 U.S. 421, 429 (1920) (Brandeis, J., dissenting), *overruled* by *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

157. See *id.* at 428.

the majority's limited construction of the FTC Act.<sup>158</sup> He argued that the FTC should have broad authority to regulate commerce.<sup>159</sup> Later, courts continuously found his arguments persuasive.<sup>160</sup>

Neo-Brandeisians believe that Brandeis's arguments apply to Big Tech's dominance in the twenty-first century.<sup>161</sup> Former FTC Chair Lina Khan is a Neo-Brandisian and structure-interpretation proponent.<sup>162</sup> As former FTC Chair, Khan aspires to "broaden the scope of antitrust law" and "encourage regulators and courts to apply it more creatively."<sup>163</sup> She believes that the consumer welfare standard is outdated and does not address tech companies' business models.<sup>164</sup> She poses that a new, expansive, structure-focused antitrust framework will address Big Tech antitrust concerns.<sup>165</sup>

In her article, *Amazon's Antitrust Paradox*, Khan used economic and legal arguments to argue that the antitrust framework needs reform.<sup>166</sup> Economically, she cited several sources to say that the consumer welfare standard is "failing by its own metrics."<sup>167</sup> She noted that the Chicago School's consumer welfare standard ignores the "process that give[s] rise to" high prices.<sup>168</sup> She concluded that Amazon has made itself "indispensable" to its market and has "entrench[ed]" itself in a dominant, anti-competitive position.<sup>169</sup>

Legally, Khan challenged the Chicago-School view that Congress intended the consumer welfare standard.<sup>170</sup> She argued that the Sherman

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158. *See id.* at 429.

159. *See id.* at 429–42.

160. *See, e.g., Brown Shoe*, 384 U.S. at 320 (describing that Brandeis's "strong dissent" favoring FTC power became the court's view after *Gratz*).

161. *See, e.g., Khan, supra* note 6, at 740–44; *see also* Stucke & Ezrachi, *supra* note 5 (discussing the modern "investment gap" in which businesses invest less but profit more from merger activity and stock returns).

162. *See* David McCabe, *An Architect of Biden's Antitrust Push Is Leaving the White House*, N.Y. TIMES (Dec. 30, 2022), <https://perma.cc/428U-JL7K>.

163. Brian Fung & Catherine Thorbecke, *Lina Khan's Rise Was Heralded as An Antitrust Revolution. Now She Has to Pull It Off*, CNN BUS., <https://perma.cc/R3BB-ESU9> (last updated Oct. 17, 2023); *see also* *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 61–65 (D.D.C. 2022) (discussing the defendant's motion to recuse Lina Khan from the case because of her preexisting bias against Big Tech).

164. *See* Khan, *supra* note 6, at 744; *see also* Carol M. Kopp, *Product Life Cycle Explained: Stage and Examples*, INVESTOPEDIA, <https://perma.cc/WHT8-LKDM> (last updated July 26, 2024) (discussing the stages of product growth for companies, including the "maturity" stage in which "[s]ales levels stabilize" after the "growth" stage).

165. *See id.*; *see also* Dickson & Wells, *supra* note 121, at 13 (discussing that courts' freedom to expand antitrust laws is "crucial in dealing with the 'new economy'").

166. *See* Khan, *supra* note 6, at 738, 740–44.

167. *See id.* at 739.

168. *Id.*

169. *Id.* at 755.

170. *See id.* at 740–44.

Act drafters responded to the nineteenth-century “industrial trusts.”<sup>171</sup> Based on those trusts, the drafters would have wanted to enable “diversity and access to markets” for competitors, so she argued that they focused on competition, not price.<sup>172</sup> Khan qualified that the Sherman Act does not punish dominance that results from “superior product, business acumen, or historical accident.”<sup>173</sup> Khan and the Neo-Brandeisians acknowledge this difficulty and advocate for policies that are generally, but not strictly, against Brandeis-described “bigness.”<sup>174</sup>

A change in antitrust interpretation to accommodate Neo-Brandeisian views would not be unprecedented.<sup>175</sup> In *State ex inf. Hadley v. Standard Oil Co.*, a case decided early in Sherman Act history, the Missouri Supreme Court deviated from its antitrust precedent.<sup>176</sup> The court announced that the “extraordinary growth of institutions” during the late 1800s and early 1900s created “totally different” economic conditions than in earlier cases.<sup>177</sup> Under a new standard, the court held that the defendant violated antitrust laws, contrary to precedent.<sup>178</sup> The *Hadley* decision overlapped with the first period of antitrust, in which courts across the country expanded antitrust policy.<sup>179</sup>

In 1908, the *Hadley* court noted that some businesses’ “capitalizations and assets reach[ed] into the hundreds of millions of dollars.”<sup>180</sup> Like the companies in *Hadley*, Big Tech companies have large amounts of capital and assets.<sup>181</sup> Consider the most prominent Big Tech companies:<sup>182</sup> at the end of 2023, Apple had the largest market capitalization of them, at \$2.99 trillion,<sup>183</sup> and Meta had one of the smallest

171. See Khan, *supra* note 6, at 738–739.

172. *Id.* at 740; see also Dickson & Wells, *supra* note 121, at 4–13 (discussing the legislative history of the Sherman Act).

173. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). See Khan, *supra* note 6, at 725. *But see* *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 345 (1897) (White, J., dissenting) (arguing that when they drafted the Sherman Act, Congress meant “every” contract restraining trade is illegal).

174. See Khan, *supra* note 6, at 745 (“I [Lina Khan] am not advocating a strict return to the structure-conduct-performance paradigm.”).

175. See *State ex inf. Hadley v. Standard Oil Co.*, 116 S.W. 902, 1034 (Mo. 1908), *aff’d sub nom. Standard Oil Co. of Ind. v. Missouri ex inf. Hadley*, 224 U.S. 270 (1912).

176. *Hadley*, 116 S.W. at 1034.

177. *Id.* *Hadley* revoked the right for Standard Oil to conduct business in Missouri. See Joseph Fred Benson, *Missouri’s Evolving Jurisprudence: A Brief History of the Supreme Court of Missouri, 1821 to 2008*, 65 J. Mo. B. 22, 26 (2009).

178. *Hadley*, 116 S.W. at 1034.

179. See generally *id.*; see *supra* Section II.B.

180. *Hadley*, 116 S.W. at 1034.

181. See, e.g., Apple Inc. (AAPL) Stock Statistics, YAHOO FIN., <https://perma.cc/YH5G-JPCD> (last visited Nov. 19, 2024); Microsoft Corp., Annual Report (Form 10-K) (July 30, 2024), <https://perma.cc/K2DV-UYQ8>.

182. See Herrman, *supra* note 24 (defining “Big Tech”).

183. See AAPL Stock Statistics, *supra* note 181.

capitalizations, at \$909.63 billion.<sup>184</sup> Relatedly, in their 2024 10-K financial statements, Microsoft had the most assets, \$512.163 billion,<sup>185</sup> and Meta had one of the fewest, \$229.623 billion.<sup>186</sup> The *Hadley* court held that companies worth “hundreds of millions of dollars” in 1908-value dollars warranted stricter antitrust enforcement.<sup>187</sup> One hundred million dollars in 1913 (based on the earliest available price-index data) is worth about \$3 billion today.<sup>188</sup> In other words, Apple’s capitalization exceeded 100-times the present-value capitalization of the defendant-company in *Hadley*.<sup>189</sup> Other Big Tech valuations are comparable.<sup>190</sup>

### E. Recent Case Law Underlying the Structure-Price Debate

Recent precedent shows courts have begun considering Neo-Brandeisian arguments from the FTC and DOJ to reject the consumer welfare standard.<sup>191</sup> The FTC and DOJ recently initiated a wave of antitrust actions against Big Tech companies.<sup>192</sup> The decisions that have come from that wave demonstrate a judicial movement toward the structure interpretation and stronger antitrust policy.<sup>193</sup>

#### 1. *United States v. Microsoft Corp.*

Before the government initiated its recent wave of actions, *United States v. Microsoft Corp.* steered federal courts away from the price

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184. See Meta Platforms, Inc. (META) Stock Statistics, YAHOO FIN., <https://perma.cc/NX26-FMKS> (last visited Nov. 19, 2024).

185. See Microsoft Form 10-K, *supra* note 181.

186. See Meta Platforms, Inc., Annual Report (Form 10-K) (Feb. 2, 2024), <https://perma.cc/5PJD-JKHT>.

187. State *ex inf.* *Hadley v. Standard Oil Co.*, 116 S.W. 902, 1034 (Mo. 1908).

188. See *Historical Consumer Price Index for All Urban Consumers*, BLS, at \*4–5, <https://perma.cc/6WV6-SU8L> (last visited Jan. 20, 2025) (reporting an average CPI, an inflation index, of 9.9 in 1913, the earliest available reporting date, and an average CPI of 304.702 in 2023). According to the Bureau of Labor Statistics, \$100 in 1982–84 roughly equates to \$9.90 in 1913 and \$304.70 in 2023; so, a dollar in 1913 is worth about \$30.78 today. *Id.*

189. See *id.*; *Hadley*, 116 S.W. at 1034; AAPL Stock Statistics, *supra* note 181.

190. See *Largest Tech Companies by Market Cap*, COMPANIESMARKETCAP.COM, <https://perma.cc/3R3D-WDVG> (last visited July 27, 2025) (giving the July 2025 market capitalizations of the 100 largest tech companies, with Nvidia and Microsoft having surpassed Apple’s \$3 trillion valuation).

191. See *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001); *United States v. Google LLC*, 747 F. Supp. 3d 1, 32 (D.D.C. 2024); *FTC v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 53–62 (D.D.C. 2024). *But see* *FTC v. Actavis, Inc.*, 570 U.S. 136, 161 (2013) (Roberts, J., dissenting) (“The point of antitrust law is . . . to promote consumer welfare.”).

192. See Elaine McArdle, *(Anti)Trust Issues*, HARV. L. BULL. (2024), <https://perma.cc/2KAF-MU9Z> (discussing pending antitrust cases as of October 1, 2024, against Google, Meta, Apple, and Amazon).

193. See, e.g., *Meta*, 775 F. Supp. 3d at 53–62; *FTC v. Amazon*, No. 2:23-cv-01495, 2024 WL 4448815, at \*5 (W.D. Wash. Sept. 30, 2024).

interpretation.<sup>194</sup> In *Microsoft*, the D.C. Circuit Court held that Microsoft violated the Sherman Act.<sup>195</sup> The court referred to “a century of case law” stating that a competitor “must” harm the competitive process and thereby harm consumers to violate the Sherman Act.<sup>196</sup> The court qualified that competitive harm is not itself anticompetitive, but “conduct which unfairly tends to destroy competition itself” is.<sup>197</sup>

The court relied on market structure and not market prices in reaching its decision.<sup>198</sup> In the Sherman Act’s Rule of Reason analysis, courts compare the defendant-company’s market share to comparable companies’ market shares.<sup>199</sup> One of Microsoft’s “main challenge[s]” on appeal was that “nascent” competitors should have been included in defining the relevant market size.<sup>200</sup> Nascent competitors are competitors that are not yet viable but threaten to take over a market in the “reasonably foreseeable future” with a breakthrough innovation.<sup>201</sup> Microsoft asserted that nascent competitors incentivized it to offer better prices.<sup>202</sup> The court agreed with Microsoft that the consumer option to “turn to other suppliers” prevents price harms.<sup>203</sup> Still, the D.C. Circuit rejected Microsoft’s arguments, saying that the at-issue nascent technologies were not “now” part of the market structure.<sup>204</sup> The court held that courts should only include “well-developed” threats, not nascent threats.<sup>205</sup> To be clear, the court still considered the price effects of Microsoft’s conduct.<sup>206</sup> However, price was not the *Microsoft* court’s main focus.<sup>207</sup>

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194. See *United States v. Microsoft Corp.*, 253 F.3d 34, 34 (D.C. Cir. 2001).

195. See *id.* at 53, 58.

196. *Id.* at 58.

197. *Id.* (quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993)).

198. See *Microsoft*, 253 F.3d at 53, 57–58.

199. See *id.* at 54; *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) (“The existence of [market] power ordinarily is inferred from the seller’s possession of a predominant share of the market.”).

200. *Microsoft*, 253 F.3d at 34.

201. *Id.* For an example of nascent competition, a Chinese artificial intelligence (AI) company “leapfrogged” Big Tech innovation just one month after releasing its AI model. See Steve Kopack & Brian Cheung, *Tech Stocks Fall as China’s DeepSeek Sparks U.S. Worries About the AI Race*, NBC NEWS (Jan. 27, 2025), <https://perma.cc/25Q9-5TQ8>. Microsoft and Big Tech stock prices “plunged,” reflecting investors’ concerns about the nascent company beating Big Tech. *Id.*

202. See *Microsoft*, 253 F.3d at 57.

203. See *id.* at 52.

204. See *id.* at 57.

205. *Id.* But see *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 53 (D.D.C. 2022) (asserting that acquisition of a “likely potential competitor” in a market could be anticompetitive conduct).

206. See *Microsoft*, 253 F.3d at 57.

207. See *id.* at 58.

## 2. *United States v. Google LLC*

From 2020 to 2021, the Khan-led FTC and other government entities initiated a wave of antitrust actions against Big Tech companies.<sup>208</sup> The actions alleged antitrust violations against Amazon,<sup>209</sup> Apple,<sup>210</sup> Meta,<sup>211</sup> and Google.<sup>212</sup> The wave of government actions may have begun a new, fifth period in the structure-price debate, undoing the long-standing policy favoring the consumer welfare standard.<sup>213</sup>

Prominently, in *United States v. Google LLC*, the District Court of D.C. held Google violated the Sherman Act, marking the first decision of the enforcement wave.<sup>214</sup> The *Google* court relied on the *Microsoft* decision to adopt the structure interpretation.<sup>215</sup> The court held that Google's violations arose through its structural dominance, even when it presented little evidence of price harms.<sup>216</sup>

The district court adopted the structure interpretation to hold that Google violated the Sherman Act.<sup>217</sup> Google did not charge a price to use its browser service, so it could not control market prices.<sup>218</sup> Despite Google's no-price business model, the court held Google's dominance violated the Sherman Act because its exclusive dealing agreements unfairly blocked competitors.<sup>219</sup> The court noted that Google has maintained a structural dominance since 2009, which "easily" demonstrated dominance.<sup>220</sup> The court was unconvinced by Google's arguments that artificial intelligence, a nascent technology, lowered

208. See McArdle, *supra* note 192.

209. See David McCabe, *U.S. Accuses Amazon of Illegally Protecting Monopoly in Online Retail*, N.Y. TIMES (Sept. 26, 2023), <https://perma.cc/2763-959D>.

210. See *Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 967 (9th Cir. 2023) (describing Apple's app store as a "walled garden" that prevents app developers from offering applications to iPhones); David McCabe & Tripp Mickle, *U.S. Sues Apple, Accusing It of Maintaining an iPhone Monopoly*, N.Y. TIMES (Mar. 21, 2024), <https://perma.cc/YZ6L-VZK6>.

211. See *FTC v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 26 (D.D.C. 2024); Cecelia Kang, *U.S. Revives Facebook Suit, Adding Details to Back Claim of a Monopoly*, N.Y. TIMES (Nov. 4, 2021), <https://perma.cc/6A2H-UK9R>.

212. See *United States v. Google LLC*, 747 F. Supp. 3d 1, 32 (D.D.C. 2024) (D.D.C. Aug. 5, 2024); see also Amy Sindik, *Big Tech and Tying Arrangements: Are Antitrust Revisions Needed?*, 28 COMM. L. & POL'Y 47, 49 tbl. 1 (2023).

213. See Stucke & Ezrachi, *supra* note 5.

214. See *United States v. Google LLC*, 747 F. Supp. 3d 1, 32 (D.D.C. 2024).

215. See *id.* at 106 ("The [*Google*] court structures its conclusions of law consistent with *Microsoft*'s analytical framework.").

216. See *id.* at 117–18 (acknowledging the evidence of Google charging an abnormal price "is limited"); *id.* at 123 (holding that evidence of structural harms "suffices to establish market power").

217. See *id.* at 117–18.

218. See *id.* at 109 (understanding that "search is a zero-priced good").

219. See *id.* at 152.

220. See *id.* at 119.

barriers to enter its market.<sup>221</sup> The court further rejected Google's counterargument that its product quality improved.<sup>222</sup> Then, the court expressed its reservations with existing antitrust laws.<sup>223</sup> It declared in dicta that some laws may be outdated, like the *Brown Shoe* factors test.<sup>224</sup> The court also broached whether Google intended to violate antitrust laws, even though antitrust laws do not currently consider a dominator's intent.<sup>225</sup>

After the court published the *Google* opinion, news outlets reported that *Google* marked a "landmark" decision because the government's legal arguments and factual allegations were meritorious.<sup>226</sup> Commentators predicted that *Google* would influence other courts to adopt the structure interpretation against Big Tech companies.<sup>227</sup> Additionally, since the *Google* decision, plaintiffs and prosecutors have initiated more actions against Google.<sup>228</sup> Although the wave of Big Tech litigation has not ended, recent rulings reveal *Google* has persuaded courts.<sup>229</sup>

### 3. Recent Motion Rulings

In the motion rulings in *FTC v. Meta Platforms, Inc.* and *FTC v. Amazon, Inc.*, the courts supported the structure interpretation that the *Microsoft* and *Google* courts applied.<sup>230</sup> While the *Meta* and *Google* courts were arguably bound by the *Microsoft* decision from the D.C. Circuit

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221. *See id.* at 123.

222. *See id.* at 123.

223. *See id.* at 109, 187.

224. *See* United States v. Google LLC, 747 F. Supp. 3d 1, 109 n.4 (D.D.C. 2024). The *Brown Shoe* factors deal with how to define a market. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325–34, (1962).

225. *See* United States v. Google LLC, 747 F. Supp. 3d 1, 187 (D.D.C. 2024); Maurice E. Stucke, *Is Intent Relevant?*, 8 J.L. ECON. & POL'Y 801, 802–07 (2012) (summarizing how intent typically has a role in the antitrust analysis, but its exact function in some instances is "unsettled"). *But see* United States v. U.S. Gypsum Co., 438 U.S. 422, 443 (1978) (declaring an intent element for antitrust crimes).

226. *See, e.g.,* da Silva & Rahman-Jones, *supra* note 13; McCabe, *Google, supra* note 12.

227. *See, e.g.,* da Silva & Rahman-Jones, *supra* note 13 ("[I]f the *Google* case goes through, it would affect more tech giants."); McCabe, *Google, supra* note 12 ("[*Google*] is likely to influence other government antitrust lawsuits against [Big Tech companies].").

228. *See* Jordan Novet & Jennifer Elias, *Chegg Sues Google for Hurting Traffic as It Considers Strategic Alternatives*, CNBC, <https://perma.cc/3TDW-U5QV> (last updated Feb. 25, 2025); Matthew Barakat, *Google Faces a New Antitrust Trial After Ruling Declaring Search Engine a Monopoly*, ASS. PRESS, <https://perma.cc/Y4SH-LZXM> (last updated Sept. 9, 2024).

229. *See, e.g.,* *FTC v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 53–62 (D.D.C. 2024); *FTC v. Amazon*, No. 2:23-cv-01495, 2024 WL 4448815, at \*7 (W.D. Wash. Sept. 30, 2024).

230. *See, e.g.,* *Meta*, 775 F. Supp. 3d at 53–62; *Amazon*, 2024 WL 4448815, at \*5.

Court, the *Amazon* court was not bound by the *Microsoft* decision but still adopted the structure interpretation.<sup>231</sup>

In *Meta*, the District Court of D.C. abrogated the consumer welfare standard.<sup>232</sup> *Meta* argued that the “consumer welfare standard” was appropriate for the enforcement action.<sup>233</sup> The FTC countered that price effects are “downstream” from anticompetitive conduct, so a structure-focused antitrust interpretation was appropriate.<sup>234</sup> The FTC prevailed.<sup>235</sup> The court held that *Meta*’s alleged behavior was anticompetitive under the structure interpretation.<sup>236</sup> The court noted that Facebook did not charge consumers to use its products.<sup>237</sup> Relying on the *Microsoft* decision, the *Meta* court focused on whether *Meta*’s actions “foreclosed competition,” not whether they “led to price or output change.”<sup>238</sup> The *Meta* court announced that price-output effects remain “probative” but not dispositive.<sup>239</sup>

Similarly, in *Amazon*, the District Court of Washington denied *Amazon*’s motion to dismiss.<sup>240</sup> The FTC’s arguments persuaded the court.<sup>241</sup> The court did not rely on price or output to hold *Amazon* liable.<sup>242</sup> Rather, the court quoted a Ninth Circuit case that defined anticompetitive conduct as actions that tend to “impair the opportunities of rivals” and “do not further competition.”<sup>243</sup> The *Amazon* decision is important because while the *Microsoft* decision binds the *Google* and *Meta* courts, the *Amazon* court relied on Ninth-Circuit, not D.C.-Circuit, precedent.<sup>244</sup>

Together, the *Microsoft*, *Google*, *Meta*, and *Amazon* opinions form the foundational persuasive law for the Big Tech structure-price debate.<sup>245</sup> This Comment reaches its conclusions using these opinions, historical trends, antitrust statutes, and legal commentary.<sup>246</sup>

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231. See generally *Amazon*, 2024 WL 4448815.

232. See *Meta*, 775 F. Supp. 3d at 53–62 (rejecting *Meta*’s arguments that the court should only consider “consumer welfare,” calling the arguments “conflate[d]”).

233. *Id.* at 53.

234. *Id.* at 54.

235. See *id.* at 53.

236. See *id.* at 53–55, 60–61.

237. See *id.* at 53.

238. *Id.* at 54.

239. *Id.* at 58.

240. See *FTC v. Amazon*, No. 2:23-cv-01495, 2024 WL 4448815, at \*7 (W.D. Wash. Sept. 30, 2024).

241. See *id.* (quoting *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1137 (9th Cir. 2022)).

242. See *Amazon*, 2024 WL 4448815, at \*5.

243. *Id.* (quoting *Dreamstime.com, LLC v. Google LLC*, 54 F.4th 1130, 1137 (9th Cir. 2022)).

244. See generally *Amazon*, 2024 WL 4448815.

245. See *infra* Part III.

246. See *infra* Part III.

### III. ANALYSIS

This Comment reaches two conclusions.<sup>247</sup> First, courts will continue to apply the structure interpretation to Big Tech antitrust cases because the law supports the structure interpretation.<sup>248</sup> Second, the structure interpretation better addresses tech market economic concerns.<sup>249</sup>

#### A. *Legally, Courts Will Probably Continue to Adopt the Structure Interpretation for Big Tech Companies.*

This Comment first predicts that courts will continue to adopt the Sherman Act structure interpretation for Big Tech antitrust cases after *United States v. Google LLC*.<sup>250</sup> Two points support this conclusion: (1) courts interpret antitrust statutes within the context of external, non-legal factors,<sup>251</sup> and (2) courts will likely want to expand antitrust laws based on new external conditions posed by Big Tech companies.<sup>252</sup>

##### 1. Antitrust Laws Give Courts Flexibility to Side with the Structure Interpretation.

According to the traditional canons of statutory interpretation—plain text, legislative intent, and comparative statutes<sup>253</sup>—the federal antitrust statutes are flexible to accommodate either the structure or the price interpretation.<sup>254</sup> First, the plain language of the Sherman Act and its subsequent statutes do not resolve the debate.<sup>255</sup> Congress used broad language to draft the antitrust statutes, and none of them clearly addresses the structure-price debate.<sup>256</sup> However, as Bork pointed out, antitrust statutes use economic terms like “combinations” and “monopolies.”<sup>257</sup> Because the statutes use these terms, Bork would agree that the correct interpretation considers economic policy arguments.<sup>258</sup> The economic implications of the different interpretations are examined later in Section

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247. See *infra* Sections III.A.–III.B.

248. See *infra* Section III.A.

249. See *infra* Section III.B.

250. See *supra* Sections II.B.–II.E.

251. See *infra* Section III.A.1.

252. See *infra* Section III.A.2.

253. See *supra* Section II.C.; *Neder v. United States*, 527 U.S. 1, 21 (1999) (assessing Congress’s intended statutory interpretations with a “natural reading” and an inquiry to the “settled meaning” in common law).

254. See *supra* Sections II.B.–II.E.

255. See 15 U.S.C. §§ 1, 2, 12, 18, 19, 45; *supra* Section II.C.

256. See *supra* Section II.C.; *United States v. N. Secs. Co.*, 120 F. 721, 723 (D. Minn. 1903).

257. See 15 U.S.C. §§ 1, 2.

258. See Bork, *Goals*, *supra* note 48, at 244.

III.B.,<sup>259</sup> but as a threshold matter, interpreters cannot solely examine plain language to resolve the structure-price debate.<sup>260</sup>

Next, Congress's intentions for the structure-price debate are unclear.<sup>261</sup> Both Chicago School and Neo-Brandeisian scholars want courts to recognize their theories about the drafters' intentions.<sup>262</sup> Yet, courts have not found either sides' arguments concretely persuasive, evidenced by inconsistent precedent.<sup>263</sup>

Then, Sherman Act's subsequent statutes do not reveal the drafters' intentions for the Sherman Act.<sup>264</sup> The Clayton Act addresses structure and price concerns by penalizing both "acquisitions in restraint of trade," a structure-focused conduct, and "price discrimination," a price-focused conduct.<sup>265</sup> Likewise, one might interpret the FTC Act to expand antitrust laws in general or just the FTC's powers.<sup>266</sup> Neither the Clayton Act nor the FTC Act clarify the Sherman Act drafters' intentions, so the drafters' intentions remain uncertain.<sup>267</sup>

With no definitive answer in federal statutes, interpreters should consider *stare decisis* and policy.<sup>268</sup> Since Congress enacted the Sherman Act, courts have "waxed and waned" about what they consider the "correct" interpretation, based on policy considerations.<sup>269</sup> In the first period of antitrust, courts used antitrust laws to reduce dominators that presented poor economic conditions.<sup>270</sup> Then, in the second period, courts adhered to the political federalism movement.<sup>271</sup> In the third period, the public's corporate aversion pressured courts to strengthen antitrust laws.<sup>272</sup>

259. See *infra* Section III.B.

260. See 15 U.S.C. §§ 1–7, 12–27, 45.

261. See Bork, *Goals*, *supra* note 48, at 242.

262. See *supra* Section II.B., II.D.

263. Compare Bork, *Goals* *supra* note 48, at 242, and Khan, *supra* note 6, at 740–44, with *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act is not to protect businesses . . . it is to protect the public."), and *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (quoting *Spectrum Sports*, 506 U.S. at 458) ("The [Sherman Act] directs itself . . . against conduct which unfairly tends to destroy competition itself.").

264. See *supra* Section II.C.2.

265. See 15 U.S.C. §§ 12, 18.

266. See 15 U.S.C. § 45.

267. See 15 U.S.C. §§ 12, 18–19, 45; see also Bork, *Goals*, *supra* note 48, at 242, 244.

268. See Section II.B.

269. See Stucke & Ezrachi, *supra* note 5.

270. See *supra* Section II.B.; *N. Secs. Co. v. United States*, 193 U.S. 197, 346 (1904); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 79–80 (1911); *United States v. Am. Tobacco Co.*, 221 U.S. 106, 187–88 (1911).

271. See *supra* Section II.B.; *United States v. Wilshire Oil Co.*, 9 F. Supp. 396, 402 (S.D. Cal. 1934).

272. See *supra* Section II.B.; *Appalachian Coals v. United States*, 288 U.S. 344, 360 (1933).

In the fourth period, Chicago School scholars persuaded courts that price dominance harmed the economy.<sup>273</sup> Evidently, courts' waxing and waning policies have correlated to changing external factors, like economic conditions and prevailing scholarship.<sup>274</sup>

External factors support the structure interpretation.<sup>275</sup> For one factor, advocacy for the structure interpretation has reached the American government.<sup>276</sup> Lina Khan revolutionized antitrust law with her advocacy both before and during her FTC reign.<sup>277</sup> In the same way that Robert Bork led the consumer welfare movement,<sup>278</sup> Khan has led courts to adopt the structure interpretation.<sup>279</sup> For another factor, public pressures likely will influence courts to adopt the structure interpretation.<sup>280</sup> After *Google*, popular news outlets published articles reporting subsequent decisions and predicting antitrust expansion.<sup>281</sup> The extensive news coverage evidences that laypeople closely follow the Big Tech structure-price debate, possibly showcasing the public's desire for Big Tech regulation.<sup>282</sup> Finally, the most important factor is the state of technology markets.<sup>283</sup> This discussion is reserved for the economic arguments in Section III.B., but the arguments support the structure interpretation.<sup>284</sup>

Considering external factors, the Chicago School's legal arguments no longer work.<sup>285</sup> Interpreters cannot conclude whether the Sherman Act should address structure or price harms from statutes alone.<sup>286</sup> Richard Posner brought up that antitrust cases become moot under the price

273. See *supra* Section II.B.; *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997).

274. Compare Stucke & Ezrachi, *supra* note 5, with *supra* Section II.B (describing the periods of antitrust enforcement and how they correlate to public pressure, changing scholarship, and politics).

275. See *supra* Sections II.D.–II.E.

276. See Khan, *supra* note 6, at 740–44; Fung & Thorbecke, *supra* note 163; McArdle, *supra* note 192.

277. See Khan, *supra* note 6, at 740–44; Fung & Thorbecke, *supra* note 163.

278. See *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Rehnquist, J., concurring) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)); *State Oil Co. v. Khan*, 522 U.S. 3, 16 (1997) (citing ROBERT BORK, *THE ANTITRUST PARADOX* 281–82 (1978)).

279. See McArdle, *supra* note 192; *supra* Section II.B. (describing how courts tend to follow other courts' interpretations).

280. See, e.g., da Silva & Rahman-Jones, *supra* note 13; McCabe, *Google*, *supra* note 12.

281. See da Silva & Rahman-Jones, *supra* note 13; McCabe, *Google*, *supra* note 12.

282. See da Silva & Rahman-Jones, *supra* note 13; McCabe, *Google*, *supra* note 12. Cf. *FTC v. Gratz*, 253 U.S. 421, 432 (1920) (describing that the American people regarded market concentration as “menacing,” prompting heightened antitrust regulation).

283. See *infra* Section III.B.

284. See *infra* Section III.B.

285. See BORK, *supra* note 7, at 57–67, 108–16; Bork, *Goals*, *supra* note 48, at 242, 246.

286. See *supra* Section III.A.

interpretation,<sup>287</sup> but this argument does not defeat Neo-Brandeisian arguments on its own.<sup>288</sup> The Chicago School theories may have worked in the 1970s and 1980s,<sup>289</sup> but courts have started to deviate from the consumer welfare standard,<sup>290</sup> and other courts are likely to follow those courts.<sup>291</sup> Hence, the Chicago School's legal arguments do not defeat the Neo-Brandeisian's arguments to adopt the structure interpretation.<sup>292</sup>

## 2. *Google* Signaled Courts' Adoption of the Structure Interpretation.

Given that antitrust laws give courts interpretative flexibility, it follows that *Google* signaled an expansion of antitrust laws.<sup>293</sup> The *Google* court reaffirmed *Microsoft* to conclude that the structure interpretation best addresses Big Tech antitrust concerns.<sup>294</sup> After the *Google* decision, the *Meta* and *Amazon* courts cited similar precedent to adopt the structure interpretation,<sup>295</sup> indicating that *Google* most likely has already influenced other courts.<sup>296</sup>

Lina Khan's departure from the FTC could slow courts' adoption of the FTC's structure arguments.<sup>297</sup> However, before she departed, several judges already considered her position on the structure interpretation.<sup>298</sup> The wave of recent cases that Khan and the Neo-Brandeisians initiated will carry persuasive weight for pending cases.<sup>299</sup> Therefore, the *Google*

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287. See Posner, *supra* note 7, at 938.

288. Compare *id.*, with *infra* Section III.B.

289. See *supra* Section II.D.1.

290. See *supra* Sections II.E.1.–II.E.3.; see, e.g., United States v. Google LLC, 747 F. Supp. 3d 1, 32 (D.D.C. 2024).

291. See *supra* Section II.E.4; da Silva & Rahman-Jones, *supra* note 12; McCabe, *Google*, *supra* note 12.

292. See Bork, *Goals*, *supra* note 48, at 242; Posner, *supra* note 7, at 926, 929; *supra* Section III.A.1.

293. See *Google*, 747 F. Supp. 3d at 32, 117–24.

294. See *id.* at 106. Compare *id.* at 32 (holding the Sherman Act regulates a priceless industry), with Khan, *supra* note 6, at 740–44 (arguing the Sherman Act should not regulate price).

295. See *FTC v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 53–62 (D.D.C. 2024); *FTC v. Amazon*, No. 2:23-cv-01495, 2024 WL 4448815, at \*7 (W.D. Wash. Sept. 30, 2024).

296. See *Meta*, 775 F. Supp. 3d at 53–62; *Amazon*, 2024 WL 4448815, at \*7.

297. See Allison Morrow, *Lina Khan Likely to Be Fired as FTC Chair Under a Trump Presidency*, CNN BUS. (Nov. 12, 2024), <https://perma.cc/46JZ-JVKW>. But see Shreyas Sinha, *FTC Chair Lina Khan Is Leaving—What Will Happen to Her Big Tech Probes?*, OBSERVER (Dec. 12, 2024), <https://perma.cc/7W4J-B36A> (discussing that Khan's successor “seems to share her general view of Big Tech's dominance”).

298. See Tzippy Shmilovitz, *The Woman Who Could Dismantle the Technology Giants*, YNEWS.COM (Oct. 3, 2023, 3:46 PM), <https://perma.cc/KFK4-7RG7>.

299. See *id.*; McArdle, *supra* note 192.

decision will influence courts to continue to adopt the structure interpretation with the flexibility of antitrust laws.<sup>300</sup>

*B. Economically, the Structure Interpretation Will Likely Address Big Tech Concerns.*

Courts evidently have adopted the structure interpretation based on Neo-Brandeisian legal arguments.<sup>301</sup> However, whether the structure interpretation will remedy Big Tech economic concerns, if they even exist, presents a separate issue.<sup>302</sup> This Comment concludes that Big Tech economic concerns do exist, and the structure interpretation will remedy these concerns.<sup>303</sup> Two ideas support these two economic conclusions: (1) Big Tech companies present many market structure concerns,<sup>304</sup> and (2) Big Tech industries present few market price concerns.<sup>305</sup> Because the structure interpretation, not the price interpretation, regulates market dominance,<sup>306</sup> the structure interpretation better alleviates existing concerns with Big Tech market dominance.<sup>307</sup>

1. The Structure Interpretation Addresses Big Tech's Structure Problems

The Big Tech antitrust concerns come from Big Tech companies' massive, multi-trillion-dollar market sizes.<sup>308</sup> This dominance presents market structure problems.<sup>309</sup> Big Tech companies dedicate billions of dollars to outgrowing smaller companies.<sup>310</sup> Moreover, Big Tech companies have dominated their respective markets for years,<sup>311</sup> achieving advantages and customer loyalty over competitors in new economy markets.<sup>312</sup>

For a competitor to outperform a Big Tech dominator, the competitor would need to capitalize on a disruption, like a change in consumer

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300. See *Google*, 2024 WL 3647498, at \*3; *supra* Sections II.B., II.C., II.E.

301. See *supra* Sections II.D., II.E.

302. See *supra* Section II.D.

303. See *supra* Sections II.D., II.E.

304. See *infra* Section III.B.1.

305. See *infra* Section III.B.2.

306. See Lambert & Cooper, *supra* note 5, at 357.

307. See *id.*

308. See AAPL Stock Statistics, *supra* note 181; *United States v. Microsoft Corp.*, 253 F.3d 34, 57 (D.C. Cir. 2001) (holding a 95% market share is monopolistic).

309. See AAPL Stock Statistics, *supra* note 181; Microsoft Form 10-K, *supra* note 181.

310. See Microsoft Form 10-K, *supra* note 181; Meta Form 10-K, *supra* note 186.

311. See *United States v. Google LLC*, No. 20-CV-3010, 2024 WL 3647498, at \*2 (D.D.C. Aug. 5, 2024); AAPL Stock Statistics, *supra* note 181.

312. See *Google*, 747 F. Supp. 3d at 117–24; Posner, *supra* note 7, at 929.

demand.<sup>313</sup> However, given society's reliance on Big Tech products,<sup>314</sup> such a disruption is unlikely to happen soon in the tech industry,<sup>315</sup> or at least Big Tech would be expected to lead the disruption.<sup>316</sup> Instead of an economic disruption, expanding antitrust laws could artificially disrupt technology markets, altering the status quo and reducing dominators' sizes.<sup>317</sup> Ideally, such a disruption would give smaller competitors a chance to compete against dominators.<sup>318</sup> A chance to compete would give consumers more product alternatives and strengthen competitive forces.<sup>319</sup>

Like its legal arguments, the Chicago School's economic arguments for the price interpretation are outdated.<sup>320</sup> The Chicago School argued that the opportunity to achieve dominance incentivized businesses to compete.<sup>321</sup> However, as a result of Big Tech's pervasiveness, markets have solidified,<sup>322</sup> so smaller companies struggle to outcompete big companies.<sup>323</sup> Richard Posner argued that new economy market volatility is high, so dominators are not secured in their market positions.<sup>324</sup> Market volatility enabled nascent competitors to outcompete dominators twenty years ago.<sup>325</sup> Regardless, tech market dominators have had decades to develop first-mover advantages and establish a firm market presence, which has decreased tech market volatility.<sup>326</sup> The consumer welfare

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313. See *supra* Section II.D. (describing Big Tech companies' assets, capitalizations, and societal integration); Stucke & Ezrachi, *supra* note 5; Posner, *supra* note 7, at 929, 938–39.

314. See Marr, *supra* note 131; Jenik, *supra* note 132; Bergeron & Blinder, *supra* note 133.

315. See *United States v. Microsoft Corp.*, 253 F.3d 34, 53, 58 (D.C. Cir. 2001) (excluding nascent competition from Microsoft's market analysis when the lower court found that no nascent competitors "could now, or would soon" outcompete Microsoft); see, e.g., *Google*, 2024 WL 3647498, at \*80 (describing artificial intelligence's potential to outcompete Google's search functions and concluding it will not for the "foreseeable future").

316. See, e.g., Microsoft Form 10-K, *supra* note 181 (showing billions of dollars in assets).

317. See Stucke & Ezrachi, *supra* note 5 (calling expansion of antitrust law a "disruption").

318. See *supra* Section II.D.1–II.D.2. (demonstrating that society relies on Big Tech products and that Big Tech companies compare to Industrial-Revolution giants).

319. See *supra* Section II.A.

320. See *Bilski v. Kappos*, 561 U.S. 593, 605 (2010) ("Technology . . . progress[es] in unexpected ways.").

321. See Posner, *supra* note 7, at 929.

322. See Kopp, *supra* note 186.

323. See Posner, *supra* note 7, at 926, 929 (discussing technology market volatility twenty years ago).

324. See *id.* at 939.

325. See *id.*; *supra* Section II.B. (discussing how structure-price interpretations change).

326. See Posner, *supra* note 7, at 929; *Butamax Advanced Biofuels LLC v. Gevo, Inc.*, 868 F. Supp. 2d 359, 374 (D. Del. 2012) (discussing first-mover advantages); Kopp, *supra* note 186 (describing how sales steady in the "maturity" economic stage of a

standard fails to address new problems that Big Tech companies present.<sup>327</sup>

The result of long-standing, unchallenged domination is not that companies will innovate and keep prices low.<sup>328</sup> Rather, dominators will focus on blocking competition and divest from product improvement.<sup>329</sup> Brandeis recognized this phenomenon over 100 years ago.<sup>330</sup> Now, it is reoccurring.<sup>331</sup> The antitrust statutes' drafters aimed to prevent this phenomenon.<sup>332</sup> Big Tech companies pose actual structure problems that courts can remedy by adopting the structure interpretation.<sup>333</sup>

## 2. Big Tech Does Not Pose Price Problems That the Price Interpretation Would Remedy

While major structure problems exist in Big Tech industries, Big Tech price problems are few.<sup>334</sup> As many recent decisions highlight, some Big Tech companies do not charge any price for their main products, but they have maintained structural dominance.<sup>335</sup> Lina Khan is correct that the Chicago School's consumer welfare standard is ill-equipped to tackle Big Tech companies.<sup>336</sup> Technology markets are too complicated to rely on market prices because companies need to charge a price to manipulate market prices.<sup>337</sup>

Robert Bork tried to justify the price-focused consumer welfare model with macroeconomic models.<sup>338</sup> While macroeconomic models look at prices,<sup>339</sup> Big Tech companies do not charge prices but still harm markets.<sup>340</sup> The structure interpretation stops dominators before they cause

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company, which could describe the stage of the Big Tech industry); Adam Hayes, *What is a Monopoly? Types, Regulations, and Impact on Markets*, INVESTOPEDIA, <https://perma.cc/ZU99-5VWV> (last updated June 21, 2024).

327. See *supra* Section II.D.

328. See Brandeis, *Other People's Money*, *supra* note 6.

329. See *id.*

330. See *id.*

331. See *supra* Sections II.D.1.–II.D.2. (describing ways in which Big Tech companies have become economically and socially integrated); GEORGE SANTAYANA, *THE LIFE OF REASON: OR THE PHASES OF HUMAN PROGRESS* 284 (Charles Scribner's Sons, 1948) (1905), <https://perma.cc/28UG-LPS2> (“Those who cannot remember the past are condemned to repeat it.”).

332. See *supra* Section II.A.

333. See *supra* Section II.D.2.

334. See, e.g., *United States v. Google LLC*, 747 F. Supp. 3d 1, 109 (D.D.C. 2024); *FTC v. Meta Platforms, Inc.*, 775 F. Supp. 3d 16, 53–62 (D.D.C. 2024).

335. See *Google*, 747 F. Supp. 3d at 117–24; *Meta*, 775 F. Supp. 3d at 53–62.

336. See Khan, *supra* note 6, at 744. Compare *id.*, with *Google*, 747 F. Supp. 3d at 117–24, and *Meta*, 775 F. Supp. at 53.

337. See Khan, *supra* note 6, at 738, 740–44; Posner, *supra* note 7, at 925.

338. See BORK, *supra* note 7, at 108–16.

339. See *id.*

340. See, e.g., *United States v. Google LLC*, 747 F. Supp. 3d 1, 109 (D.D.C. 2024).

price harms.<sup>341</sup> Because Big Tech companies cause harm through market structures, not market prices, courts should adopt the structure interpretation to remedy Big Tech antitrust concerns.<sup>342</sup>

Both legally and economically, the structure interpretation is more appropriate to regulate Big Tech dominators than the price interpretation, and accordingly, *Google* marks a new era of antitrust policy that the structure interpretation will support.<sup>343</sup>

#### IV. CONCLUSION

Based on Neo-Brandeisian arguments, courts should follow the trend from the recent wave of antitrust litigation and adopt the structure interpretation.<sup>344</sup> Where Congress has not declared otherwise with any clarity,<sup>345</sup> the solution to the antitrust “paradox” is that either the structure or price interpretations could be correct, so long as the law addresses timely economic issues.<sup>346</sup> Problematically, the Chicago School’s consumer welfare standard is outdated with respect to Big Tech antitrust.<sup>347</sup> Switching to the structure interpretation would protect consumers and competitors against modern economic concerns.<sup>348</sup> The structure interpretation is supported in both law and economics.<sup>349</sup>

In the future, when Big Tech problems are remedied or tech markets evolve, other antitrust policies may be more appropriate.<sup>350</sup> Until then, the American government is likely to regulate Big Tech companies’ structural dominance, and rightfully so.<sup>351</sup>

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341. See Lambert & Cooper, *supra* note 5, at 353.

342. See *supra* Part II.

343. See *supra* Part III.

344. See generally *Google*, 747 F. Supp. 3d; see *supra* Sections III.A.2, III.B.1.

345. See *supra* Section II.C.

346. See *supra* Section III.A.1.

347. See *supra* Section III.B.2.

348. See *supra* Section III.A.1.

349. See *supra* Part III.

350. See *supra* Sections III.A.

351. See *supra* Part III.