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Joshua Murphy

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A “Special” Solution for Antitrust’s Big Tech Problem

Joshua Murphy*

I. INTRODUCTION

There are many names used to denote the largest companies in history, including “Big Tech,” the big four, and GAFA. Whatever label they are given, the fears and suspicions surrounding Google (also known as Alphabet) Apple, Facebook (also known as Meta), and Amazon are similar, and they are not novel. These concerns include data privacy, censorship, and, most relevant here, antitrust. In totality, this disquiet stems from the fact that these companies are massive beyond comprehension—as Congress put it: “[C]ompanies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons.”¹ Railroad tycoons, however, did not have trillion-dollar market caps.²

While Big Tech firms certainly affect individuals’ personal lives,³ they have far more control over the marketplace, as highlighted by the public concern over Big Tech’s market dominance.⁴ Meanwhile, the lack of actual antitrust enforcement against Big Tech evinces an incongruity between Big Tech business models, traditional antitrust doctrines, and public

* J.D. Candidate, Seton Hall University School of Law; B.A., The College of New Jersey.

¹ STAFF OF SUBCOMM. ON ANTITRUST, COM., & ADMIN. L. OF THE COMM. ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 6–7 (Comm. Print 2022) [hereinafter INVESTIGATION OF COMPETITION].

² Apple was the first company to surpass a trillion-dollar market capitalization with Microsoft, Alphabet, and Amazon following in short order; however, Alphabet and Amazon may soon see their market caps fall below that trillion-dollar threshold. See Nick Routley, *The Shrinking Trillion Dollar Market Cap Club*, VISUAL CAPITALIST (Nov. 4, 2022), <https://www.visualcapitalist.com/shrinking-trillion-dollar-market-cap-club>. For a discussion on why some Big Tech companies are trending out of the trillion-dollar club, see Luc Olinga, *Amazon, Alphabet, Meta, and Microsoft Go Through a Nightmare*, STREET (Oct. 28, 2022, 19:41 AM), <https://www.thestreet.com/technology/the-very-bad-week-of-amazon-alphabet-meta-and-microsoft>.

³ See, e.g., Jack Turner, *The 7 Main Ways Technology Impacts Your Daily Life*, TECH.CO (Aug. 20, 2022, 12:01 AM), <https://tech.co/vpn/main-ways-technology-impacts-daily-life>. The invasion by Big Tech into people’s private lives has led to calls for greater regulation of technology giants. See Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893, 896 (2022).

⁴ See Alford, *supra* note 3, at 895–97 (providing an overview of voices that have spoken out against Big Tech).

sentiment.⁵ Concurrently, however, the limits placed on antitrust doctrine have merit, and caution should be taken when expanding the reach of antitrust laws.⁶ To address these concerns, this Comment will explore the relationship between Big Tech and antitrust, specifically in regard to single-firm monopolization under the Sherman Act Section 2 (“Section 2”),⁷ and assert that a federal court of appeals specializing in antitrust law should be established as the most efficacious method to adjudicate Big Tech antitrust disputes.

Part II describes the current U.S. antitrust doctrine for single-firm monopolization under Section 2. Thereafter, this Part defines “Big Tech” in the antitrust context and explores the shortcomings of the Section 2 framework in relation to Big Tech’s unique products and markets. Part III then introduces generalist and specialized courts. This Part describes the predominantly generalist Article III federal judiciary, compares the effects of generalist and specialized courts, and highlights particular scenarios in which specialization may be desirable. Part IV advocates for utilizing a specialized appellate antitrust court to address the unique challenges Big Tech poses by explaining how specialization’s unique outcomes can counteract Section 2’s current inefficiencies. Part V emphasizes specialization’s efficacy as applied to Big Tech antitrust by exploring the shortcomings of other potential solutions, namely, broad regulation through legislation. Part VI concludes this Comment and summarizes why specialized courts are best

⁵ See Sophie Copenhaver, Note, *Big Tech Is Why I Have (Anti)Trust Issues*, 95 ST. JOHN’S L. REV. 869, 869 (2021) (“Antitrust laws were once an effective tool to break up companies that had grown too large. However, . . . they are no longer useful in regulating large technology companies . . .”). Despite a perceived lack of enforcement overall, the Department of Justice does have a pending suit against Google, *see* complaint at 1–4, *United States v. Google LLC*, 1:23-cv-00108 (E.D. Va. Jan. 24, 2023) (alleging Google’s practice of requiring website publishers to use only Google’s “ad exchange” tool and hampering competitors’ ability to advertise on the search engine), and the Federal Trade Commission has a pending suit against Facebook, *see* complaint at 2, *FTC v. Meta Platforms, Inc.*, 3:22-cv-04325 (N.D. Cal. July 27, 2022) (seeking to enjoin Facebook (Meta) from acquiring Within Unlimited, Inc., a virtual reality company).

⁶ *Infra* Part V.

⁷ 15 U.S.C. § 2.

equipped to stifle the anticompetitive effects of Big Tech and achieve American antitrust objectives.

II. THE MONOPOLIZATION FRAMEWORK AND ITS APPLICATION TO BIG TECH

Overall, U.S. antitrust law has historically sought to promote market efficiency, cultivate competition, and, chiefly, maximize consumer welfare.⁸ Valuing consumer welfare above all is largely unique to the United States, and allows for firms to maintain monopolies as long as the end-consumer is not negatively targeted; contrarily, European antitrust law emphasizes fairness in competition and, thus, strives primarily to provide competitors with a level playing field.⁹ The two systems' differences largely derive from the United States rooting its antitrust values in tradition,¹⁰ while Europe has adapted its values to an evolving public perception of the marketplace.¹¹ Distinct from other arguments, this Comment does not advocate for a shift in focus for U.S. antitrust law, in regards to Big Tech or otherwise; rather, it argues that the current U.S. antitrust judicial system insufficiently promotes U.S. values when applied to Big Tech due to its employment of a generalist judiciary. As this Comment will articulate, the inadequacies inherent in a generalist judiciary, including a lack of uniformity in decision-making and expertise, are most apparent in Big Tech antitrust litigation where the complex economic concepts that underly novel technology markets weigh heavily on outcomes.¹²

⁸ PHILIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* 100 (5th ed. 2021).

⁹ James Calder & Abid Qureshi et al., *A Review of Similarities and Contrasts Between American Antitrust and European Union Competition Law*, 2004 COLUM. BUS. L. REV. 380, 383.

¹⁰ See John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563, 571–76 (2022) (discussing the advent of the consumer welfare theory and its roots in the U.S. antitrust tradition).

¹¹ Calder & Qureshi et al., *supra* note 9, at 383–87 (providing a useful overview of some important differences between European and U.S. antitrust law).

¹² *Infra* Part IV.C.1. As an aside, nothing in this Comment should be read to demean the generalist judiciary in any way. This Comment merely argues that, while a generalist judiciary is the optimal choice in the majority of legal areas, the unique challenges posed by Big Tech and antitrust can be best addressed by specialization.

To begin exploring the current U.S. antitrust system, it serves to highlight the primary legislations that guide antitrust adjudication. The Sherman Act,¹³ the Clayton Act,¹⁴ and the Federal Trade Commission Act (FTCA)¹⁵ are the three laws that federal antitrust enforcement agencies employ.¹⁶ This Comment will focus solely on the Sherman Act Section 2 because Section 2 serves as an adequate guidepost for exploring the relationship between Big Tech and U.S. antitrust. In this Part, Section A will describe monopolization law's development and current framework and Section B will introduce the challenges of applying this framework to Big Tech.

A. The Sherman Act Section 2: Development and Current Standing

The foundation of United States antitrust law is the Sherman Act.¹⁷ Passed in 1890, the Act was Congress's response to powerful trusts (conglomerations of large businesses in a sector that create a single dominant player in a market),¹⁸ including oil, tobacco, gunpowder, and sugar companies, using their monopolistic positions to raise prices and exclude competitors.¹⁹ Thus, Congress wrote Section 2 to cover single-firm monopolization and attempts to monopolize.²⁰ Though monopolization is discussed in detail below,²¹ it is important to point out that monopolies

¹³ 15 U.S.C. §§ 1, 2.

¹⁴ *Id.* § 18.

¹⁵ *Id.* §§ 41–58.

¹⁶ The Department of Justice and the Federal Trade Commission have dual jurisdiction to enforce antitrust laws in most civil matters but have clashed over their differing enforcement policies. See Kimberly H. Anker, Note, *Best Frenemies: Evaluating the Dual Jurisdiction of the Federal Antitrust Agencies*, 63 B.C.L. REV. 255, 255–59 (2022).

¹⁷ Brennan Weiss, Note, *Reframing Antitrust Law for Big Tech: Lessons from the German Bundeskartellamt*, 73 FED. COMM'NS L.J. 193, 204 (2020).

¹⁸ See Katie Canales, *What Does 'Antitrust' Mean? Inside 'Trust-Busting' Laws*, BUS. INSIDER (Dec. 9, 2019, 4:13 PM), <https://www.businessinsider.com/what-is-antitrust-laws-big-tech-hearing-2020-7>.

¹⁹ See Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 ST. JOHN'S L. REV. 101, 102 (2015).

²⁰ See 15 U.S.C. § 2; see, e.g., *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); Chris Bernard, Note, *Shifting and Shrinking Common Ground: Recalibrating the Federal Trade Commission's and Department of Justice's Enforcement Powers of Single-Firm Monopoly Conduct*, 34 DEL. J. CORP. L. 581, 587–88 (2009) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 767 (1984)) (“purely unilateral conduct is illegal only under [Section] 2 and not under [Section] 1”).

²¹ *Supra* Part II.A.1–2.

and monopolization are distinct concepts.²² A firm can legally achieve a monopoly, whether it be by “force of accident” or “superior skill, foresight, and industry,” but it cannot monopolize against the spirit of antitrust laws.²³ Thus, Section 2 provides that “[e]very person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony”²⁴

The current Section 2 framework for assessing when a firm has monopolized or has attempted to monopolize was defined by the Supreme Court in *United States v. Grinnell*.²⁵ *Grinnell* involved a monopolization suit against Grinnell Corporation, which held 89 percent of the central station service market (i.e., property protection services).²⁶ Ultimately, the Court ruled that Grinnell’s market share constituted a monopoly and the defendant had abused this market power.²⁷ In reaching this conclusion, the Court stated that a Section 2 violation required “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power”²⁸ Though a simple framework, the Supreme Court has subsequently cautioned against invalidating a firm’s mere possession of monopoly power because “monopoly power . . . is not only not unlawful; it is an important part of the free-market system.”²⁹ Thus, courts have clarified that the *Grinnell* framework requires a plaintiff to (1) define the relevant market, (2) demonstrate that the alleged monopolist had monopoly power in that market, and (3) show that the monopolist engaged in an impermissible “exclusionary activity” to procure, increase,

²² See Albert A. Foer, *The Spectrum of Monopolism: An Introduction to the Future of Monopoly and Monopolization*, 2008 WIS. L. REV. 225, 227–28 (“ . . . it is difficult to distinguish legitimate competition from unlawful attempts to monopolize, . . . monopoly is the objective that businesses strive for.”).

²³ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 429–30 (2d Cir. 1945); see, e.g., *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956); see also Bernard, *supra* note 20, at 587–88 (quoting *Copperweld Corp.*, 467 U.S. at 767) (“purely unilateral conduct is illegal only under [section] 2 and not under [section] 1.”).

²⁴ 15 U.S.C. § 2.

²⁵ 384 U.S. 563, 570 (1976).

²⁶ See *id.* at 572–75.

²⁷ *Id.* at 574–75.

²⁸ *Id.* at 570.

²⁹ *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

or extend the duration of its monopoly.³⁰ Thus, Subsection 1 will cover the relevant market and monopoly power elements, and Subsection 2 will explain what constitutes exclusionary activity.

1. The Relevant Market and Monopoly Power

Defining the relevant market is a pertinent step to determining whether monopoly power exists; in fact, the Supreme Court has articulated that monopoly power may be inferred from a firm controlling an adequate share of the relevant market.³¹ Courts have held that the relevant market is comprised of both “the product market and the geographic market.”³² The product market has been defined as “all products reasonably interchangeable by consumers for the same purposes.”³³ This broad definition serves to encompass the product produced by the monopolist and products that “generally compete with each other and are thus part of the same market.”³⁴ Such “reasonably interchangeable” products are ones that a reasonable consumer would switch to upon a significant price increase of the initial product (otherwise known as the cross-elasticity of demand).³⁵ The relevant geographic market, on the other hand, “comprises all physical territories in which actual or potential producers are located and to which consumers can reasonably turn for sources of supply [given a significant price increase].”³⁶

³⁰ See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 223–26 (8th ed. 2007) [hereinafter ABA ANTITRUST]; see, e.g., *Trinko*, 540 U.S. at 407 (requiring the plaintiff to define the relevant market, and show the defendant possessed monopoly power and engaged in exclusionary conduct); *United States v. Microsoft Corp.*, 253 F.3d 34, 50–51 (D.C. Cir. 2001) (requiring the plaintiffs to define the relevant market, show factors that allowed monopoly power to be inferred, and show anticompetitive conduct by the defendant).

³¹ See *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956); see also ABA ANTITRUST, *supra* note 30, at 223.

³² *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 44 (D.D.C. 2022); see e.g., *E.I. du Pont*, 351 U.S. at 394.

³³ *Facebook*, 581 F. Supp. 3d at 44 (quoting *Microsoft Corp.*, 253 F.3d at 52); see also Richard J. Gilbert & A. Douglas Melamed, *Innovation Under Section 2 of the Sherman Act*, 84 ANTITRUST L.J. 1, 43–44 (2021) (citing *SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1207–09 (2d Cir. 1981)) (providing a discussion on defining the product market).

³⁴ ABA ANTITRUST, *supra* note 30, at 225; see also James M. Sellers, *The Black Market and Intellectual Property: A Potential Sherman Act Section Two Antitrust Defense?*, 14 ALB. L.J. SCI. & TECH. 583, 591 (2004).

³⁵ See U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES, § 1.1 (1997); ABA ANTITRUST, *supra* note 30, at 225–26.

³⁶ ABA ANTITRUST, *supra* note 30, at 226; see, e.g., *Am. Key Corp. v. Cole Nat’l Corp.*, 762 F.2d 1569, 1575 (11th Cir. 1985) (Plaintiff alleged that Defendant had exclusionary agreements “in the Atlanta Metropolitan Area, . . . the state of Georgia, the Southeastern United States, and the United States.”); *Microsoft Corp.*, 253 F.3d at 52 (the Court defined the relevant geographic market as “all Intel-compatible PC operating systems worldwide”).

As for monopoly power, courts have noted that direct proof of monopoly power—i.e., a showing that the defendant “profitably raised prices substantially above the competitive level”—is “rarely available.”³⁷ Thus, as noted, monopoly power may be inferred from the mere presence of a sufficiently dominant market share.³⁸ To evince a dominant market share, Courts have further subdivided this analysis by requiring a showing of (1) a dominant share of the relevant market, and (2) high barriers to entry.³⁹ For example, “a market share in excess of 70 percent generally establishes a prima facie case of monopoly power” where there are also barriers to entry.⁴⁰ Barriers to entry are defined as “either a cost that would have to be borne by an entrant [into the market] that was not and is not borne by the incumbent or any condition” that is likely to inhibit another firm from entering the market.⁴¹ Such barriers include, but are not limited to, large capital requirements for entry, economies of scale, regulations,⁴² and network effects.⁴³ Network effects are discussed below in the context of Big Tech.⁴⁴ For now, it is sufficient to understand that network effects are present where “the value of any product or service increases the more others use the same product or service.”⁴⁵

³⁷ *Microsoft Corp.*, 253 F.3d at 51.

³⁸ See ABA ANTITRUST, *supra* note 30, at 223–26; see, e.g., *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (requiring the plaintiff to define the relevant market, and show the defendant possessed monopoly power and engaged in exclusionary conduct); *Microsoft Corp.*, 253 F.3d at 50–51 (requiring the plaintiffs to define the relevant market, show factors that allowed monopoly power to be inferred, and show anticompetitive conduct by the defendant).

³⁹ See, e.g., *Mcwane v. FTC*, 783 F.3d 814, 830–32 (11th Cir. 2015) (holding that a “overwhelming market share [of 90%]” along with “the large capital outlays to enter” constituted sufficient evidence of monopoly power); *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 450–51 (4th Cir. 2011) (holding that monopoly power could be assumed where the defendant “has long dominated” the relevant market with over 70% market share and “numerous” barriers to entry exist).

⁴⁰ ABA ANTITRUST, *supra* note 30, at 230.

⁴¹ *Id.* at 233.

⁴² See *id.* at 234–35; David L. White, *Shaping Antitrust Enforcement: Greater Emphasis on Barriers to Entry*, 1989 BYU L. REV. 823, 827–32 (providing a comprehensive list of entry barriers).

⁴³ See Peter S. Menell, *Economic Analysis of Network Effects and Intellectual Property*, 34 BERKELEY TECH. L.J. 219, 226–28, 236–38 (2019) (first providing an explanation of network effects’ impact on the marketplace and, second, explaining why such impact serves as a barrier to entry in the intellectual property sphere); ABA ANTITRUST, *supra* note 30, at 235–36.

⁴⁴ *Infra* Part II.B.2.

⁴⁵ ABA ANTITRUST, *supra* note 30, at 235.

Overall, while barriers to entry may support a finding of monopoly power, most monopoly power disputes center around defining the relevant market and showing that the defendant has a dominant share of that market.⁴⁶ Thus, the outcome of some antitrust cases primarily turns on the court defining a large or small denominator—the relevant market—and a large or small numerator—the defendant’s market share.⁴⁷ This typically results in antitrust cases involving the plaintiff alleging a narrow relevant market with the defendant arguing for a broad definition of the relevant market.

2. Exclusionary Conduct

The exclusionary conduct requirement of a Section 2 claim reflects the courts’ realization that monopoly power alone does not constitute an antitrust violation, and may actually support and promote an efficient market.⁴⁸ Accordingly, the Court in *Grinnell* included the requirement that a firm with monopoly power must partake in “the willful acquisition or maintenance of that [monopoly] power.”⁴⁹ While “defining the contours of this element [] has been one of the most vexing questions in antitrust law,”⁵⁰ the modern approach to determining exclusionary conduct has

⁴⁶ See, e.g., *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005) (holding that a market share between 75 to 80 percent is “more than adequate to establish a prima facie case of power”); *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) (“Courts generally require a 65% market share to establish a *prima facie* case of market power.”); *Exxon Corp. v. Berwick Bay Real Est. Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (“[M]onopolization is rarely found when the defendant’s share of the relevant market is below 70%.”).

⁴⁷ *Sellers*, *supra* note 34, at 592. The following cases are examples of courts dealing with opposing views on what the relevant market should be. See *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 394–95 (1956) (dismissal was influenced by finding that the relevant market was nationwide); *Broadcom Corp v. Qualcomm Inc.*, 501 F.3d 297, 315 (3d Cir. 2007); *Queen City Pizza, Inc. v. Domino’s Pizza, Inc.*, 124 F.3d 430, 437–39 (3d Cir. 1997) (Plaintiff’s alleged market of “ingredients, supplies, materials, and distribution services used by [Defendant]” was too narrow and not properly defined).

⁴⁸ See *Verizon Commc’ns v. L. Offs. of Curtis V. Trinko, LLP*, 450 U.S. 398, 407 (2004) (“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system”); *United States v. Aluminium Co. of Am.*, 148 F.2d 416, 429 (2d Cir. 1945) (“The successful competitor, having been urged to compete, must not be turned upon when he wins”); see also *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (“Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it.”).

⁴⁹ *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

⁵⁰ ABA ANTITRUST, *supra* note 30, at 241.

tended toward a categorical analysis of the specific business action being challenged.⁵¹ These categories include: (1) predatory pricing,⁵² (2) refusals to deal,⁵³ (3) exclusionary distributions,⁵⁴ (4) misuses of institutions,⁵⁵ and (5) exclusionary innovations.⁵⁶

Some case examples of these categories may provide clarification. First, predatory pricing typically involves anticompetitive activity in which a monopolist (1) charges prices below its own costs and (2) has a reasonable probability of regaining those losses.⁵⁷ The parameters of predatory pricing challenges were explored in *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, which saw a tobacco company participate in a cigarette price-cutting war; however, the Court found no predatory pricing because “no evidence suggest[ed] that Brown & Williamson . . . was likely to obtain the power to raise the prices . . . above a competitive level” and thereby recoup the losses it incurred in the price-cutting phase.⁵⁸ Second, while the Court has insisted that a monopolist “has

⁵¹ See CHRISTOPHER L. SAGERS, *EXAMPLES & EXPLANATIONS FOR ANTITRUST* 208–10 (Rachel E. Barkow et al. eds., 3d ed. 2021) [hereinafter ANTITRUST E & E].

⁵² Herbert J. Hovenkamp, *Predatory Pricing Under the Areeda-Turner Test*, FAC. SCHOLARSHIP AT PENN L., at 1 (Mar. 2015), https://scholarship.law.upenn.edu/faculty_scholarship/1825 (stating that proof of predatory pricing requires a plaintiff to show (1) a market structure allowing for the predator to rationally predict that the predatory pricing strategy would be profitable and (2) that the defendant’s prices were below a relevant cost measure for a significant number of sales); see, e.g., *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1496 (11th Cir. 1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 590–91 (1986).

⁵³ The inquiry for refusals to deal must include some consideration of the plaintiff’s ability to overcome the challenged refusal by its own means. See *Dorsey & Jacobson*, *supra* note 19, at 121 (citing *NicSand, Inc. v. 3M Co.*, 507 F.3d 442 (6th Cir. 2006)).

⁵⁴ Such distributions may include “intra-brand” or “inter-brand” exclusive deals and contracts with suppliers or customers, see Andrew I. Gavil, *Exclusionary Distribution Strategies By Dominant Firms: Striking a Better Balance*, 72 ANTITRUST L.J. 3, 6 (2004) (citing *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57–58 (1977) (establishing a contentious legal framework for analyzing intra-brand distribution deals within a market)), or leveraging, the use of monopoly power in one market to obtain a competitive advantage in a separate market, see Emily W. Black & Carrington Giammittorio, *Antitrust and Business Litigation*, 84 TEX. BAR J. 24, 24 (2021) (citing *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429 (7th Cir. 2020)) (discussing a monopolist’s misuse, or leveraging, of monopoly power to gain further power).

⁵⁵ A “misuse of institutions” refers to “manipulation of private and government standard setting.” See ABA ANTITRUST, *supra* note 30, at 301.

⁵⁶ See Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 172–82 (2010) (discussing cases involving a firm’s innovation that have anticompetitive and exclusionary consequences).

⁵⁷ ABA ANTITRUST, *supra* note 30, at 286; see, e.g., *Brooke Grp. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–24, 229 (1993).

⁵⁸ *Brooke Grp.*, 509 U.S. at 222–24.

no duty to engage” with a competitor, it found a Section 2 violation for a refusal to deal in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*⁵⁹ In *Aspen Skiing*, two ski resort operators had long shared a joint ski ticket that allowed customers to use both resorts’ mountains for skiing, of which the defendant-operator owned three and the plaintiff-operator owned one.⁶⁰ The Court found that the defendant’s discontinuing of the group ticket constituted a refusal to deal because the defendant had presented no economic reason for doing so and subsequently stymied the plaintiff’s attempt to market its one mountain.⁶¹ Third, an exclusionary distribution was found in *Viamedia, Inc. v. Comcast Corp.*,⁶² in which Comcast had required the purchase of an “advertisement representative service” to its “Interconnect Service.”⁶³ The Court held that requiring the purchase of two separate products where the defendant has monopoly power over one may constitute exclusionary conduct.⁶⁴ Fourth, a misuse of institutions typically involves a competitor influencing the rules surrounding market trends, like standards on information disclosure, environmental protection, and contract standards, to limit competition.⁶⁵ Such a violation was seen in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, in which the defendant, a member of a standard-setting organization, had secured the adoption of a fire safety standard that prohibited the use of a new competitor’s product.⁶⁶ Lastly, exclusionary conduct aimed at hindering innovation was at issue in *United States v. Microsoft Corp.*⁶⁷ where the plaintiffs alleged that network effects—the enhancement of a product’s value to its user as its user base increases—protected Microsoft’s market power in the

⁵⁹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1984).

⁶⁰ *Id.* at 588–94.

⁶¹ *Id.* at 593–94.

⁶² 951 F.3d 429, 465 (7th Cir. 2020).

⁶³ *Id.* at 465–67.

⁶⁴ *See id.*

⁶⁵ *See* ANTITRUST E & E, *supra* note 51, at 230; *see, e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

⁶⁶ *Allied Tube & Conduit Corp.*, 486 U.S. at 501.

⁶⁷ 253 F.3d 34 (D.C. Cir. 2001).

operating systems market, and that Microsoft engaged in conduct to thwart the distribution of an innovative new product that had the potential to erode its dominance in the operating systems market.⁶⁸

Each category of potentially exclusionary conduct encompasses a variety of business actions by competitors, however, none of those actions alone make the conduct exclusionary.⁶⁹ For each category of conduct to be exclusionary, Courts also inquire into the defendant's justification for the conduct and the conduct's effects on the market.⁷⁰ In short, if a defendant does not have a legitimate business justification other than a desire to exclude competition, or the defendant's justification is a "pretext,"⁷¹ and the effects of the action "reasonably appear capable of making a significant contribution to . . . maintaining monopoly power," the challenged conduct will be deemed exclusionary.⁷²

B. *Applying Section 2 to Big Tech*

Section 2 has long been a cornerstone of antitrust litigation, but it has gained even more prominence in the wake of Big Tech's continued market dominance and growth.⁷³ The increase

⁶⁸ *Id.* at 55. The many nuances of network effects and interoperability are beyond the scope of this Comment, however, the relevant information on network effects is discussed below in the context of Big Tech. *Infra* Part II.B.2.

⁶⁹ See ABA ANTITRUST, *supra* note 30, at 230; see also White, *supra* note 42, at 826 ("... these and other particularized forms of exclusionary conduct are not isolated or discrete occurrences where entry barriers are material to antitrust policy.").

⁷⁰ See ABA ANTITRUST, *supra* note 30, at 244; ANTITRUST E & E, *supra* note 51, at 207. Courts may also make an inquiry into the defendant's intent to exclude rivals, however, intent is typically only relevant "to the extent it helps [the court] understand the likely effect of the monopolist's conduct." *Microsoft*, 253 F.3d at 59; see also *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) ("In order to fall within [the Sherman Act] §2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing."); Barry E. Hawk, *Attempts to Monopolize—Specific Intent as Antitrust's Ghost in the Machine*, 58 CORNELL L. REV. 1121, 1162–67 (1962) (exploring the role of intent in the various categories of monopolization cases).

⁷¹ See ABA ANTITRUST, *supra* note 30, at 244; Allen Kezsbom & Alan V. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 COLUM. BUS. L. REV. 1, 21–24 (discussing reasonable business justifications for denying access to an "essential facility").

⁷² *Microsoft*, 253 F.3d at 79 (citing 3 PHILLIP AREEDA & HERBERT HOBENKAMP, ANTITRUST LAW 69 (4th ed. 1996)); *Morgan v. Ponder*, 892 F.2d 1335, 1363 (8th Cir. 1989)).

⁷³ See Alford, *supra* note 3, at 929 (discussing the FTC's and DOJ's recent Section 2 enforcement in light of public sentiment toward Big Tech).

in public support for heavy antitrust enforcement has correlated directly with the increased public distrust towards Big Tech.⁷⁴ Thus, Big Tech has been far more susceptible to antitrust enforcement⁷⁵; however, this enforcement has not yielded many results besides mild fines (mild relative to a Big Tech firm’s market capitalization).⁷⁶ To assess the shortcomings of current Section 2 antitrust law, Subsection 1 will describe how a Big Tech firm is categorized in the antitrust context and Subsection 2 will assess how Big Tech’s unique features make it difficult to apply the Section 2 framework to their platforms.

1. What Is a Big Tech Firm?

Though the definition of a Big Tech firm in popular vernacular has been previously addressed,⁷⁷ it is necessary to explore why Google, Apple, Facebook, and Amazon are the four companies deemed to comprise Big Tech and how Big Tech firms are categorized in the antitrust context.⁷⁸ First, the reason for distinguishing Big Tech from other “tech firms” in the antitrust context is simple—these four companies make up a disproportionate share of their respective markets, control imperative services in their markets, and have staggering market power overall.⁷⁹ Individually, Facebook boasts 2.45 billion monthly active users and has acquired nearly ninety companies since 2003⁸⁰; Amazon accounts for nearly 37 percent of all online commerce and is

⁷⁴ See *id.*

⁷⁵ See James Herbison, *Big Tech Antitrust Enforcement Update*, 61 INFRASTRUCTURE, Winter 2022, at 1 (“[Big Tech] ha[s] business models uniquely prone to investigation and litigation under federal and state antitrust laws.”).

⁷⁶ Though fines are the common remedy for antitrust violations, they are primarily only given to Big Tech firms in Europe. See generally Joe Panettieri, *Big Tech Antitrust Investigations: Amazon Apple, Google Meta/Facebook and Microsoft Updates*, CHANNELE2E (Oct. 21, 2022), <https://www.channele2e.com/business/compliance/big-tech-antitrust-regulatory-breakup-updates> (providing an updated list on antitrust actions and remedies by region and company).

⁷⁷ *Supra* Part I.

⁷⁸ Microsoft has been left out of the “Big Tech” designation, at least for this Comment’s purposes, because Apple, Amazon, Google, and Facebook “have business models uniquely prone to investigation and litigation under federal and state antitrust laws.” Herbison, *supra* note 75, at 1.

⁷⁹ See JAY B. SKYES, CONG. RSCH. SERV., R45910, ANTITRUST AND “BIG TECH” 1 (2019); see also INVESTIGATION OF COMPETITION, *supra* note 1, at 6–7 (highlighting the transformation of technology startups into the dominant big-tech firms seen today).

⁸⁰ James Herbison, *Big Tech Investigated for Antitrust Violations*, 59 INFRASTRUCTURE, Spring 2020, at 3.

engaged in an increasing number of industries including e-commerce, cloud computing, and digital streaming;⁸¹ Apple’s revenue in 2021 totaled \$365.82 billion,⁸² and the company acquires a smaller company “every three to four weeks”;⁸³ and Google licenses the world’s most popular mobile operating system (Android) and its search engine processes over 3.5 billion searches a day.⁸⁴ In total, these four goliaths have purchased more than 500 companies since 1998.⁸⁵ Thus, Big Tech firms are especially susceptible to heightened antitrust scrutiny and litigation.⁸⁶

Despite being lumped into “Big Tech,” Google, Apple, Facebook, and Amazon do not have identical business models and often require different classifications for antitrust analysis.⁸⁷ These classes include “information platforms” and “transaction platforms.”⁸⁸ In short, these classifications help to clarify what is important to each platform and why they would engage in alleged exclusionary conduct.⁸⁹

Google and Facebook exemplify information platforms because their business models typically involve (1) offering free content or services to attract a consumer base, (2) garnering that consumer base’s personal information through continuous usage of the free content or services, and (3) selling the information to advertisers or selling advertising space for third parties to reach the user base.⁹⁰ Due to offering free products and services to consumers, the typical definitions of

⁸¹ See *id.* at 4; see also *Amazon*, FORTUNE, <https://fortune.com/company/amazon-com> (last visited Jan. 6, 2023).

⁸² Frederica Laricchia, *Apple’s Revenue Worldwide 2004-2021*, STATISTA (July 27, 2022), <https://www.statista.com/statistics/265125/total-net-sales-of-apple-since-2004>.

⁸³ Justin Harper, *Apple Buys a Company Every Three to Four Weeks*, BBC (Feb. 24, 2021), <https://www.bbc.com/news/business-56178792>.

⁸⁴ See Jacob Beaupre, *Big Is Not Always Bad: The Misuse of Antitrust Law to Break Up Big Tech Companies*, 18 DEPAUL BUS. & COM. L.J. 25, 25 (2020).

⁸⁵ Donald I. Baker & William S. Comanor, *A U.S. Antitrust Agenda for the Dominant Information Platforms*, 35 ANTITRUST 66, 67 (2021).

⁸⁶ Herbison, *supra* note 80, at 3.

⁸⁷ See *id.* at 4.

⁸⁸ See Baker & Comanor, *supra* note 85, at 67.

⁸⁹ See *id.* (discussing the economic differences between information and transactional platforms).

⁹⁰ *Id.* at 66 n.1.

monopoly power—“the power to control prices or exclude competition”⁹¹ or the power to “profitably raise prices substantially above the competitive level”⁹²—do not directly apply to these information platforms because they inherently do not have prices to control.⁹³ Thus, most antitrust challenges against information platforms focus “on evidence that the company has the power to ‘exclude competitors.’”⁹⁴

Conversely, transaction platforms like Apple and Amazon base their business models on (1) creating an online marketplace on which participating buyers and sellers (“third parties”) can complete transactions and (2) having those third parties pay the platform for use of the marketplace.⁹⁵ Thus, monopoly power’s “power to control prices” definition is more applicable to transaction platforms.⁹⁶ But defining the relevant market, an essential aspect of a *prima facie* Section 2 case, can be more complicated for transaction platforms because of the various parties involved, including the third-party sellers, end-consumers, and the platform provider.⁹⁷

2. The Problems with Applying Sherman Act Section 2 to Big Tech

As discussed, the traditional Section 2 framework for a monopolization violation is (1) defining the relevant market, (2) proving monopoly power by either showing the firm has a dominant share of that market or the firm had the power to “control prices or exclude competition,” and (3) showing exclusionary conduct by the firm.⁹⁸ Big Tech firms, however, present roadblocks

⁹¹ *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956).

⁹² *United States v. Microsoft Corp.*, 253 F.3d 34, 50 (D.C. Cir. 2001).

⁹³ As a note, Google and Facebook do charge other companies for specific services like advertisements or more favorable search results; however, their core products, Google Search and Facebook’s social media application, are free-to-use. *See Herbison supra* note 80, at 7.

⁹⁴ *Id.*

⁹⁵ *See Baker & Comanor, supra* note 85, at 67.

⁹⁶ Herbison, *supra* note 80, at 8.

⁹⁷ Discussing two-sided markets, *infra* Part II.B.2.

⁹⁸ *Supra* Part II.A.

to efficiently applying this standard because many Big Tech firms operate in unique, two-sided markets⁹⁹ and benefit from intangible network effects.¹⁰⁰

First, understanding what constitutes “network effects” is essential to comprehending why Section 2’s current application is insufficient for defining Big Tech’s relevant market and exclusionary conduct. Network effects refer to the positive feedback loop online platforms enjoy; meaning that as more users utilize a platform, like Facebook’s flagship social media site, the more potential users the platform can reach.¹⁰¹ This phenomenon results in the platform becoming exponentially more valuable because (1) advertisers or merchants on the platform will pay more for access to more users and (2) the cost for users to switch to alternatives will increase as more people use the same platform.¹⁰²

The results of network effects in the Big Tech antitrust context are that (1) the unique networks of Big Tech platforms cause the traditional “reasonably interchangeable” product market definition to be insufficient to describe the relevant market and (2) alternatives available to third parties seeking to combat the incumbent network, such as building their own platform or using a different platform, become less valuable and viable as Big Tech firms capture more network effects.¹⁰³ The biggest issue for courts, however, is understanding and calculating network effects.¹⁰⁴ Some scholars advocate for focusing on the value of the network to a single person and exponentiating that value to the aggregate of people on the network, while others focus on the

⁹⁹ See John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805, 1807–08 (2020).

¹⁰⁰ For a discussion of network effects in antitrust, see Marina Lao, *Networks, Access, and “Essential Facilities”*: *From Terminal Railroad to Microsoft*, 62 SMU L. REV. 557, 560–64, 579–82 (2009).

¹⁰¹ See Nicholas Economides, *Public Policy in Network Industries* 474 (NYU, Working Paper No. 2451/26079, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284617.

¹⁰² See *id.*

¹⁰³ See Nikolas Guggenberger, *Essential Platforms*, 24 STAN. TECH. L. REV. 237, 251–59 (2021) (discussing the impact of network effects on the “reasonably interchangeable” market inquiry).

¹⁰⁴ See, e.g., *Epic Games, Inc. v. Apple, Inc.*, 559 F. Supp. 3d 898 (N.D. Cal. 2021).

amount of business and user transactions that take place on the network.¹⁰⁵ No matter how they are calculated, “[n]etwork [effects] make it virtually impossible for a small network [or platform] to thrive”; thus, network effects are often at the heart of Big Tech antitrust claims.¹⁰⁶

Second, complicating matters further, Big Tech firms largely assert their dominance within two-sided markets—i.e., a market with two or more distinct groups of customers.¹⁰⁷ The majority of Big Tech firms operate two-sided markets, including Amazon’s marketplace, Apple’s App Store, and Facebook’s social media platform.¹⁰⁸ Two-sided platforms present additional problems for courts because they create “indirect” network effects—“i.e., the value of the platform for a customer on one side of the market increases as more customers on the other side of the market participate.”¹⁰⁹

An example of a two-sided market is the Amazon marketplace, which involves Amazon, on one side, charging third-party merchants for use of its platform (the “marketplace”) to reach consumers on the other side of its platform.¹¹⁰ In a one-sided market, the network effects would extend merely to the consumers or the sellers.¹¹¹ In a two-sided market, however, there are additional considerations like the value to the third-party merchants as more consumers and other merchants begin to use the platform.¹¹²

¹⁰⁵ Guggenberger, *supra* note 103, at 279–81.

¹⁰⁶ CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 184 (1999).

¹⁰⁷ See John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of American Express*, 41 CARDOZO L. REV. 1805, 1807 (2020).

¹⁰⁸ *Id.*

¹⁰⁹ See Ben Bloodstein, *Amazon and Platform Antitrust*, 88 FORDHAM L. REV. 187, 194 (2019).

¹¹⁰ See *id.* at 221–23.

¹¹¹ See, e.g., Lapo Filistrucchi et al., *Identifying Two-Sided Markets*, TILBURG UNIV., Feb. 21, 2021, at 8 n.33, <http://ssrn.com/abstract=2008661> (“For some products, like certain new books, Amazon (basically) buys at a wholesale price and sells for a retail price, which is a one-sided model.”)

¹¹² See *id.* (“The presence of strong indirect network effects [in a two-sided market] lies at the core of most third party complainants’ theories of harm.”)

Similar to typical network effects, scholars have proposed multiple theories to identify and define network effects in a two-sided market, including qualitative and quantitative methods.¹¹³ A qualitative method utilizes the court’s intuition, interviews of agents in the market, and deductive reasoning to assess network effects without an in-depth economic analysis.¹¹⁴ This approach is inaccurate and only reveals whether network effects are positive or negative, rather than the size of the network; however, it is preferable for generalist judges (who typically have a full docket of cases) because it is “relatively easy [to apply] and not particularly time-consuming.”¹¹⁵ Contrarily, a quantitative method seeks to actually measure the size, type, and impact of network effects at play by employing market-wide analysis including surveys, empirical data, and economic studies.¹¹⁶ This method is underutilized because it is costly and time-consuming and its highly technical nature “may be ill-suited for ‘generalist judges.’”¹¹⁷

An illustrative example of network effects and two-sided markets is *Epic Games, Inc. v. Apple, Inc.*¹¹⁸ *Epic Games* involved an antitrust allegation against Apple because Apple had removed Epic’s Fortnite application from the Apple App Store.¹¹⁹ Apple’s App Store policy required third-party app providers to pay Apple thirty percent of the third party’s earnings on in-app purchases.¹²⁰ For example, if someone bought Fortnite from the Apple App Store and purchased an “item” within the Fortnite app, Epic must give Apple 30 percent of those earnings.¹²¹ Problems arose when Epic Games decided to offer a 20 percent discount to customers who

¹¹³ See Bloodstein, *supra* note 109, at 226 (inquiring into Amazon’s indirect network effects).

¹¹⁴ See Filistrucchi et al., *supra* note 111, at 11–13 (discussing the network effects analysis in the advertiser context).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 14–18.

¹¹⁷ Bloodstein, *supra* note 109, at 226.

¹¹⁸ 559 F. Supp. 3d 898 (N.D. Cal. 2021).

¹¹⁹ *Id.* at 940.

¹²⁰ See Emma C. Smizer, *Epic Games v. Apple: Tech-Tying and the Future of Antitrust*, 41 LOY. L.A. ENT. L. REV. 215, 216 (2021)

¹²¹ *Id.*

purchased Epic’s apps through its own direct payment store to avoid Apple’s 30 percent charge.¹²² Apple subsequently removed Epic’s Fortnite app from the Apple App Store for terms-of-service violations.¹²³

Ultimately, the Court held that Epic Games had failed to state a Section 2 violation, reasoning that (1) Epic’s definition of the relevant market was inaccurate and (2) Apple did not have monopoly power in the market because of alternatives such as Google’s app store (“Google Play”).¹²⁴ The Court rejected both parties’ proposal for a market definition, and instead defined the relevant market as “gaming transactions on smartphones and tablets,” thus “reducing the market to Apple and Google.”¹²⁵ Once Google Play was included in the relevant market as a viable alternative to the Apple App Store, Epic could no longer rely on making an inference of monopoly power, and the Court subsequently concluded that no monopoly power existed.¹²⁶

Epic Games and the Court’s finding on the relevant market reflect the tensions underlying both network effects and two-sided markets. On one hand, some critics contend that the Court’s definition may have been too narrow, because other two-sided markets like Nintendo and third-party app stores also may be reasonably interchangeable competitors.¹²⁷ Conversely, others argue that the Court’s definition may have been too broad because the Apple App store and Google Play are not reasonably interchangeable substitutes for users of either platform due to their respective networks.¹²⁸ These critiques of *Epic Games* serve to show how a court’s interpretation of the relevant market and network effects can materially alter the outcome—like when the *Epic Games*

¹²² *Id.* at 217.

¹²³ *Epic Games*, 559 F. Supp. 3d at 898.

¹²⁴ *Id.*

¹²⁵ Tijana Kovovic, *Epic v. Apple: An Antitrust Experiment*, Note, 12 UNION UNIV. L. SCHL. REV. 634, 638 (2021).

¹²⁶ *Id.* at 640–41.

¹²⁷ *See id.* at 637–38.

¹²⁸ *Infra* note 184.

court's market definition leaned in favor of Apple's proposed definition, making it virtually impossible for Epic to prevail on a Section 2 claim.¹²⁹

III. OVERVIEW: GENERALIST AND SPECIALIZED JUDGES

A court's generality or specialization refers to its jurisdiction,¹³⁰ its function,¹³¹ its concentration,¹³² and the ability of judges to choose the types of cases they hear.¹³³ As an overview, the current federal judicial system is predominantly comprised of courts of general jurisdiction,¹³⁴ a lack of case type concentration,¹³⁵ and random assignment of cases to judges.¹³⁶ The sole specialized aspect of Article III judges is their function, which is limited to judging—hearing cases and deciding the law.¹³⁷ This Comment will focus specifically on concentration specialization. In this Part, Subsection A introduces the predominantly generalist federal judiciary, Subsection B introduces concentration specialization and provides examples of its application, and Subsection C analyzes the benefits and drawbacks of each judiciary system.

A. Generalist Courts in Article III

The judicial system relevant to this Comment is the Article III judiciary, as created by the Constitution.¹³⁸ The Article III judiciary is colloquially known as the federal court system and includes “. . . Supreme Court justices, and federal circuit and district judges.”¹³⁹ This judicial

¹²⁹ See Kovovic, *supra* note 125, at 639.

¹³⁰ See Sapna Kumar, Comment, *Patent Court Specialization*, 104 IOWA L. REV. 2511, 2514 (2019).

¹³¹ See Richard A. Posner, *Will the Federal Courts of Appeals Survive until 1984: An Essay on Delegation and Specialization of the Judicial Function*, 56 S. CAL. L. REV. 761, 778 (1983).

¹³² See Kumar, *supra* note 130, at 2515.

¹³³ See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 522 (2008).

¹³⁴ See *id.* at 522.

¹³⁵ See, e.g., Kumar, *supra* note 130, at 2514 (providing the example of Federal Circuits as an exception to the general lack of concentration).

¹³⁶ Cheng, *supra* note 133, at 523.

¹³⁷ See Posner, *supra* note 131, at 778; Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 DUKE L.J. 1667, 1671 (2009).

¹³⁸ See U.S. CONST. art. III (“The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

¹³⁹ *About Federal Judges*, U.S. COURTS, <https://www.uscourts.gov/judges-judgeships/about-federal-judges#:~:text=Article%20III%20Judges,confirmed%20by%20the%20U.S.%20Senate> (last accessed Oct. 23, 2022).

system is predominantly generalist,¹⁴⁰ with most Article III courts having general jurisdiction.¹⁴¹ Indeed, “[t]he dominant image of judges in the United States is one in which they specialize in judging but not in any particular subject matter.”¹⁴²

The generalist nature of the federal judiciary is primarily motivated by two things: (1) the Constitution’s separation of powers concerns and (2) the goal of cultivating a diversity of ideas and approaches.¹⁴³ First, a generalist court can hear all forms of cases; thus, it is best suited to act as a check on all justiciable legislative and executive actions.¹⁴⁴ Further, generalist courts allow for insulation from political pressures because generalist judges are more “faithful to the original spirit of an enactment.”¹⁴⁵ Second, generalist judges, by their nature, hear a variety of cases and are further immunized from forming entrenched beliefs on a specific area of law.¹⁴⁶ These aspects of the judiciary in a specialized court are further explored below.¹⁴⁷

B. *Concentration Specialization*

The two primary forms of specialization in the U.S. judicial system are concentration and subject matter specialization.¹⁴⁸ Subject matter specialization, or opinion specialization, is created informally, with a particular judge choosing to hear certain types of cases or a particular court attracting litigants of a specific case type, potentially due to the court’s expertise or its past decisions being favorable to defendants or plaintiffs.¹⁴⁹ An empirical study by Edward K. Cheng

¹⁴⁰ Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111 (1990).

¹⁴¹ Cheng, *supra* note 133, at 522.

¹⁴² LAWRENCE BAUM, *SPECIALIZING THE COURTS* 1 (2011).

¹⁴³ *See id.*, at 1–2 (explaining the virtues of generalist courts within the three-branch system).

¹⁴⁴ *See* Posner, *supra* note 131, at 784.

¹⁴⁵ *Id.* at 785.

¹⁴⁶ *Id.* at 785–86.

¹⁴⁷ *Infra* Part IV.C.2.

¹⁴⁸ *See* Kumar, *supra* note 130, at 2514–15.

¹⁴⁹ *Id.*

showed that opinion specialization is widespread at the appellate level.¹⁵⁰ Concentration specialization, conversely, occurs formally, with legislation agglomerating certain types of cases into a single judicial system.¹⁵¹ This typically involves Congress granting the affected court exclusive subject matter jurisdiction over a type of case.¹⁵² Thus, it is important to distinguish that when referring to subject matter specialization, the reference is to the judge or court’s informal preference of subject matter, while concentration specialization refers to an actual grant of exclusive jurisdiction over a particular field. Though subject matter specialization appears to be a frequently utilized tool amongst appellate judges, its informal and decentralized nature prevents it from fully realizing the benefits of a specialized court.¹⁵³ Thus, this Comment advocates for concentration specialization to effectively address antitrust’s Big Tech issues.

Despite many commentators expounding on the perils of judicial specialization,¹⁵⁴ concentration specialization has proven the most manageable and practical path for a court’s specialization.¹⁵⁵ Examples of concentration specialization include the Federal Circuit, which hears all patent law cases at the appellate level, and the Court of International Trade (CIT).¹⁵⁶ The CIT was created by the Customs Courts Act of 1980¹⁵⁷ (Customs Act) and is the only specialized Article III trial court.¹⁵⁸ The Customs Act provided the CIT exclusive subject matter jurisdiction over all civil actions against the federal government arising from customs and international trade

¹⁵⁰ Cheng, *supra* note 133, at 534–40 figs. 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, & 1.11.

¹⁵¹ Kumar, *supra* note 130, at 2515.

¹⁵² *Id.*; *see, e.g.*, 28 U.S.C. § 1581 (granting the Court of International Trade “exclusive jurisdiction to review . . .” specific cases against the federal government).

¹⁵³ *Infra* Part IV.C.1.

¹⁵⁴ *See* BAUM, *supra* note 142, at 2.

¹⁵⁵ *See, e.g.*, Kumar, *supra* note 130, at 2524–26 (explaining the success of concentration specialization in the Federal Circuit).

¹⁵⁶ *Id.* at 2515.

¹⁵⁷ 28 U.S.C. § 1581.

¹⁵⁸ Gary S. Katzmman, *The United States Court of International Trade*, 62 BOS. BAR J. 6, 6 (2018).

laws.¹⁵⁹ Similarly, the Federal Courts Improvement Act of 1981 (Federal Courts Act) provided the Federal Circuit with exclusive jurisdiction over patent, copyright, and other appeals from the district courts.¹⁶⁰

C. Pros and Cons of Generalist and Specialist Judiciaries

The argument for or against specialization has largely come out in favor of generalist courts, with only the aforementioned exceptions supporting concentration specialization.¹⁶¹ Proponents and critics of specialized courts primarily disagree over whether the perceived benefits of specialized courts actually manifest, and, if they do, whether those benefits are outweighed by specialization's potential drawbacks.¹⁶² Lawrence Baum provides a helpful oversight of this tension stating that “the ‘neutral virtues’ of specialization, perceived benefits that underlie its dominance[,] . . . are quality of decisions, efficiency, and uniformity in the law.”¹⁶³ Baum points out that there is insufficient empirical data as to whether these benefits are ever realized,¹⁶⁴ and other scholars contend that such benefits may only manifest in certain situations.¹⁶⁵ Thus, it serves to explore the pros and cons of specialized appellate courts and explain why specialization's benefits may only outweigh its drawbacks in certain scenarios. To do so, Subsection 1 will explain the desirable outcomes of specialized courts and when those outcomes may be realized, while Subsection 2 will assess the downsides of specialized courts.

1. The Arguments for Specialized Courts

¹⁵⁹ Kumar, *supra* note 130, at 2515.

¹⁶⁰ 28 U.S.C. § 1295.

¹⁶¹ See Revesz, *supra* note 140, at 1111.

¹⁶² BAUM, *supra* note 142, at 4.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See, e.g., Kumar, *supra* note 130, at 2517–27 (discussing patent law's specialization in the Federal Circuit and why the quantity and complexity of patent law cases necessitated specialization); Vanessa C. Perez, *Specialization Trend: Water Courts*, 49 ENV'T L. 587, 606–11 (2019) (arguing that water rights is a factually and legally complex field that could benefit from specialization).

The primary positive effects of concentrating a particular case type into a specialized appellate court are increased expertise, uniformity, and efficiency.¹⁶⁶ These benefits are interrelated; specifically, expertise “is an attribute that might produce certain results,” while uniformity and efficiency are themselves results of specialization.¹⁶⁷ At the same time, a subsequent increase in judicial expertise is also a common result of a court’s specialization.¹⁶⁸ Commentators, however, debate the actual increase in expertise, uniformity, and efficiency that specialized courts produce, as well as whether these effects are even desirable or beneficial.¹⁶⁹ Thus, the subsequent analysis will explain these effects and the scenarios in which they may be most desirable.

A specialized court offers increased expertise in its focus area because the criteria for judges selected to specialized courts will likely include expertise in the legal field, and the court’s exclusive jurisdiction will increase the judges’ exposure to specific types of cases.¹⁷⁰ Indeed, past experiences with specialization at the trial level have shown that increased exposure to a type of case increases expertise, or at least the public perception of expertise.¹⁷¹ Greater expertise within a court means higher-quality decisions, with specialist judges being more adept at “‘interpreting the law well’ and [] mak[ing] good policy.”¹⁷² Though even expert judges cannot “necessarily ensure *right* answers, their decisions are more likely to fall within the subset of better answers

¹⁶⁶ See Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Courts: Specialists vs. Generalists*, FORDHAM INT’L L.J. 788, 793 (2012); BAUM, *supra* note 142, at 4.

¹⁶⁷ See Baum, *supra* note 137, at 1676; see also Markus B. Zimmer, *Overview of Specialized Courts*, 2 INT’L J. FOR COURT ADMIN. 46, 46 (2009) (Specialized judges “who deal with those issues with much greater frequency, develop the expertise to adjudicate disputes that involve those issues more efficiently . . .”).

¹⁶⁸ See Zimmer, *supra* note 167, at 47.

¹⁶⁹ See Baum, *supra* note 137, at 1676–78.

¹⁷⁰ See *id.* at 1676–77; Zimmer, *supra* note 167, at 47.

¹⁷¹ Good examples are the International Trade Commission, an independent federal agency that hears a large amount of intellectual property rights cases, and the Patent Pilot Program, which tested patent specialization at the trial level. See Elizabeth Connors, *Specializing District Courts for Patent Litigation*, 69 CASE W. RES. L. REV. 771, 772–73 (2019).

¹⁷² Lynda J. Oswald, *Improving Federal Circuit Doctrine Through Increased Pollination*, 54 AM. BUS. L.J. 247, 252 (2017) (quoting BAUM, *supra* note 142, at 32–33).

owing to their greater experience and understanding of a field.”¹⁷³ Thus, specialization is most desirable in legal areas with complex, fact-intensive cases where less experienced judges may not have the requisite knowledge or time to fully understand the legal issues and factual analyses.¹⁷⁴

Whether greater expertise correlates with higher-quality decisions has been debated primarily because of the multiple ways decision quality can be measured.¹⁷⁵ For example, one study measuring the quality of decisions in specialized courts based its determinations on the rate of dissents by other judges to the specialized court’s decision.¹⁷⁶ This study found that dissents were higher among specialized courts and concluded that higher dissents indicated lower-quality decisions; however, it is also arguable that increased dissents indicate an increased complexity of arguments, resulting in higher-quality decisions.¹⁷⁷ Another interesting study looked at the increase in experience and expertise of judges in the Patent Pilot Program, a project that artificially created specialized courts by funneling patent litigation to select district judges who signed on to the program.¹⁷⁸ The report measured case disposition, time to disposition, and the rate of appeal and reversal of the specialized courts.¹⁷⁹ Overall, the program found that cases in the specialized courts were disposed of faster than the non-participating courts and the specialized courts were a smaller percentage of total patent appeals, despite adjudicating a substantial percentage of all patent cases.¹⁸⁰ These markers suggest that judges with more experience are better able to identify

¹⁷³ Cheng, *supra* note 133, at 524.

¹⁷⁴ Discussing how specialization’s most prized benefits may still have drawbacks, see Baum, *supra* note 137, at 1676; Ginsburg & Wright, *supra* note 166, at 794, 797, 800–01; Elisabetta Silvestri, *Judicial Specialization: In Search of The ‘Right’ Judge for Each Case?*, 2 RUSS. L.J. 165, 168 (2014).

¹⁷⁵ See, e.g., Carolina Arlota & Nuno Garoupa, *Do Specialized Courts Make a Difference? Evidence from Brazilian State Supreme Courts*, 27 EUR. BUS. L. REV. 487, 499 (2016) (studying the rate of dissents within Brazil’s specialized tribunals).

¹⁷⁶ See *id.*

¹⁷⁷ See *id.*

¹⁷⁸ See, e.g., MARGARET S. WILLIAMS ET AL., FED. JUD. CTR., PATENT PILOT PROGRAM FIVE-YEAR REPORT 33 (2016) (studying the rate of reversal by higher courts when patent law cases are specialized at the trial level).

¹⁷⁹ *Id.* at 22, 31–33, 38–39.

¹⁸⁰ See *id.* at 22–23, 39.

and dismiss meritless cases and their decisions on the merits are less frequently appealed due to higher perceived quality.¹⁸¹ Ultimately, the two studies appear to indicate a slight-to-moderate correlation between decision quality and judicial expertise.

Further, specialization increases courts' uniformity in decision-making.¹⁸² Generalist courts may produce different outcomes in factually similar cases because various courts and judges may have distinct ideological beliefs, favor one party, or have different understandings of the law.¹⁸³ Specialized courts, on the other hand, have a monopoly over a specific type of case, meaning fewer judges hear such cases and, thus, conflicting interpretations of the law are minimized.¹⁸⁴ Uniformity's primary benefits are greater predictability for litigants and decreased forum shopping.¹⁸⁵ With greater predictability, parties will better understand their likelihood of success and be more hesitant to take a weak case to court; therefore, decreasing litigation costs.¹⁸⁶ Moreover, a generalist court's particular interpretation of the law may produce more favorable outcomes for one party than another court, promoting forum shopping; while a specialized court eliminates this disparity in outcomes.¹⁸⁷ As such, similar to expertise, uniformity is most desirable in complex legal areas that naturally induce multiple interpretations of the law.¹⁸⁸

Lastly, specialization promotes a court's efficiency.¹⁸⁹ Increases in efficiency manifest via the judiciary's expertise, which produces improved case management, faster case disposition, and,

¹⁸¹ See Colin Bosch, *The Patent Pilot Program: What Is It, Is It Successful, and Should It Even Exist?*, 22 UCLA J.L. & TECH., Fall 2018, at 11–12.

¹⁸² Zimmer, *supra* note 167, at 47.

¹⁸³ *Id.*

¹⁸⁴ Baum, *supra* note 137, at 1675.

¹⁸⁵ See Ginsburg & Wright, *supra* note 166, at 795.

¹⁸⁶ Zimmer, *supra* note 167, at 47.

¹⁸⁷ *Id.*

¹⁸⁸ See, e.g., Kumar, *supra* note 130, at 2512 n.1 (citation omitted) (noting how the Federal Circuit was intended to “end the ‘current legal confusion’ caused by conflicting interpretations of patent law from regional circuits.”).

¹⁸⁹ See Zimmer, *supra* note 167, at 46–47; Ginsburg & Wright, *supra* note 166, at 795.

ultimately, a lesser burden on litigants.¹⁹⁰ While the distinction between specialization’s benefits on judicial efficiency and expertise is nuanced, it is important; mainly, the increase in expertise is the catalyst for increases in efficiency.¹⁹¹ While a judge’s expertise may increase the quality of decisions, it also allows for quicker decision-making on meritorious cases and the identification and dismissal of meritless cases, as evinced by the results from the Patent Pilot Program.¹⁹² Additionally, greater judicial expertise leads to an improvement in case management because judges with more experience in and knowledge of the subject matter can better handle procedural aspects like pretrial schedules, filing requirements, and disclosures of evidentiary materials.¹⁹³ Specialization also leads to an increase in efficiency for generalist courts because generalist courts can transfer “time-consuming, problematic, and complex areas in the law to specialized courts,” which are better equipped to deal with them.¹⁹⁴ Thus, specialization is also more desirable where a case type’s complexity would impede the efficiency of a generalist court.

2. Drawbacks of Specialized Courts and Potential Solutions

The federal judiciary has been praised for staying generalist where specialization in government and society “is both inevitable and desirable, [and] a source of benefits to the organizations in which it occurs and to the people whom those organizations serve.”¹⁹⁵ Largely, the maintenance of generalist courts is driven by the perceived drawbacks of specialization: (1) increased susceptibility to outside influence and (2) a narrowing of specialist judges’

¹⁹⁰ See Zimmer, *supra* note 167, at 46–47.

¹⁹¹ Ginsburg & Wright, *supra* note 166, at 794.

¹⁹² See WILLIAMS ET AL., *supra* note 178, at 33, *see also* Ginsburg & Wright, *supra* note 166, at 794; Baum, *supra* note 137, at 1676.

¹⁹³ See Zimmer, *supra* note 167, at 47.

¹⁹⁴ *Id.* at 46; *see also* Silvestri, *supra* note 174, at 168.

¹⁹⁵ BAUM, *supra* note 142, at 1.

perspectives.¹⁹⁶ Critics of specialized courts, however, recognize that these drawbacks can be counteracted, and may not be insurmountable in some instances.¹⁹⁷

A specialized court's increased susceptibility to outside influence, otherwise known as "capture," is due to specialized courts having fewer judges, specialist judges hearing fewer cases, and the selection process of specialist judges.¹⁹⁸ For example, Circuit Judge Douglas Ginsburg and Professor Joshua Wright, in their consideration of the potential effects of specialization in antitrust law, discuss the various external interest groups that would have a stake in the selection of judges for a specialist antitrust tribunal.¹⁹⁹ These groups include National Competition Authorities, a country's competition regulator that makes first-instance decisions of whether competition laws have been violated; antitrust bars, which litigate antitrust cases; consumer organizations; and various business interest groups.²⁰⁰ Each of these groups will have different goals, mainly, either increased or decreased regulation, and will be motivated to lobby for the specialized antitrust tribunal to appoint judges with particular views.²⁰¹

Though such interest groups typically influence the selection of judges for generalist courts, they are far more motivated to influence judge selection for specialized courts because a particular case type will be entirely concentrated in that single court.²⁰² For example, an interest group that influences the selection of a judge to one of the multitudes of district courts or the twelve federal appellate courts will, by its nature, have far less impact on the actual results in that area of law than if the group influences the selection of a judge to the sole court that has jurisdiction over

¹⁹⁶ See Ginsburg & Wright, *supra* note 166, at 807; BAUM, *supra* note 142, at 2; Zimmer, *supra* note 167, at 48–49.

¹⁹⁷ See, e.g., Ginsburg & Wright, *supra* note 166, at 810 (concluding an analysis of specialized courts in antitrust law by stating that "the objections raised against specialist tribunals, at least as applied to antitrust cases, are not daunting, much less insurmountable").

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 800–01.

²⁰¹ See *id.* at 801.

²⁰² BAUM, *supra* note 142, at 37–38.

a legal field.²⁰³ Thus, interest groups can attain more influence in a particular legal area at a lower cost by holding sway over a specialized court.²⁰⁴

Critics of specialization have attempted to present evidence of such “capture” by interest groups of specialized courts,²⁰⁵ but empirical data on this phenomenon is scarce.²⁰⁶ Notably though, no matter interest groups’ actual influence on specialist courts, even the perception of a court being biased towards one party over another will negatively impact the court’s effectiveness.²⁰⁷ Thus, some jurisdictions have explored solutions to this “capture” problem by having specialist courts “staffed by judges drawn from generalist courts, temporarily and only to the extent needed.”²⁰⁸ The premise behind this procedural safeguard is that generalist judges, who are less susceptible to capture while serving on generalist courts, could provide a specialized court with a neutral perspective.

Further, critics of specialized courts opine that specialized judges have a narrowed perspective on legal issues and public policy.²⁰⁹ This narrowed perspective may be the result of judges on specialized courts (1) being exposed to repeat players in litigation, like the interest groups mentioned above, and will favor one party over another; or (2) having their expertise entrench them in particular beliefs and provide them less overall judicial experience to draw on, as opposed to generalist judges.²¹⁰ While the former concern likely has the same causes and effects as the capture consideration above, the latter concern requires more discussion.

²⁰³ *Id.* at 37.

²⁰⁴ *See id.* 37–38.

²⁰⁵ *See, e.g.,* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 392 (discussing the failure of the Commerce Court and the perception of its bias that led to additional judges being appointed to the tribunal).

²⁰⁶ *See* Perez, *supra* note 165, at 596.

²⁰⁷ *Id.*

²⁰⁸ Ginsburg & Wright, *supra* note 166, at 808.

²⁰⁹ *See id.* at 802.

²¹⁰ *See id.* at 803–04.

While increased expertise and specialization are largely agreed to lead to entrenchment in particular viewpoints, the debate surrounding this aspect of specialized courts is whether the drawbacks of such entrenchment are overcome by other desirable outcomes. For example, Judge Ginsburg and Professor Wright explored specialization's effects on various aspects of a court's efficacy, including (1) its variability, i.e., its exposure to multiple areas of the law; (2) its bias, i.e., favoring one party or one particular view of the law or public policy; and (3) its total error, i.e., making correct or "high quality" decisions.²¹¹ Overall, generalist courts were found to have lower bias but higher variability and total error, while specialized courts had higher bias but lower variability and total error.²¹² Thus, if lower bias is valued above all other markers, specialized courts will likely be seen as a deficient option. But if lower error and increased expertise are desired, then specialization would be a viable option. Though the three concepts explored by Ginsburg and Wright are hypothetical distinctions between generalist and specialized courts, they are still a worthwhile consideration when analyzing the two judicial forums.

IV. WHY A SPECIALIZED COURT IS BEST SUITED TO APPLY SECTION 2 TO BIG TECH

So far, this Comment has explored the current Section 2 framework, the complex economic issues that make Section 2 difficult to apply to Big Tech, and judicial specialization's benefits and drawbacks. Given that specialization's desirability is dependent on the issues and goals of a particular legal area, it is necessary to analyze how specialization may affect the unique problems Big Tech presents for antitrust law. As discussed, specialist judges are most desirable where (1) there is a complex legal area to which an inexperienced generalist judge may be ill-suited, (2) increased expertise is more likely to lead to "higher quality" decisions, and (3) judicial efficiency

²¹¹ *Id.*

²¹² *Id.* at 804 illus. 1.

may be a concern.²¹³ Thus, the congruence between Big Tech’s antitrust problems and the aforementioned benefits of specialization exemplifies why specialization is an efficacious option for antitrust law to confront Big Tech.²¹⁴

First, while studies have not elucidated a one-to-one link between judicial specialization and an increase in decision quality, there has been evidence that specialization positively impacts certain markers of decision quality. As mentioned, the Patent Pilot Program found specialization had a favorable effect on adjudication time and reversal rates,²¹⁵ however, there is no consensus on the most accurate metrics for discerning decision quality.²¹⁶ Additionally, the perception of a decision’s quality will largely depend on how an individual is affected by the legal interpretation.²¹⁷ Thus, the complexity of the legal area and the role of efficiency are the more prudent measures for specialization’s desirability in antitrust.

The complexity of applying Section 2 to the unique circumstances of Big Tech platforms cannot be understated; understanding the intricacies and impact of network effects and two-sided markets on antitrust analysis requires experienced adjudicators.²¹⁸ Network effects are often immeasurable and two-sided markets can be analyzed in a plethora of ways,²¹⁹ and even understanding simple market effects may depend on assessing the number of users or transactions in a given case.²²⁰ This complexity arises from the unique and novel positions Big Tech companies hold in the marketplace, requiring courts to (1) measure the size of the network effects that permeate a Big Tech platform (2) assess if those network effects apply to one or both sides of the

²¹³ See *supra* Part IV.C.1.

²¹⁴ See *supra* Parts II.B.2, III.C.

²¹⁵ See WILLIAMS ET AL., *supra* note 178, at 33.

²¹⁶ Connors, *supra* note 171, at 801.

²¹⁷ See *id.*

²¹⁸ See Bloodstein, *supra* note 109, at 226.

²¹⁹ *Id.* at 226.

²²⁰ Guggenberger, *supra* note 103, at 279–81.

two-sided market, and (3) understand whether those effects are positive or negative.²²¹ As such, scholars have recognized that generalist judges may be “ill-suited” to identifying, understanding, and defining network effects in innovative two-sided markets, such as the Amazon marketplace, Google search engine, and Apple App Store.²²²

Even if a judge understands network effects and complex markets, analyzing the impact of these concepts in each case is a highly technical venture requiring judges to choose between a qualitative or quantitative method of identifying the particular network effects at play.²²³ As mentioned, a qualitative method is efficient but also inaccurate and does not reveal the actual quantity of network effects.²²⁴ Conversely, a quantitative method garners superior in-depth measures of a network’s size and type but is more time-consuming.²²⁵ Most generalist judges would be inclined to opt for the more efficient qualitative method because it is less time intensive and the alternative quantitative technical method’s complexity “may be ill-suited for ‘generalist judges.’”²²⁶ The quantitative method, however, is the optimal choice for comprehensive analysis and its time-consuming drawbacks are less impactful when the method is employed by a judiciary with expertise.²²⁷ Thus, specialist judges are an ideal choice for Big Tech antitrust cases because they can employ the most accurate analysis in the most efficient manner.

Nikolas Guggenberger elucidated an example of this increased expertise and efficiency in analyzing networks in two-sided markets by showing how the *Epic Games* Section 2 ruling would have been impacted by a judiciary with a greater understanding of the nuanced network effects

²²¹ See Bloodstein, *supra* note 109, at 226.

²²² See *id.* at 226 (discussing the inquiry into Amazon’s network effects); see also Herbison, *supra* note 80, at 6–8 (discussing Facebook and Google’s two-sided markets).

²²³ See Filistrucchi et al., *supra* note 111, at 11–13.

²²⁴ See *id.*

²²⁵ *Id.*

²²⁶ See Bloodstein, *supra* note 109, at 226.

²²⁷ See *id.*

and Big Tech platforms at play.²²⁸ In doing so, Guggenberger utilized the Essential Facilities Doctrine, an offshoot of the unilateral refusal to deal doctrine;²²⁹ however, the example can be easily applied in the context of a specialist judiciary employing traditional Section 2 analysis. As a recap, a court requires “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power” in order to impose Section 2 liability.²³⁰

In *Epic Games*, monopoly power would naturally follow from having a significant share of the relevant market. The *Epic Games* court found that the relevant market was comprised of Apple’s and Google’s respective app stores.²³¹ This market definition resulted in the court finding that Apple did not possess monopoly power because Google Play stood as a viable alternative for consumers.²³² The two app stores, however, are not interchangeable because each has its own unique network and users tend to “single home”—meaning that Epic’s exclusion from one app store necessarily excludes it from that store’s entire network, with no alternative to reach the network’s users.²³³ This is because (1) “[r]eaching only Apple iOS or Google Android users does generally not provide a viable business option” and (2) due to network effects and practical considerations, third parties cannot be expected to create a competitive alternative to the Apple App Store that would have equal access to Apple’s users.²³⁴ Thus, the requirement that products be “reasonably interchangeable” in a given market would not be satisfied by the court’s definition;

²²⁸ See Nikolas Guggenberger, *The Essential Facilities Doctrine in the Digital Economy: Dispelling Persistent Myths*, 23 YALE J.L. & TECH. 301, 316–23 (2021).

²²⁹ See *id.*

²³⁰ *United States v. Grinnell*, 384 U.S. 563, 570 (1976).

²³¹ See *Epic Games v. Apple, Inc.*, 559 F. Supp. 3d 898, 940 (N.D. Cal. 2021).

²³² See Kovovic, *supra* note 125, at 640–41.

²³³ See Guggenberger, *supra* note 228, at 317 (2021).

²³⁴ *Id.* at 318–19. Research showed that Apple’s iOS enjoyed a 91 percent “loyalty rate” in 2018, meaning that those users would be very unlikely to switch to an Android device in response to an increase in prices on the Apple App Store. See Damien Geradin & Dimitrios Katsifis, *The Antitrust Case Against the Apple App Store*, 17 J. COMPETITION L. & ECON. 503, 538 (2021). Moreover, if an app developer like Epic were to abandon the iOS ecosystem, they would risk losing up to 31 percent of their customer base. *Id.* at 538–39.

instead, the Apple App Store itself would be the relevant market because there are no reasonable alternatives and it cannot be reasonably duplicated.²³⁵

Moreover, once monopoly power in the relevant market is established, the most likely exclusionary conduct that would impose liability on Apple would be a refusal to deal. Apple refused to deal with Epic Games by removing Epic's Fortnite application because Epic violated the Apple App Store terms of service when it attempted to avoid Apple's 30 percent surcharge on all in-app purchases.²³⁶ Though courts have been clear that monopolists generally have no duty to deal with competitors, on occasion, they must grant access to their facilities on reasonable terms.²³⁷ Thus, Epic could argue that either (1) Apple's de-platforming of Epic's apps constituted a refusal to deal or (2) Apple's 30 percent surcharge on in-app purchases was an unreasonable term that constituted a refusal to deal.²³⁸ Because Section 2 liability for refusals to deal is an ill-defined concept, Apple can still argue that its terms were favorable given the market conditions, available alternatives, and Epic's return on its investment in the Apple App Store.²³⁹

In the end, having a specialized court with expert judges adjudicate the *Epic Games* case may not have changed the outcome given the potential arguments surrounding the exclusionary conduct factor. Nevertheless, it is likely that the court's findings on the relevant market and product alternatives would have been significantly impacted by more nuanced considerations of network effects.²⁴⁰ What Guggenberger's analysis highlights is that (1) judicial expertise allows for more flexibility in complex digital market antitrust analysis and (2) an expert's ability to

²³⁵ Guggenberger, *supra* note 228, at 318–19; *see also* Geradin & Katsifis, *supra* note 234, at 535 (proposing that the relevant market for Apple's App Store is "app distribution on iOS devices, a two-sided market on which Apple has a de facto monopoly").

²³⁶ *Id.* at 320; *see Epic Games*, 559 F. Supp. 3d at 940.

²³⁷ ABA ANTITRUST, *supra* note 30, at 275; *see Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600 (1984).

²³⁸ *See* Guggenberger, *supra* note 228, at 320.

²³⁹ *See id.*

²⁴⁰ *Id.*

understand network effects and two-sided markets is conducive to effectively imposing Section 2 liability on Big Tech.²⁴¹

Overall, the relationship between Big Tech and antitrust is rife with complex legal and economic analyses,²⁴² fears of doctrine being pushed to its extremities,²⁴³ and a disconnect between traditional case law and new-age markets.²⁴⁴ These tensions arise from the novel antitrust issues that Big Tech poses—especially when network effects and two-sided markets are robust in a given case—and the focus by generalist courts on efficiency and minimal bias, rather than high quality and technical adeptness.²⁴⁵ Thus, given the desirable outcomes of specialized courts to proffer high-quality decisions and astute analyses of complex legal areas, specialized courts are a sufficient option to meet the goals of American antitrust law and adequately control Big Tech in the market.

V. REGULATORY APPROACHES TO CURBING BIG TECH AND THEIR SHORTCOMINGS

Though this Comment advocates that judicial specialization would be an effective method for addressing the conflicting relationship between Big Tech and antitrust, other means have been presented to address Big Tech’s antitrust problems, namely, broad legislation. As such, to obtain a comprehensive analysis of specialization’s desirability in this context, it is necessary to compare other proposed solutions’ benefits and shortcomings. As a reminder, the goals of American antitrust law are to promote market efficiency, competition, and, above all, consumer welfare.²⁴⁶

²⁴¹ Shortly after the Epic Games litigation, in 2020, Apple announced it would be cutting its app store commission from 30 percent to 15 percent for developers making less than \$1 million per year; however, those eligible developers “generated just 5 percent of the App Store’s total revenue” in 2019. Alex Castro, *Apple Will Reduce App Store Cut to 15 Percent for Most Developers Starting January 1st*, VERGE (Nov. 18, 2020, 6:00 AM), <https://www.theverge.com/2020/11/18/21572302/apple-app-store-small-business-program-commission-cut-15-percent-reduction>.

²⁴² *Supra* Part II.B.2.

²⁴³ *Infra* Part VI.

²⁴⁴ *Supra* Part II.B.2.

²⁴⁵ *Supra* Parts II.B.2, III.C.2.

²⁴⁶ *See supra* Part II.

Therefore, in order to be a more viable solution than specialization, regulation through broad legislation must have the potential to advance those aims better than specialization’s case-by-case application.

In this realm, the legislation with arguably the most support is the American Innovation and Choice Online Act (“Choice Act”).²⁴⁷ The Choice Act aims to address various monopolistic conduct by Big Tech firms regarding refusals to deal or dealing with other firms on unfavorable terms.²⁴⁸ For example, the *Epic Games* litigation would be a type of activity addressed by the Choice Act.²⁴⁹ To regulate such conduct, the Choice Act designates “covered platforms,”²⁵⁰ which are essentially Big Tech firms.²⁵¹ The Choice Act then prohibits the covered platforms from engaging in thirteen types of discriminatory conduct, such as “advantaging their own products or services over those of other business users”²⁵² Overall, the Choice Act alleviates the burden on plaintiffs to prove monopoly power in the relevant market, instead requiring plaintiffs to show that the defendant qualifies as a covered platform, a markedly easier undertaking.²⁵³ Further, the Choice Act makes demonstrating exclusionary conduct less demanding by establishing delineated illegal conduct for plaintiffs to point to, only affording Big Tech firms limited affirmative defenses to justify their conduct.²⁵⁴

Despite the Choice Act’s obvious procedural benefits to plaintiffs in successfully litigating antitrust challenges against Big Tech, the question of whether the Choice Act promotes substantive

²⁴⁷ S.2992, 117th Cong. (2021).

²⁴⁸ See JAY B. SKYES, CONG. RSCH. SERV., R46875, THE BIG TECH ANTITRUST BILLS 2 (2021).

²⁴⁹ See *id.* at 3.

²⁵⁰ See S.2992, 117th Cong. § 2(a)(5) (2021) (Designating covered platforms, in part, as any online platform that has at least 50,000,000 monthly users in the United States or has an average market capitalization greater than \$550,000,000,000).

²⁵¹ SKYES, *supra* note 248, at 3.

²⁵² *Id.* at 4.

²⁵³ *Id.* at 5.

²⁵⁴ See *id.*

antitrust goals is less certain. First, the Choice Act likely would hamper market efficiency because it disallows Big Tech from making adequate distinctions between “similarly situated businesses.”²⁵⁵ For example, Google’s search engine inherently discriminates against certain businesses that offer less useful information to consumers; thus, requiring Google to treat each result similarly would hamper the search engine’s usefulness.²⁵⁶ Second, market competition may be diminished, rather than promoted, by the Choice Act’s “covered platforms” designation because the four Big Tech firms highlighted in this Comment are not the only technology firms with the potential to dominate the marketplace.²⁵⁷ While this Comment has focused on Google, Apple, Facebook, and Amazon, other firms like Microsoft and Netflix still carry a vast amount of market power but may not meet the qualifications for a covered platform.²⁵⁸ As a result, the Choice Act creates “a two-level playing field,” with the covered platforms under a more stringent regulatory scheme than other firms.²⁵⁹

Lastly, and most importantly, blanket regulations like the Choice Act may actually harm consumer welfare—American antitrust’s foremost objective.²⁶⁰ Undisputedly, Big Tech’s massive market innovations have improved consumer welfare by lowering prices and increasing the buying choices consumers have.²⁶¹ This is a result of multiple Big Tech efficiencies, including the aforementioned tailored Google search results, Amazon’s model of providing consumers optimal choices between Amazon-brand and third-party products, and the Apple App Store’s

²⁵⁵ See Thomas M. Lenard, *Congress’s Anti-Innovation, Anti-Consumer Big Tech Antitrust Proposals*, 44 REGULATION 10, 11 (2021).

²⁵⁶ See *id.*

²⁵⁷ See *id.* (A firm’s “[s]ize alone says nothing about whether a given behavior is anticompetitive.”).

²⁵⁸ See Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087, 1122–23 (2022).

²⁵⁹ *Id.* at 1123.

²⁶⁰ See *supra* Part II.

²⁶¹ See Alford, *supra* note 3, at 899–901; see also Beaupre, *supra* note 84, at 41–42.

amalgamation of thousands of applications on a single device.²⁶² These business models require Big Tech platforms to favor the businesses that they believe will best serve consumers. As such, critics of the Choice Act have noted that the bill prohibits these business models by placing blanket prohibitions on self-preferencing (favoring one business over another) and could lead to inefficiencies, decreased innovation, higher prices, and fewer choices for consumers.²⁶³

These potential drawbacks of the Choice Act highlight the inherent differences between blanket prohibitions and judicial case-by-case analysis. Antitrust law has historically utilized common law because of its flexible case-sensitive application.²⁶⁴ While this Comment has explored the inadequacies of current antitrust law when applied to Big Tech, those shortcomings arise largely from the imbalance between Big Tech’s exponential innovation and common law’s traditionally slow development, rather than an innate dissonance between common law and antitrust.²⁶⁵

Ultimately, the Choice Act has potential benefits for plaintiffs and could serve to impose greater liability on Big Tech firms. Like any blanket regulation, however, the Choice Act merely seeks to force a desired outcome, rather than “curing the underlying disease (the lack of competition).”²⁶⁶ What this means for Big Tech antitrust is that the short-term outcome of the Choice Act may be a rebalancing of market position between Big Tech and other competitors, but the long-term effects will likely see other firms gain similar market advantages through means that circumvent the regulation’s parameters. Thus, if a flexible case-sensitive adjudicatory approach is the most efficacious method for meeting American antitrust goals and, as this Comment has

²⁶² Lenard, *supra* note 255, at 10.

²⁶³ See Portuese, *supra* note 258, at 1123.

²⁶⁴ See Thomas A. Lambert, *Addressing Big Tech’s Market Power: A Comparative Institutional Analysis*, 75 SMU L. REV. 73, 76 (2022).

²⁶⁵ *Supra* Part II.

²⁶⁶ Lambert, *supra* note 264, at 84.

explored, judicial specialization may be the best mode of adjudication for Big Tech-antitrust cases, then a specialized appellate court would be worthy of consideration to address Big Tech's dominant market position.

VI. CONCLUSION

Negative public sentiments against Big Tech are valid, but so too are the concerns surrounding an overreach of regulation. Big Tech firms are some of the most innovative and revolutionary companies in history, and their success should not be unjustly punished. Current antitrust doctrine is capable of controlling these companies—provided, however, the legal principles are applied properly by adjudicators who understand the impact of network effects in entrenching market dominance and hindering entry, two-sided markets, and public policy implications that are inherent in Big Tech antitrust complaints.

Though a generalist judiciary will be the optimal adjudicatory method in most legal areas, Big Tech and the antitrust concerns surrounding these goliaths present a unique scenario where increased judicial expertise and efficiency inherent in specialization are desirable. Therefore, the creation of a federal antitrust appellate court is necessary to accomplish sensible Big Tech reformation and obtain a balance between innovation, consumer welfare, and competitive markets.