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1 Introduction

As in most countries, antitrust laws in the U.S.[1] provide the legal framework to promote market competition and to punish anticompetitive behavior by business firms and collective entities. Such anticompetitive practices usually involve collusion, cartelization, and abuse of market dominance, among others. A growing concern in U.S. antitrust circles is the set of challenges posed by Big Tech—large technology and internet firms such as Google, Apple, Facebook, and Amazon (GAFA)—to market competition, consumer choice, and consumer welfare.

In recent years, U.S. lawmakers and antitrust officials at the U.S. Department of Justice (DoJ) and the Federal Trade Commission (FTC) have become increasingly cognizant of the threat posed by the quickly and vastly increasing dominance of GAFA.[2] In late 2020, Google and Facebook were sued by the DoJ and FTC, respectively, for potential antitrust violations. Both technology giants have also been sued by a coalition of U.S. states over antitrust concerns. Meanwhile, in 2020, U.S. House Democrats concluded legislative proposals that targeted the monopoly powers of all these four Big Tech firms.[3] In 2021, numerous bills that targeted the growing market power of Big Tech were introduced in both the U.S. House of Representatives

[1] In the U.S, the main federal antitrust laws are the Sherman Antitrust Act of 1890, the Clayton Act of 1914, and the Federal Trade Commission Act of 1914. Largely peculiar to the U.S., states also have state-level antitrust laws, with the state attorneys general being the state official authorized to file civil lawsuits against anticompetitive behavior.

[2] Parakkal, Raju (2020), "Antitrust in the Digital Era: Rethinking Dominance and its Abuse." In Udai S. Mehta and Ujjwal Kumar (Eds.) *Competition and Regulation in India, 2019*, pp. 28-56. Jaipur, India: CUTS.

[3] McKinnon, John D. (2020), "Antitrust Cases Pile Up for Big Tech." *Wall Street Journal* December 17, 2020.

and the U.S. Senate. Although all of these bills have the potential to become law, their final fate is uncertain at the moment.

Strangely enough, the current stand-off between Congress and Big Tech draws a parallel with the historic antitrust tussles that Congress had with organized baseball for a century because of a unique exemption from antitrust challenges that baseball received from the U.S. Supreme Court in 1922. To some extent, baseball's antitrust immunity de facto extended to the three other major American sports as well—football, basketball, and hockey. Although the sports industry and the technology industry have markedly different market structures and *modi operandi*, the erstwhile efforts by lawmakers to bring greater antitrust scrutiny to the sports leagues is instructional in developing a roadmap to successfully addressing the antitrust concerns that currently swirl around Big Tech. One such lawmaker was the late U.S. Senator Arlen Specter from the state of Pennsylvania. Specter had long-standing connections to both baseball and antitrust and was one of the most notable members of the U.S. Congress who was involved, for almost three decades from the 1980s to the 2000s, in efforts to eliminate baseball's antitrust exemption. The prior antitrust work of the late Senator becomes relevant and significant in the context of the current concerns over potential antitrust violations by Big Tech.

The preceding discussion leads to the central question examined in this study: What lessons are obtained for antitrust action against Big Tech from the antitrust history with the sports industry? This question is pertinent and timely for at least three reasons. First, from a legislative angle, the prior antitrust objectives and arguments of U.S. lawmakers, such as Senator Specter, concerning the sports leagues closely mirror those of current lawmakers against Big Tech. For example, Senator Specter remarked during a Senate hearing on December 12, 1992,

concerning baseball and antitrust law that "…sports were affected with a *public interest*…"[4] and, therefore, it deserved legislative scrutiny. This parallels the present-day contention of lawmakers and antitrust pundits who question the power of Big Tech and argue that modern technology and the Internet are imbued with a *similar public interest*.[5] Transferable lessons are, therefore, available for antitrust between these two scenarios. Second, in terms of timing, the current antitrust attention on Big Tech is nascent and, therefore, it is appropriate to look back in history at the antitrust saga with the sports leagues to draw early lessons. Finally, even though lawmakers' efforts did not directly lead to an annulment of the antitrust exemptions enjoyed by these four leagues, the power asymmetry that existed in favor of the leagues and the team owners has dissipated in at least some of these leagues, especially with regard to labor relations.[6] For example, ever since the "Big 3"—basketball superstars Chris Bosh, LeBron James, and Dwyane Wade—joined together as teammates of the Miami Heat franchise in 2010, there have been greater opportunities for NBA superstars to informally meet (read: "collude," which is a violation of Section 1 of the Sherman Act) to successfully form similar "Big 3" efforts without attracting antitrust concerns from the NBA, team owners, or NBA fans. In other words, some of the original antitrust concerns over the power asymmetry in labor relations have either been organically dissolved or strategically ignored. Regardless, the antitrust journey of the sports leagues presents helpful lessons for lawmakers, government officials, and antitrust scholars as

[4] C-SPAN (2020), "Arlen Specter on MLB Anti-Trust." Dec 10, 1992: URL: https://www.c-span.org/video/?c4926960/user-clip-arlen-specter-mlb-anti-trust

[5] Wheeler, Tom, Phil Verveer, and Gene Kimmelman (2020), "The Need for Regulation of Big Tech Beyond Antitrust." *The Brookings Institution*. URL: https://www.brookings.edu/blog/techtank/2020/09/23/the-need-for-regulation-of-big-tech-beyond-antitrust/

[6] Rodenberg, Ryan M. and Justin M. Lovich (2013), "Reverse Collusion." *Harvard Journal of Sports & Entertainment Law* 22: 191-223.

they address antitrust concerns related to Big Tech. By carefully examining and evaluating the sports leagues' antitrust journey, this research seeks to inform both the legislative and scholarly communities in American antitrust of these valuable lessons.

2 Antitrust and Big Tech: The Perils of Bigness and Dominance

It was a foregone conclusion that the phenomenal growth of the major technology firms was bound to run into antitrust troubles at some point. The historical evidence for that was situated in the Microsoft antitrust case from the late 1990s, when the U.S. DoJ and a group of 20 U.S. state attorneys general sued Microsoft Corp. on May 18, 1998, for possible violation of U.S. antitrust laws. The main charge was that the world's then most dominant software company was "illegally protecting its operating-system monopoly and seeking a new monopoly for its own browser, Internet Explorer,"[7] by bundling its browser with its market-dominating Windows operating system, thereby nixing growth opportunities for other browsers, notably its then closest competitor browser, Netscape Navigator. For the emerging digital era, the U.S. government's move to go after Microsoft for abuse of corporate power and dominance by invoking the nation's antitrust laws was unprecedented.[8] The case was settled via a consent decree[9] that allowed

[7] Blumenthal, Richard and Tim Wu (2018), "What the Microsoft Antitrust Case Taught Us." *The New York Times* May 18, 2018. https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html.

[8] Gavil, Andrew I. and Harry First (2014), *The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century*. Cambridge, MA: The MIT Press.

[9] A "consent decree" is a practice in the U.S. justice system where parties settle disputes without any admission of guilt or assigning of liabilities. Issuing consent decrees is an increasingly common practice in U.S. antitrust cases. In the Microsoft antitrust case, as per the terms of the consent decree, the company was not declared guilty but had to agree to various constraints placed on its operating system, software, and contracting practices.

Microsoft to continue to bundle other software, including Internet Explorer, with its operating system but restricted "the terms and conditions that Microsoft could impose on PC makers who distributed Windows."[10] While many of the states that sued Microsoft thought the company got away with a very light punishment, critics of government intervention in business and industry—such as pro free-market economist, Milton Friedman—decried the antitrust intervention in the computer industry.[11] Meanwhile, supporters of the DoJ's antitrust actions have since pointed out how the outcome of the case helped innovation surge in the American digital space and prevented Microsoft from holding a triple monopoly of operating system, internet browser, and major applications.[12]

Despite the tumultuous and long-drawn-out Microsoft experience, U.S. antitrust has largely been quite lax in the past few decades. This was true regardless of the political party in

[10] Rosoff, Matt (2020), "DoJ Case Against Google Has Strong Echoes of Microsoft Antitrust Case." *CNBC LLC* October 20, 2020. https://www.cnbc.com/2020/10/20/doj-case-against-google-has-strong-echoes-of-microsoft-antitrust-case.html.

[11] Reacting critically to Microsoft's competitors, such as Netscape, Oracle and Sun Microsystems, lobbying lawmakers hard in the 1990s to bring an antitrust case against Microsoft, Friedman asked technology executives at a conference in 1999 whether it was "really in the self-interest of Silicon Valley to set the government on Microsoft," while reminding the executives that "Your industry, the computer industry, moves so much more rapidly than the legal process that by the time this suit is over, who knows what the shape of the industry will be?" Friedman lamented: "Never mind the fact that the human energy and the money that will be spent in hiring my fellow economists, as well as in other ways, would be much more productively employed in improving your products." At the same conference, Friedman continued to warn and predict: "You will rue the day when you called in the government. From now on, the computer industry, which has been very fortunate in that it has been relatively free of government intrusion, will experience a continuous increase in government regulation. Antitrust very quickly becomes regulation." Crovitz, L. Gordon (2013), "Silicon Valley's 'Suicide Impulse'." *The Wall Street Journal* January 28, 2013. https://www.wsj.com/articles/SB10001424127887323539804578266290231304934.

[12] Blumenthal, Richard and Tim Wu (2018), "What the Microsoft Antitrust Case Taught Us." *The New York Times* May 18, 2018. https://www.nytimes.com/2018/05/18/opinion/microsoft-antitrust-case.html.

power—Democratic or Republican.[13] Notwithstanding this recent record of lackadaisical enforcement of antitrust laws, certain actions and inactions by Big Tech and an increasing suspicion that the growing dominance of these technology firms was jeopardizing not only fair market competition but also American democracy forced the DoJ, the FTC, and many state antitrust agencies to spring into action in the last few years. Quite noticeably, there have been concurrent antitrust action coming from the legislature, with the U.S. House Judiciary Committee drafting several bipartisan antitrust bills targeted at the growing dominance of Big Tech and the alleged abuse of that dominance. As will be explained in detail in section 4, these bills are the first legislative salvos at the might of GAFA and represent a watershed moment in modern-day antitrust policy. It was inevitable that the stunning growth of Big Tech in the decade of 2010-2020 would not escape scrutiny by lawmakers.

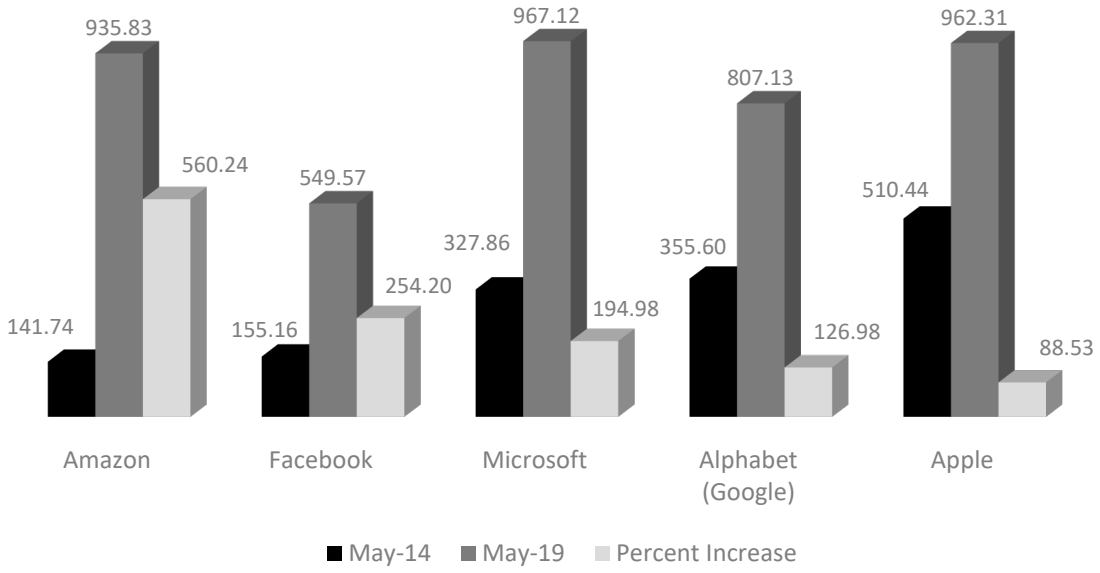
2.1 The Growth of Big Tech

A century ago or so ago, Standard Oil Co. butted heads with U.S. antitrust agencies and was declared by the U.S. Supreme Court in 1911 as an illegal monopoly for its aggressive pricing and anticompetitive business practices. Standard Oil got split into 34 different entities, some of which went on to become part of a group of oil companies collectively known as Big Oil. Today, it is the turn of major technology companies to grapple with U.S. antitrust—in place of Big Oil and antitrust, there is Big Tech and antitrust. In many ways, the scenarios are not too different from a century ago, as U.S. lawmakers and antitrust agencies take on Big Tech and the alleged abuse of its dominance.

[13] Stucke, Maurice E. and Ariel Ezrachi (2017), "The Rise, Fall, and Rebirth of the U.S. Antitrust Movement." *Harvard Business Review* December 15, 2017. https://doi.org/https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

But how "big" is Big Tech, and how did "Big Tech" happen? The "Bigness" of Big Tech has become modern folklore but it warrants a detailed presentation and pointed discussion here. Figure 1 provides a quick snapshot of the growth of the major tech firms—GAFAM—during the period 2014-2019 in terms of their market capitalizations. While every one of these five companies experienced gravity-defying increases in their market capitalizations in this five-year period, the growth of two companies is especially noticeable: Facebook, whose market capitalization jumped more than three-fold, and Amazon, whose market capitalization registered a phenomenal growth of over 500 percent.

Figure 1: Growth of GAFAM Market Capitalization, 2014-2019 (USD billions)[14]



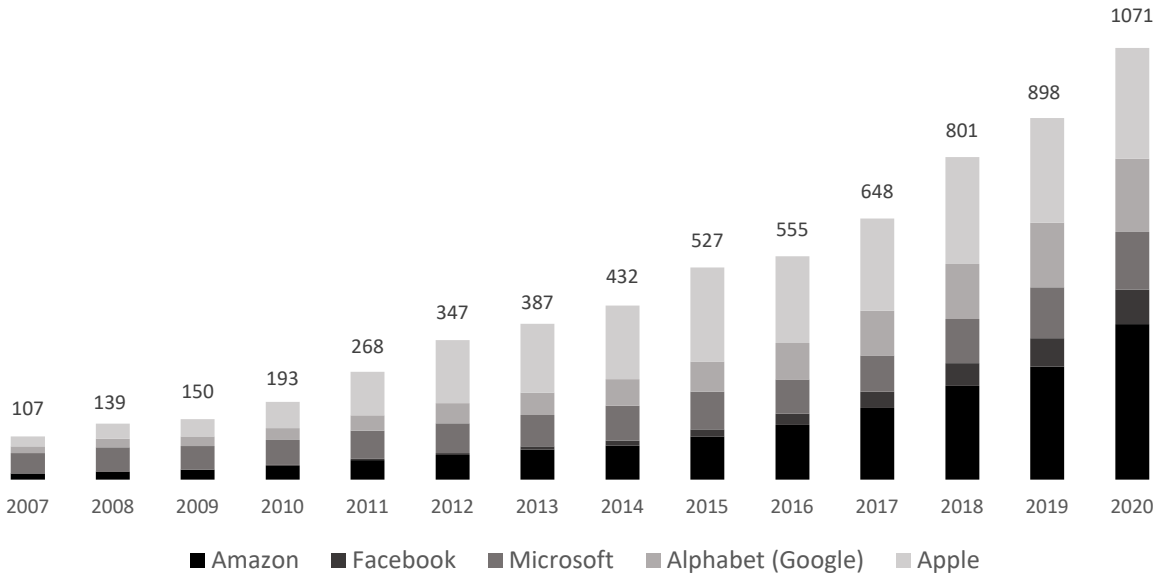
As of end-July 2021, the market capitalizations of all of these five Big Tech firms crossed a trillion dollars each (see Figure 2). While market capitalizations tell one side of the story, the

[14] Statista (2019), "GAFAM Market Cap Jumps $2.7 Trillion Over Past Five Years." *Statista* May 3, 2019. URL: https://www.statista.com/chart/17875/market-capitalization-of-selected-tech-companies/

growth in revenues constitute an equally compelling side of the same story. Figure 3 illustrates the individual and combined revenue growth of GAFAM from 2007-2020.

Figure 2: GAFAM Market Capitalization, July 30, 2021 (USD billions)[15]

Figure 3: Individual and Combined Revenue Growth of GAFAM, 2007-2020 (USD billions)[16]



[15] The raw market capitalization data for each company were obtained from Yahoo Finance (2021). URL: https://finance.yahoo.com/

[16] Statista (2022), "Google, Amazon, Meta, Apple, and Microsoft (GAMAM) - Statistics & Facts." *Statista*. URL: https://www.statista.com/topics/4213/google-apple-facebook-amazon-and-microsoft-gafam/#topicOverview

As Figure 3 shows, from around $107 billion in combined revenues in 2007, the total for GAFAM grew to $1071 billion by 2020—a 900 percent increase over a thirteen-year period. To put this growth in perspective, Figure 4 tracks the shifts in the top six most valuable companies in the world since the turn of the century. While there was only one GAFAM company in the top six in 1999—Microsoft Corp.—by 2017, all top five businesses were each of the five GAFAM companies. April 2021 market capitalization figures show that five out of the top six most valuable companies include the GAFAM companies.

Figure 4: Most Valuable Companies in the World by Market Capitalization[17]

RANK	1999	2009	2014	2017	April 2021
1	Microsoft $602bn	Exxon Mobil $327bn	Apple $478bn	Apple $861bn	Apple $2,252bn
2	GE Corp. $507bn	Microsoft $271bn	Exxon Mobil $438bn	Alphabet (Google) $730bn	Microsoft $1,966bn
3	Cisco Systems $357bn	Walmart $208bn	Microsoft $333bn	Microsoft $660bn	Saudi Aramco $1,897bn
4	Walmart $307bn	HSBC $198bn	Google $298bn	Amazon $564bn	Amazon $1,711bn
5	Exxon Mobil $278bn	China Constrn. $193bn	Johnson & Johnson $282bn	Facebook $513bn	Alphabet (Google) $1,538bn
6	Intel $275bn	Apple $188bn	GE Corp. $268bn	Tencent $493bn	Facebook $870bn

GAFAM Company

[17] The data for 1999, 2009, and 2014 are from Steiger, Paul E. (2014), "What a Difference 25 Years Makes." *CNBC.* URL: https://www.cnbc.com/2014/04/29/what-a-difference-25-years-makes.html. The 2017 data are from Statista (2018), "Digital Economy Compass 2018." *Statista*. URL: https://www.statista.com/study/52194/digital-economy-compass/. The April 2021 data are from Statista (2021), "The 100 Largest Companies in the World by Market Capitalization in 2021." *Statista*. URL: https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/.

The growth in GAFAM revenues and market capitalizations have been accompanied by sizeable increases in market shares for these firms, most notably Google, Apple, Facebook, and Amazon; thus, triggering antitrust concerns. At least since 2010, Google has consistently maintained around 90 percent market share among online search engines for search queries globally.[18] Apple's iPhones in the U.S. registered an increase from 33 percent of smartphone sales in the first quarter of 2016 to a whopping 65 percent in the last quarter of 2020 and 55 percent in the first quarter of 2021.[19] Among social media websites in the U.S., Facebook almost mirrors Google's dominance by enjoying a 78 percent share of all visits.[20] Last but certainly not the least, Amazon's share of the total U.S. retail e-commerce business reached an all-time high of 56.7 percent in 2021, with second-placed Walmart at a distant 6.2 percent.[21]

A major route through which some of these companies expanded their market shares was by acquiring smaller firms and start-ups in similar or closely-related industries. This is especially true for Google and Facebook, both of which made some notable acquisitions along the way: While Google acquired YouTube in 2006 and Waze in 2013, Facebook snapped up Instagram in

[18] StatCounter (2022), "Worldwide Desktop Market Share of Leading Search Engines from January 2010 to July 2022." *Statista*. URL: https://www.statista.com/statistics/216573/worldwide-market-share-of-search-engines/

[19] Counterpoint Research (2022), "Manufacturers' Market Share of Smartphone Sales in the United States from 1st quarter 2016 to 2nd quarter 2022." *Statista*. https://www.statista.com/statistics/620805/smartphone-sales-market-share-in-the-us-by-vendor/

[20] This statistic is for the period Oct 1, 2021 to September 23, 2022 and is based on a survey of 8,214 users in the age group of 18-64 years. Statista (2022), "Social Network Usage by Brand in the U.S. in 2022." *Statista*. https://www.statista.com/forecasts/997135/social-network-usage-by-brand-in-the-us

[21] PYMNTS (2022), "Amazon's Share of US eCommerce Sales Hits All-Time High of 56.7% in 2021." *PYMNTS* March 14, 2022. URL: https://www.pymnts.com/news/retail/2022/amazons-share-of-us-ecommerce-sales-hits-all-time-high-of-56-7-in-2021/

2012 and WhatsApp in 2014. Google's buying spree saw it acquire, on average, *one company per week* since 2010.[22] For its part, Facebook has acquired over 90 companies as of 2021.

2.2 Digital Dominance: Causes, Consequences, and Concerns

The *first* of the two fundamental tools of digital dominance is data, or Big Data, as it has collectively come to be called. Some,[23] although erroneously,[24] have even referred to Big Data as the twenty-first century equivalent of oil, in terms of its importance to firm performance and success in the digital era. Despite the seemingly erroneous comparison with oil, the vast amounts of information in the form of consumer preferences, shopping data, and geospatial data in the possession of Big Tech has led these firms to effectively monetize this data to exercise what has been alleged as an act of "data dominance."[25] In turn, data dominance has led to increased market power and market dominance by way of increased switching costs for consumers. Take Google, for example. Even though a decade ago, one could make the argument that the switching

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[22] Epstein, Robert (2018), "Manipulating Minds: The Power of Search Engines to Influence Votes and Opinions." In *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple*, edited by Martin Moore and Damian Tambini, p. 294-319. New York: Oxford University Press.

[23] The Economist (2017), "The World's Most Valuable Resource: Regulating the Data Economy." *The Economist* May 6, 2017.

[24] Schlosser argues that, for various reasons, it is erroneous to equate data with oil. For one, data has no fixed supply or scarcity as oil does. Data also does not have the high cost of generation that oil extraction demands. Quite critically, oil is a one-time use commodity while data can be re-used and shared numerous times for various purposes. Furthermore, while the quality of data can be enhanced by combining data from different sources, the same cannot be said of the quality of oil that has been mixed with oil extracted from different locations. See Schlosser, Adam (2018), "You May Have Heard Data is the New Oil. It's Not." *World Economic Forum*. https://www.weforum.org/agenda/2018/01/data-is-not-the-new-oil/.

[25] United States, Congress House Committee on the Judiciary, Subcommittee on Antitrust Commercial, and Administrative Law (2020), "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations." https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

costs for a Google consumer was negligible compared to that of a Microsoft Windows user,[26] the fact that Google is no longer only a search engine and offers a bevy of online products and services to which the average Google user has committed means that the *second* fundamental tool of digital dominance—network effects—makes the switching costs for a Google user prohibitively high. As is well-known, network effects are outcomes that materialize when users of a service or product become a network, and the bigger the network the more value, or welfare, the users derive from that service or product. The higher the welfare the user receives from the network, the costlier it is to switch to another network or provider. The argument is that the data dominance and network effects that Big Tech currently enjoy have together created massive barriers to market entry that have led to fewer competitors and less competition.

3 Antitrust and American Sports Leagues: Baseball's Antitrust Exemption Saga

The history of the relationship between American antitrust laws and the country's top four sports leagues is as enthralling as the sports themselves. At the center of that fascinating relationship is the antitrust exemption enjoyed, either explicitly or implicitly, by these leagues. The antitrust exemption for baseball, and effectively for the remaining three leagues, is an anomaly not only in the sports world but also in the antitrust world. Adding to its anomalous nature are the widely-held misconceptions about the nature, origin, and persistence of the exemption itself.[27]

[26] Edlin, Aaron S. and Robert G. Harris (2013), "The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google." *Yale Journal of Law and Technology* 15 (2): 169-213.

[27] Given space constraints and the fact that baseball's exemption from antitrust challenges *de facto* extended limited antitrust immunity to the other three professional sports leagues as well, particularly due to Congressional inaction, the rest of this paper will discuss only baseball's antitrust history and not the antitrust history pertaining to the other three major American sports.

3.1 Baseball's Antitrust Exemption: Its Genesis and Sustenance

Baseball is the oldest of the four leagues and even predates the first American antitrust law, the Sherman Act, which became law in 1890. As will be evident presently, the fact that baseball, as a league, existed before the Sherman Act came into being is consequential. Even though the origin of baseball's antitrust exemption is commonly traced to the 1922 decision by the U.S. Supreme Court in the case called *Federal Baseball Club of Baltimore v. National League* ("*Federal Baseball*," hereafter), where the Court held that "the federal antitrust laws did not apply to baseball, because these laws only governed interstate commerce, and baseball was not a form of interstate commerce,"[28] the 1922 decision itself had to do with the original structure of baseball as a business. Unlike regular business industries where it was considered appropriate for free and open competition to lead to highly successful businesses that offered lower prices or better products, or both, to the benefit of customers, in baseball and in sports in general, one team consistently being the best would deprive the sport of the excitement that results from fierce competition, nearly evenly-matched games, and widespread fan support, all of which would ultimately have a negative effect on team revenues.[29] To prevent such an undesirable outcome, team owners in the National League—baseball's oldest sports league[30]—instituted the "reserve

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Football, basketball, and hockey never received a blanket antitrust exemption, which is still unique to baseball in the U.S.

[28] Banner, Stuart (2013, pp. xiii), *The Baseball Trust: A History of Baseball's Antitrust Exemption*. New York: Oxford University Press.

[29] Banner (2013)

[30] The National League of Professional Base Ball Clubs (National League) was formed in 1876. Although the National League was the first major league in baseball, it was not the first professional baseball league in the country. That honor belongs to the National Association of Professional Base Ball Players (National Association), which was formed in 1871. For various reasons, the National Association is not considered a major league, especially by contemporary

clause" in player contracts that perpetually tied a player to a team until the team chose not to renew the contract.[31] While the reserve clause prevented escalation in player salaries from scuttling the possibility of players jumping ship to the highest bidder—and thereby ensured that team costs were kept under control—it was arguably in breach of the law of contracts, although not of antitrust laws as they were not in existence at that time. And, in most cases that were brought before the courts between 1890 and 1914 by National League teams against players for breach of contract, the contracts containing the reserve clause were found to be unenforceable under common law because it was too *indefinite* in its terms and lacked *mutuality*.[32]

Even though the reserve clause was not enforceable, National League team owners continued to retain it in player contracts and agreed amongst themselves to not poach players reserved by other teams. They could do this successfully because there was no competing league offering players a higher salary. That situation continued until 1901 when the American League was formed and the validity and enforceability of the reserve clause went back to the courts for further debate. In a departure from the previous cases that were decided by lower courts, one case involving one of the best players at the time—Napolean Lajoie—was decided by the

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standards. See Eckerd, E. Woodward (2001), "The Origin of the Reserve Clause: Owner Collusion Versus "Public Interest." *Journal of Sports Economics* 2 (2): 113-30.

[31] As Banner (2013: 6) explains, the reserve clause led to "an unusual system of labor relations, in which players were effectively bound for life to teams that first signed them. Every contract included a clause allowing the club to renew it for the following year. Once renewed, the next year's contract included a similar clause for the year after, and so on, for the remainder of a player's career. Even a player who sat out of baseball for a year or more was still controlled by the team with which he last played."

[32] The reserve clause was deemed indefinite because the terms did not specify the exact salary or how the salary would be determined, among other details. The indefiniteness rendered it a preliminary agreement to create a future contract and not a contract per se. The reserve clause was devoid of mutuality—under the principle of equity jurisprudence—because the contract only bound the player to the club and not vice versa. See Banner (2013: 15-18).

Pennsylvania Supreme Court, which ruled in 1902 on appeal by the Philadelphia Phillies of the National League that given the star worth and value of Lajoie to the Phillies, the reserve clause could be enforced to prevent Lajoie from playing for the Philadelphia Athletics of the American League.[33] Of notable consequence was the fact that the injunction by the Pennsylvania Supreme Court was effective only in the state of Pennsylvania, and Philadelphia Athletics transferred Lajoie to the Cleveland franchise of the American league, evidently to prevent the league from losing the star player.[34]

By 1903, the two leagues—National and American—had come to an agreement to respect reserve clauses in players' contracts in the other league's teams. Although this effectively cemented the existence of reserve clauses in players' contracts—as there were no other leagues to offer alternative offers to the contracted players—the understanding between the two leagues was always ripe for antitrust complaints, for it smacked of collusion between the only two leagues in existence. All that changed in 1913 when a new league—the Federal League—was formed and an antitrust suit was filed by Federal against the National League and the American League for violating federal and state antitrust laws. The leading charge was that the National League and the American League had effectively converted organized baseball into a *monopoly* that not only controlled for perpetuity the salaries and professional trajectories of baseball players but also prevented the entry of new leagues for want of skilled players who could suit up

[33] Banner (2013)

[34] The State Museum of Pennsylvania (2016), "Napoleon Lajoie: How Major League Baseball Made Legal History." http://statemuseumpa.org/napoleon-lajoie-war-between-american-national-leagues/.

for teams in new leagues.[35] As defendants, the National League and American League's arguments centered on the fact that section 6 of the Clayton Act of 1914, a recent amendment to the antitrust laws of the land, stated that "The labor of a human being is not a commodity or article of commerce,"[36] and therefore, "the monopolization of the labor of human beings was not subject to federal antitrust law."[37] The effort was to preclude baseball from antitrust laws by arguing that it was not "commerce," so organized baseball could continue as it existed. Despite initial setbacks to this argument at the trial court, organized baseball succeeded to get the trial court's decision reversed at the D.C. Circuit Court of Appeals. The opposite side immediately appealed to the Supreme Court, where organized baseball won its most decisive and famous victory. The Supreme Court upheld the decision of the Court of Appeals and in a unanimous decision for the Court, Justice Oliver Wendell Holmes delivered the following key parts of a rather concise opinion that was evidently a victory for organized baseball (emphases added):[38]

> The business is *giving exhibitions of baseball*, which are *purely state affairs*. It is true that, in order to attain for these exhibitions the great popularity that they have achieved, competitions must be arranged between clubs from different cities and states. But the fact that, in order to give the exhibitions, the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business…the transport is a mere incident,

[35] Grow, Nathaniel. 2014. *Baseball on Trial: The Origin of Baseball's Antitrust Exemption*. Urbana, IL: University of Illinois Press.

[36] Kovner, Joseph (1947), "The Legislative History of Section 6 of the Clayton Act." *Columbia Law Review*, 47 (5): 749-65.

[37] Grow (2014: 84)

[38] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). URL: https://supreme.justia.com/cases/federal/us/259/200/

> not the essential thing. *That to which it is incident, the exhibition, although made for money, would not be called trade of commerce in the commonly accepted use of those words*. As it is put by defendant, personal effort not related to production is not a subject of commerce. *That which in its consummation is not commerce does not become commerce among the states* because the transportation that we have mentioned takes place.

In its short judgment, the Court even managed to provide analogies to make its point: "a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another state."[39] While making it evident, with the *Federal Baseball* decision, that because it was not interstate commerce, baseball could not be governed by the Sherman Act, the Supreme Court had, however, "*not* said that Congress intended to exempt baseball from the antitrust laws. Rather, the Court had determined that Congress *could not* apply the antitrust laws to baseball, because it lacked the power to do so."[40] Ever since the controversial 1922 verdict, the Supreme Court had two opportunities later to overrule this verdict: first in 1953[41] and then in 1972;[42] in

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[39] Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). URL: https://supreme.justia.com/cases/federal/us/259/200/

[40] Banner (2013: 91; emphases in original)

[41] Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). George Earl Toolson was a baseball player with the Newark Bears, a feeder team for the New York Yankees, and was bound by the reserve clause executed with the Yankees. In 1953, Toolson sued under the antitrust laws "to resist assignment to another club and to escape baseball's ironclad personnel system." In a brief one-paragraph per curium (that is, a decision collectively in the name of the court and not assigned to a single judge or justice), the Supreme Court reaffirmed the *Federal Baseball* precedent and held that baseball was not a business and therefore, was not subject to the federal antitrust laws. Abrams, Roger I. (1999, p. 310), "Before the Flood: The History of Baseball's Antitrust Exemption." *Marquette Sports Law Review* 9 (2): 307-13.

[42] Flood v. Kuhn, 407 U.S. 258 (1972). Charles Curtis Flood was a player for the St. Louis Cardinals, who was traded to the Philadelphia Phillies in 1969, a trade that Flood did not like or

both instances, however, the Court let the 1922 *Federal Baseball* decision stand.[43] The 1953 decision, in *Toolson v. New York Yankees*, is the modern understanding of baseball's antitrust exemption, as explained by Banner:[44]

> Under *Federal Baseball Club*, the source of baseball's antitrust immunity had been the commerce clause of the Constitution. Congress could not regulate baseball because it was not a form of interstate commerce. Under *Toolson*, however, the source of baseball's antitrust immunity was Congress. Congress could regulate baseball, but thus far Congress had chosen not to. *Federal Baseball Club* had rested on the limits of Congress's power, but *Toolson* rested on the vagaries of Congress's choice. From 1953 on, the argument would no longer be about whether Congress *could* bring baseball under the antitrust laws. The argument would be about whether Congress *should*. It was only after *Toolson* that lawyers could begin speaking accurately about baseball having an "exemption" from the antitrust laws, in the sense of an exemption treated as if it were actually intended by Congress.

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agree to but was required to honor because of the reserve clause. Flood sued baseball and its commissioner, Bowie Kuhn, in January 1970. Flood lost both at the federal court trial in 1970 and in the Court of Appeals in 1971. After the case went before the Supreme Court in 1972, the high court ruled that the situation with baseball's antitrust exemption was a "matter for legislative, not judicial, resolution." But, in its opinion, the Court did hold that the antitrust immunity enjoyed by baseball due to *Federal Baseball* and *Toolson* was "an established aberration" but that it is "entitled to the benefit of *stare decisis*." URL: https://supreme.justia.com/cases/federal/us/407/258/

[43] Alito Jr., Samuel A. (2009), "The Origin of the Baseball Antitrust Exemption: Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs." *Journal of Supreme Court History*, 34 (2): 183-95.

[44] Banner (2013: 120)

Banner continues to add:[45]

> Before *Toolson*, it was uncertain whether the antitrust exemption was still in effect, and it was almost as uncertain whether Congress had the power to modify it. *Toolson* removed these uncertainties by answering both questions affirmatively. After *Toolson*, there was no doubt about Congress's authority to subject baseball to whatever antitrust regime it chose.

Even though the following years witnessed intense legislative activity in Congress to pare baseball's exclusive antitrust exemption that resulted from *Toolson*, these legislative proposals amounted to naught because there was little agreement in Congress on how exactly to go about it.[46] Baseball's antitrust exemption was further reaffirmed in 1972 with the Supreme Court's decision in *Flood v. Kuhn* when the Court continued to defer to Congress on any changes to be made to baseball's antitrust exemption. Even though the reserve clause effectively ended in 1975 with the famous "Seitz decision"[47] and Congress did modify baseball's antitrust exemption with the Curt Flood Act of 1998,[48] baseball still enjoys an antitrust exemption for all activities *not* related to the employment of baseball players. As has been noted about the Curt Flood Act,[49]

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[45] Banner (2013: 121)

[46] Banner (2013)

[47] Peter Seitz was an independent baseball arbitrator whose decision in 1975 to rule in favor of two pitchers, Andy Messersmith and Dave McNally, led to the birth of free agency—players becoming free to sign with any team for which they wish to play—in professional baseball. For further details of this momentous ruling, see Abrams, Roger (2009), "Arbitrator Seitz Sets the Players Free." *The Baseball Research Journal* Fall 2009. URL: https://sabr.org/journal/article/arbitrator-seitz-sets-the-players-free/

[48] U.S. Government Publishing Office (1998), "Curt Flood Act of 1998." Public Law 105-297. October 27, 1998. URL: https://www.congress.gov/105/plaws/publ297/PLAW-105publ297.pdf

[49] Edmonds, Edmund P. (1999, p. 318), "The Curt Flood Act of 1998: A Hollow Gesture after All These Years?" *Marquette Sports Law Review* 9 (2): 315-46.

> The final clause of section two declares that the act "[d]oes not change the application of the antitrust laws in any other context or with respect to any other person or entity." The clause appears to assure the owners and commissioner of Major League Baseball that all other aspects of the business of baseball will remain free from antitrust challenge.
>
> Section three declares that the legislation involves "the business of organized professional major league baseball *directly relating to or affecting employment of* major league baseball players." Furthermore, subsection (b) reiterates that the act only relates to employment of players. The drafters of the act have taken great pains to reinforce in numerous ways the extremely narrow grant accorded in section two.

However, the advent of collective bargaining agreements (CBAs), which included provisions for a reserve clause, free agency, and player drafts, between the teams and the players' association meant that players could no longer bring antitrust suits as they themselves had agreed to the terms of the employment. So, even though baseball's antitrust exemption does not apply to players' employment, the CBAs effectively provide baseball with blanket antitrust immunity. The modern-day antitrust status of baseball, therefore, rests on the *exclusion* originally accorded by *Federal Baseball* and the *exemption* granted on the basis of that exclusion by *Toolson* and *Flood*.[50] As McMahon Jr. says, "Even though the *Federal Baseball* Court did not

[50] McMahon Jr., Joseph J. (1995), "A History and Analysis of Baseball's Three Antitrust Exemptions." *Jeffrey S. Moorad Sports Law Journal* 2(2): 213-59.

exempt professional baseball from the Sherman Act, courts and commentators have successfully manufactured a *Federal Baseball* "exemption" during the time since the opinion was issued…"[51]

3.2 U.S. Congress, Arlen Specter, and the Endurance of Baseball's Antitrust Exemption

Since 1952, numerous Congressional hearings related to baseball's antitrust exemption have been held, with wide-ranging objectives that mostly involved taking away the antitrust exemption for baseball. However, the noticeable result of all the Congressional activity in this matter has been one of inaction, with no legislation being passed on this issue. And the inaction was understood by the Supreme Court as tacit approval of baseball's immunity from the nation's antitrust laws.[52] However, the inaction by Congress for almost a century since *Federal Baseball* does not imply that efforts were never afoot in Congress to strip baseball of its prized antitrust exemption. Neither does it mean that these failed efforts hold no lessons for present-day Congressional antitrust actions.

To draw lessons from baseball's antitrust saga as they relate to modern-day Congressional efforts to bring antitrust suits against Big Tech, one needs to examine Congressional attempts at eliminating the antitrust exemption for baseball within the context of *Toolson* where the Supreme Court made it clear that Congress indeed had the authority to alter

[51] McMahon Jr. (1995: 217). In this context, McMahon Jr. (1995: 215) notes the following: "Baseball did not have an exemption until the Court was willing to uphold *Federal Baseball* as a matter of judicial policy. The exemption was created when the *Toolson* Court decided to uphold the *Federal Baseball* ruling for two primary reasons: first, professional baseball supposedly had developed significant interests by relying upon the *Federal Baseball* holding; and second, Congress had not altered the exemption during the thirty years between the *Federal Baseball and Toolson* rulings."

[52] McMahon Jr. (1995)

the antitrust status of baseball. It is a testimony to both the anomalous nature of the exemption and its resilience that Congress tried yet failed on numerous occasions to end baseball's antitrust exemption. The two most recent efforts have been from different sides of the political aisle: In April 2021, Representative Jeff Duncan and Senator Mike Lee, both Republicans, filed legislation that was co-sponsored by four Senators and 29 Representatives, all Republicans, to eliminate baseball's antitrust exemption. Even though the stated goal of the legislation was to increase competition in baseball and improve wages in MLB, critics pointed out that the true motivation stemmed from MLB's decision to move the All-Star Game out of Atlanta, GA in protest of the Republican-led Georgia state's new restrictive voting laws.[53]

The most recent Congressional effort to strip baseball of its antitrust exemption was in March 2022 when Senator Bernie Sanders, Independent Senator from Vermont, introduced legislation that targeted baseball's special antitrust status. The motivation for Sen. Sanders' move was the lockout over pay and other labor conditions that finally ended in early March 2022 but not before months of heated negotiations between MLB owners and the players' union. Prior to introducing the legislation, Sen. Sanders, in a blistering statement, repeatedly referred to MLB owners as "baseball oligarchs."[54]

> These are baseball oligarchs who negotiated in bad faith for more than 100 days in a blatant attempt to break the players' union. These are baseball oligarchs who, over the last year, eliminated their affiliation with over 40 minor league teams,

[53] Pickman, Ben (2021), "Sen. Mike Lee, Rep. Jeff Duncan Introduce Legislation to End MLB's Antitrust Exemption." *Sports Illustrated* April 14, 2021. URL: https://www.si.com/mlb/2021/04/14/mlb-antitrust-exemption-legislation-introduced-congress

[54] https://www.sanders.senate.gov/press-releases/news-sanders-statement-on-end-of-mlb-lockout/

> not only causing needless economic pain and suffering, but also breaking the hearts of fans in small and mid-sized towns all over America. These are baseball oligarchs who continue to pay minor league players totally inadequate wages and want to eliminate the jobs of another 900 minor league players. These are baseball oligarchs who receive billions of dollars in corporate welfare from taxpayers to build expensive stadiums. These are baseball oligarchs who, in many cases, charge outrageously high prices for tickets that many working class families cannot afford.
>
> It would be wrong for Congress to simply celebrate today's agreement and move on. We must prevent the greed of baseball's oligarchs from destroying the game. The best way to do that is to end Major League Baseball's antitrust exemption and I will be introducing legislation to do just that.

Sen. Sanders' statement echoes the spirit, if not the precise words, of past utterances in this regard by members of Congress, most notably that of the late Pennsylvania Senator Arlen Specter. Before Sen. Specter's involvement in baseball's antitrust exemption, he was actively connected to both antitrust and baseball. As a lawmaker, Sen. Specter was active in U.S. antitrust matters as a member of the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights[55] since 1987 and until 2011.[56] And similar to many American lawmakers, both

[55] The present name of this subcommittee is the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights.

[56] Arlen Specter Senatorial Papers, Group 2. Legislative Files, 1965-2011, TJU.2010.01.02, Thomas Jefferson University (managed by the University of Pittsburgh Library System). Section: 3. Subcommittee on Antitrust, Competition and Consumer Rights, 1982-2004. URL: https://digital.library.pitt.edu/islandora/object/pitt%3AUS-PPiU-TJU20100102/viewer

past and contemporary, he was a lover of baseball, especially of his hometown professional baseball team, the Philadelphia Phillies.[57] Given Specter's personal and antitrust background, his experiences and pronouncements as a lawmaker related to baseball's antitrust exemption arguably serve as reflective of the general Congressional attitude towards this antitrust anomaly. As such, an examination of Specter's views and speeches in this regard would be highly instructive not only to comprehend the evolution of lawmakers' attitude towards this exemption but also to understand how Specter and other members of Congress managed to put baseball's antitrust exemption to effective use.

3.3 Arlen Specter and Baseball's Antitrust Exemption: Turning a Bane into a Boon?

Even before joining the Senate antitrust subcommittee, Specter had clearly-articulated views on antitrust and a vision of how the nation's antitrust laws must promote market competition to increase consumer welfare, or the "public interest," as he called it. As a member of the Senate Committee on the Judiciary, Specter expressed his antitrust views and his thoughts on the state of antitrust enforcement during the debate on the confirmation of the new chairman of the FTC, James C. Miller III, in September 1981.[58]

[57] "Specter Lauds Phillies in U.S. Senate as Team Begins Centennial Year in Home Opener." April 13, 1983. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070009323/viewer#page/1/mode/1up

[58] "Specter Voices Concerns Over Anti-Trust Enforcement." September 21, 1981. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735069997066/viewer

> U.S. Sen. Arlen Specter (R-PA) today expressed concern over a lack of vigor in federal anti-trust enforcement during a speech on the floor of the Senate.
>
> Specter noted that the Reagan Administration has dedicated itself to a policy of deregulation.
>
> "In order for deregulation to operate in the public interest," he said, "it is essential to have effective competition. An essential element of a competitive free enterprise system, in my judgment, is vigorous enforcement of the anti-trust laws. I am concerned…that this enforcement is not sufficiently vigorous at the present time."

Specter brought the same attitude and energy to the Senate antitrust subcommittee that he joined many years later, with one of his main areas of attention being the antitrust exemption enjoyed by baseball. Given this background, a reading of Specter's reactions as a member of the Senate antitrust sub-committee towards baseball and the antitrust exemption, especially when disputes between owners and players or between the Major League and the Minor League led to possibilities of a lockdown and no baseball season, portray signs of an astute lawmaker who carefully weighed multiple, and sometimes contradictory, demands and motivations: a personal concern towards ensuring baseball continues uninterruptedly, a lawmaker's commitment towards his constituents and their love for baseball and their beloved hometown teams, and a preference to use Congressional authority judiciously.[59] There was nary a doubt that the late Senator was a fan of the sport of baseball, as confirmed by the following pieces of oral and written evidence:

[59] This sub-section draws heavily on the manuscripts that are part of the Arlen Specter Senatorial Papers Collection at Thomas Jefferson University (managed by the University of Pittsburgh

> I've been a baseball fan since I was eight years old…[60]

> I am romantic about the history of baseball and I think it's an overwhelming passion of the American people.[61]

As a lawmaker, Specter was committed to his constituents' love of baseball and their beloved hometown teams:

> America is in love with baseball…My studies led me to conclude that sports were affected with a public interest.[62]

> The Phillies begin the 1983 season with high hopes…The fans look forward to another 100 years of baseball, continuing a very special love affairs between a city and its team.[63]

Library System). The Collection can be accessed at https://digital.library.pitt.edu/collection/arlen-specter-senatorial-papers.

[60] "Senator Specter Votes to Save Baseball's Antitrust Exemption." August 3, 1995. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070027945#page/1/mode/2up/search/antitrust+AND+baseball

[61] "Arlen Specter on MLB Anti-Trust." Oral remarks by Senator Specter at the hearing of the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights on December 13, 1992. https://www.c-span.org/video/?c4926960/user-clip-arlen-specter-mlb-anti-trust

[62] "Arlen Specter on MLB Anti-Trust." Oral remarks by Senator Specter at the hearing of the Senate Judiciary Subcommittee on Antitrust, Monopolies and Business Rights on December 13, 1992. https://www.c-span.org/video/?c4926960/user-clip-arlen-specter-mlb-anti-trust

[63] "Specter lauds Phillies in U.S. Senate as team begins centennial year in home opener." April 13, 1983. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070009323/viewer

Specter was also keenly aware of a judicious approach to Congressional involvement with the business of baseball to the point where he sometimes reversed course. For example, on voting in the Senate Judiciary Committee, at the conclusion of professional baseball's longest strike during 1994-95, *against* an amendment to nix baseball's antitrust exemption in August 1995, Specter had the following explanation:[64]

> The strike was really very harmful to baseball…I think baseball can recoup if the owners and players can get together. I think the best thing that Congress can do is to stay out of it. With the police or fire department, the government has to intervene, and possibly require binding arbitration. But with government getting involved in everything under the sun, it's simply not a good idea that it get involved with the baseball strike.

What is illuminating is how Specter used the antitrust exemption as a tool to ensure that all the demands and motivations to which he owed responsibility were satisfied. He achieved this by invoking the exemption as a way to pressure MLB owners to agree to the one outcome that he held important in achieving the aforesaid demands—that the teams will not leave their hometowns. Sample the following in this regard:

> U.S. Sen. Arlen Specter (R-Pa) today introduced a resolution that would limit or rescind the antitrust exemptions now accorded professional baseball, football,

[64] "Senator Specter Votes to Save Baseball's Antitrust Exemption." August 3, 1995. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070027945#page/1/mode/2up/search/antitrust+AND+baseball

> basketball and hockey. Long an outspoken critic of professional sports teams' increasing move to cable and pay-per-view television programming, Sen. Specter said the pro teams do not deserve antitrust exemptions when they are depriving the public of basic sports viewing. He said if owners wish to extract maximum profits like any other business, then sports franchises should be subject to antitrust laws like any other business.[65]
>
> U.S. Sen. Arlen Specter (R-Pa) today warned the professional sports leagues that Congress may be forced to remove their anti-trust exemptions if the trend towards "pay-per-view" continues.[66]

A little over a decade later, Specter once again resorted to a threat of eliminating baseball's antitrust exemption as MLB came precariously close to a lockout in 2002, an outcome that would not have been in the best interests of baseball fans, the Senator included. Even as the lockdown loomed, Specter wrote to the then Chairman of the Senate Judiciary Committee, Patrick Leahy, as follows:[67]

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[65] "Senator Specter Introduces Resolution to Limit or Rescind Pro Sports Teams' Antitrust Exemptions." August 2, 1991. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070021369#page/1/mode/2up/search/antitrust+AND+baseball

[66] "Senator Specter warns pro sports leagues that they are jeopardizing their anti-trust exemptions in pushing for more and more "pay-per-view" TV." May 9, 1990. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070020866#page/1/mode/2up/search/antitrust+AND+baseball

[67] "Specter wants hearing on revocation of baseball's anti-trust exemption." August 29, 2002. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library

Dear Pat:

If the Baseball strike occurs tomorrow, I suggest that the Judiciary Committee promptly schedule hearings with a view to revoking Baseball's anti-trust exemption.

There is no doubt that a strike would be Major League Baseball's way of saying let the public be damned.

Baseball, like professional football, has risen to its lucrative heights as a result of the exemption under the anti-trust laws which almost no other business enjoys except for other sports businesses. If Baseball is determined to kill the goose that lays the golden egg, Congress should send a clear message to the owners and players for a plague on both your houses.

It is plain that Congress has the authority to revoke the anti-trust exemption.

…

Congressional action to revoke the anti-trust exemption may not solve the problems, but it would put the owners and players on notice that the American people, represented by Congress, will not stand idly by and permit the public to be damned without forceful action.

As much as Specter threatened legislative action on numerous occasions to eliminate baseball's antitrust exemption, he clearly was not inclined to do so as he had a fundamental

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System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070037795/viewer#page/2/mode/2up

belief that Congress had no business interfering in American professional sports. He said so himself early on: "Sen. Specter said Congress should not and could not regulate professional sports."[68] Despite that belief, however, he was one of arguably many other lawmakers, past and contemporary, who understood the worth of the antitrust exemption as an instrument to achieve the middle ground between the profitability of the professional teams and the interests of sports fans. Of great significance and relevance to this discussion is the fact that Specter believed that

> a display of Congressional interest and the *possibility* (emphasis added) of legislative action to rescind antitrust exemptions "is likely to produce restraint by franchise owners in moving to pay TV or otherwise abusing the public interest."[69]

Many years later, after MLB's longest strike of 1994-95 ended, Specter voted in the Senate Judiciary Committee in August 1995 *against* the motion to eliminate baseball's antitrust exemption. He argued as follows:[70]

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[68] "Senator Specter Introduces Resolution to Limit or Rescind Pro Sports Teams' Antitrust Exemptions." August 2, 1991. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070021369#page/1/mode/2up/search/antitrust+AND+baseball

[69] "Senator Specter Introduces Resolution to Limit or Rescind Pro Sports Teams' Antitrust Exemptions." August 2, 1991. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070021369#page/1/mode/2up/search/antitrust+AND+baseball

[70] "Senator Specter Votes to Save Baseball's Antitrust Exemption." August 3, 1995. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070027945#page/1/mode/2up/search/antitrust+AND+baseball

> I voted against eliminating the antitrust exemption because I do not believe that Congress ought to take sides in the middle of the dispute between management and the players. Frankly, I am also very worried about the future of the Pittsburgh Pirates if the antitrust exemption is eliminated. By removing the exemption, there would be no restraint on having the Pirates move out of town after a sale. Therefore, I have a very strong constituent and state interest in wanting to keep the Pirates in Pittsburgh.

A parsing of the Senator's words in these two instances reveals that, at least at the time of these pronouncements, he did not intend to support a repeal but wanted to keep the exemption on the books so it would serve the *larger* purpose of fan satisfaction by incentivizing a much-desired outcome: encouraging teams to stay put and not leave smaller cities, like Pittsburgh, for larger markets in search of profits that would arguably not materialize in these small cities, absent the antitrust immunity for baseball. In antitrust language, that would equate to the idea of "consumer welfare," although achieved through unorthodox means. Even before these key actions and pronouncements, Specter had maintained his concern for the public's welfare in the tussle between Congress and baseball over the latter's unique antitrust immunity. The following excerpt from May 1990 provides illuminating insights:[71]

> Testifying before the House Subcommittee on Telecommunications and Finance, Sen. Specter noted that more and more sports television programming is going on

[71] "Senator Specter Warns Pro Sports Leagues that they are Jeopardizing their Anti-Trust Exemptions in Pushing for More and More "Pay-Per-View" TV." May 9, 1990. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070020866/viewer

pay TV. “If the professional sports leagues want their anti-trust exemptions,” he said, “there should be no charge to the viewers.”

In the same testimony, there is evidence of how Specter used baseball’s deep interest to keep its antitrust exemption alive as a “bargaining chip” to safeguard the interests of the viewing public.[72]

> Among those listening to Sen. Specter's testimony at the hearing were Fay Vincent, Major League Baseball commissioner; Paul Tagliabue, National Football League commissioner; and David Stern, commissioner of the National Basketball Association, all of whom were invited as witnesses.
>
> …
>
> Sen. Specter testified that he is fearful that the day will come when the American sports fan will not be able to see the World Series, the Superbowl and other professional sports championships except on pay TV. Concern over this, he said, led him to get a commitment from Tagliabue during a hearing before the Senate Judiciary Committee that the NFL will keep the Superbowl on free TV at least until the year 2000.

[72] “Senator Specter Warns Pro Sports Leagues that they are Jeopardizing their Anti-Trust Exemptions in Pushing for More and More “Pay-Per-View” TV.” May 9, 1990. Arlen Specter Senatorial Papers, Group 6. Public Relations and Media Files, 1972-2010, TJU.2010.01.06, Thomas Jefferson University (managed by the University of Pittsburgh Library System). https://digital.library.pitt.edu/islandora/object/pitt%3A31735070020866#page/1/mode/2up/search/antitrust+AND+baseball

> Sen. Specter said he has "grave doubts" over the wisdom of allowing the pro sports leagues to have their anti-trust exemptions, "but as long as they have them, they have a duty to the American public."

In its outcome, it appears Specter—at least in his own deft Senatorial positions on this matter—managed to turn a bane—baseball's antitrust exemption, long considered an antitrust anomaly by most legal scholars—into a quasi-boon, if not a complete victory, for consumers of baseball. And available evidence suggests that Specter's actions and reactions were largely reflective of the general conduct of other lawmakers, especially those on the Senate judiciary committee: despite their deep disillusionment with baseball's antitrust immunity and airing of threats to repeal it, most Senators changed their positions at crucial times.[73] Specter and other lawmakers were presented with three choices and associated consequences: repeal the antitrust immunity and risk engendering chaos in baseball, including the possible demise of some beloved teams; allow the status quo to continue, including the anomalous antitrust exception, and risk the ire of players and Minor League teams and the near-certainty of increased ticket and TV viewing prices; or allow the status quo to continue, including the anomalous antitrust exception, but use the threat of repeal to exercise leverage over owners and the league in matters of team locations and pricing. From a strictly antitrust perspective, the first scenario would have been the preferred one; however, Specter and other lawmakers evidently wished to avoid the chaos that was most likely to ensue.[74] Of the remaining two choices, it is apparent that lawmakers chose the lesser of

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[73] Chass, Murray (1995), "Baseball's Antitrust Exemption Suffers a Setback." *The New York Times* August 4, 1995. www.nytimes.com/1995/08/04/sports/baseball-baseball-s-antitrust-exemption-suffers-a-setback.html.

[74] The finer motivations for this choice might be hard to discern given publicly available evidence, although owners expectedly lobbied members of Congress against the bill to repeal the antitrust exemption.

two evils, given the historical fact that baseball's antitrust immunity has survived to this day. But they did so with a strategy of quid pro quo that allowed them some degree of control and discretion over outcomes in professional baseball while letting baseball enjoy its unique yet flawed antitrust immunity.

4 Antitrust and the U.S. Congress: Big Tech in the Crosshairs

Although vastly different in their makeup, baseball and Big Tech share many common features: for the most part, the American public demonstrably loves them and have made them a key part of their lives; both baseball and Big Tech are big businesses that possess major lobbying heft; and quite relevant to this study, both have received major U.S. antitrust scrutiny, both historically and presently. Even though there is a long history of Congress being repeatedly unsuccessful in eliminating baseball's antitrust exemption, American antitrust's tryst with Big Tech is relatively more recent. The most famous and influential antitrust case for Big Tech is still Microsoft, although the recent antitrust focus of Congress has been on the other four members of GAFAM—Google (or, Alphabet, its parent company), Apple, Facebook (or, Meta, its parent company), and Amazon, collectively referred to as GAFA. The rest of the analyzes and discussions in this study will, therefore, focus only on GAFA.

4.1 Congressional Antitrust Action: A Whole Lot of Shaking Going On

In the short time that GAFA has come under scrutiny for possible antitrust violations, there has been a flurry of Congressional action to shake up Big Tech. The key motivations for these legislative actions are, for example, summed up by Representative Pramila Jaypal (Democrat –

Washington), the Vice-Chair of the U.S. House Judiciary Committee's Subcommittee on Antitrust, Commercial, and Administrative Law (emphases added):[75]

> Not only is *self-regulation* by Big Tech patently ineffective, but it also comes at the direct expense of *workers*, *consumers*, *small businesses*, *our local communities*, and the *free press*. From Amazon and Facebook to Google and Apple, it is clear that these unregulated tech giants have become *too big* to care and *too powerful* to ever put people over profits. By reasserting *the power of Congress*, our landmark bipartisan bills rein in anti-competitive behavior, prevent monopolistic practices, and restore *fairness* and *competition* while finally *leveling the playing field* and allowing *innovation* to thrive.

Rep. Jayapal's sentiments are shared by her colleague and the Chair of the House antitrust subcommittee, Representative David Cicilline (Democrat – Rhode Island) (emphases added):[76]

> The American people sent us to Washington to *get things done*. Nothing is more important than ensuring every American has an *opportunity* to get ahead. Right now, *unregulated tech monopolies* have too much *power* over our economy. They are in a unique position to pick winners and losers, destroy *small businesses*, raise prices on *consumers*, and put folks out of work. Our agenda will *level the playing*

[75] Jayapal, Pramila (2021), "Jayapal and Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice."" June 11, 2021. URL: https://jayapal.house.gov/2021/06/11/antitrust-legislation/

[76] Cicilline, David N. (2021), "House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice."" June 11, 2021. URL: https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-for-a-stronger-online-economy-opportunity-innovation-choice

field and ensure the wealthiest, most powerful tech monopolies play by the same *rules* as the rest of us.

The views of these two Democratic Representatives on the antitrust subcommittee are shared across the aisle by some of their Republican colleagues on the subcommittee as well. For example, Representative Ken Buck (Republican – Colorado), who is a staunch critic of Big Tech, had the following words while supporting new antitrust legislation (emphases added):[77]

> Big Tech has *abused* its *dominance* in the marketplace to *crush* competitors, *censor* speech, and *control* how we see and understand the world. Apple, Amazon, Facebook, and Google have prioritized *power* over innovation and *harmed* American *businesses* and *consumers* in the process. These companies have maintained *monopoly power* in the online marketplace by using a variety of *anticompetitive* behaviors to stifle competition. This legislation breaks up Big Tech's *monopoly power* to control what Americans see and say online, and fosters an online market that *encourages innovation* and provides American small businesses with a *fair playing field*. Doing nothing is not an option, we must *act now*.

These positions by lawmakers were accompanied by the House Judiciary Committee passing four tech-related bills after 19 grueling hours of deliberations spread over two days—

[77] Cicilline, David N. (2021), "House Lawmakers Release Anti-Monopoly Agenda for "A Stronger Online Economy: Opportunity, Innovation, Choice."" June 11, 2021. URL: https://cicilline.house.gov/press-release/house-lawmakers-release-anti-monopoly-agenda-for-a-stronger-online-economy-opportunity-innovation-choice

June 23 and 24, 2021.[78] These developments themselves were preceded by a 16-month investigation by members of the House Judiciary Committee's antitrust subcommittee that resulted in a high-profile report[79] that was highly critical of Big Tech for its market dominance and possible anticompetitive behaviors. The resulting four House bills—all of them introduced on June 11, 2021[80]—are comprehensive in their reach, with some of them having counterpart bills in the Senate.

While the *Ending Platform Monopolies Act* (H.R.3825) seeks "To promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses,"[81] the *Platform Competition and Opportunity Act of 2021* (H.R.3826) is expected "To promote competition and economic opportunity in digital markets by establishing

[78] A total of six bills were approved by the House Judiciary Committee during these meetings but only four were explicitly related to digital markets and technology firms.

[79] United States, Congress House Committee on the Judiciary, Subcommittee on Antitrust Commercial, and Administrative Law (2020), "Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations." https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

[80] In the U.S. House of Representatives, once a Representative sponsors and introduces a bill to be made into law, it is assigned for study to a committee, which in this case was the Judiciary Committee and its antitrust subcommittee. Once the committee approves the bill, it is released and put on a calendar for members of the House of Representatives to vote on, debate, or amend. The rest of the process continues as follows: "If the bill passes by simple majority (218 of 435), the bill moves to the Senate. In the Senate, the bill is assigned to another committee and, if released, debated and voted on. Again, a simple majority (51 of 100) passes the bill. Finally, a conference committee made of House and Senate members works out any differences between the House and Senate versions of the bill. The resulting bill returns to the House and Senate for final approval. The Government Printing Office prints the revised bill in a process called enrolling. The President has 10 days to sign or veto the enrolled bill." See https://www.house.gov/the-house-explained/the-legislative-process

[81] Congress.gov (2021), "Text - H.R.3825 - 117th Congress (2021-2022): Ending Platform Monopolies Act." June 24, 2021. https://www.congress.gov/bill/117th-congress/house-bill/3825/text

that certain acquisitions by dominant online platforms are unlawful."[82] Together, these two proposed pieces of legislation aim to reign in the existing and expanding control and dominance of large online and digital companies, such as Amazon and Apple. The *Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021* (H.R.3849)[83] also wishes to promote competition by lowering market entry barriers, thereby making it easier for new firms to enter digital markets, and reducing the costs for online consumers and businesses to switch between platforms.[84] The bill that has received enormous scrutiny and critical analysis is the *American Innovation and Choice Online Act* (H.R.3816) that Amazon believes specifically targets their company.[85] The legislation, which was also later introduced in the Senate (S.2992),[86] targets discriminatory conduct by major online platforms,[87] such as Amazon, and "would empower the government to challenge a variety of anticompetitive self-preferencing behaviors by the dominant tech platforms."[88] These four bills are very broad in scope and

[82] Congress.gov (2021), "Text - H.R.3826 - 117th Congress (2021-2022): Platform Competition and Opportunity Act of 2021." June 24, 2021. https://www.congress.gov/bill/117th-congress/house-bill/3826/text

[83] More widely known by its shorter title, ACCESS Act of 2021.

[84] Congress.gov (2021), "Text - H.R.3849 - 117th Congress (2021-2022): ACCESS Act of 2021." June 24, 2021. https://www.congress.gov/bill/117th-congress/house-bill/3849/text

[85] Amazon (2022), "Antitrust Legislation and the Unintended Negative Consequences for American Consumers and Small Businesses." *Amazon.com* June 1, 2022. https://www.aboutamazon.com/news/policy-news-views/antitrust-legislation-and-the-unintended-negative-consequences-for-american-consumers-and-small-businesses.

[86] Congress.gov (2021), "Text - S.2992 - 117th Congress (2021-2022): American Innovation and Choice Online Act." March 2, 2022. https://www.congress.gov/bill/117th-congress/senate-bill/2992/text

[87] Congress.gov (2021), "Text - H.R.3816 - 117th Congress (2021-2022): American Choice and Innovation Online Act." June 24, 2021. https://www.congress.gov/bill/117th-congress/house-bill/3816/text

[88] Baer, Bill (2022), "Why Amazon Is Wrong About the American Innovation and Online Choice Act." *The Brookings Institution* June 14, 2022. URL:

provide expansive leeway, once they become law, for U.S. antitrust agencies to file charges against anticompetitive conduct by technology firms. These bills are, however, limited in their application because they target only large firms, specifically ones that meet the legislation's definition of "covered platforms."[89] In other words, these bills, including similar ones that were later introduced in the Senate in 2021, were written specifically for Big Tech.

4.2 Big Tech, Baseball, and the Antitrust Lessons Learned

The question is, how does the current state of affairs with these tech-targeted bills compare with efforts by past lawmakers, such as those by Senator Specter, to eliminate baseball's antitrust exemption? And what lessons, if any, transfer from the baseball experience to the tech bills? One key difference is that while baseball's antitrust immunity was a privilege handed down by the Supreme Court—rather erroneously, many would argue—that Specter and others targeted but ultimately left in place, Big Tech currently enjoys the comfort of no real antitrust laws that apply to digital companies. In other words, baseball is supported by the *presence* of a favorable court ruling while Big Tech is supported by the *absence* of targeted legislation. Antitrust scholars, especially on the right of the political spectrum, argue that the current U.S. antitrust laws are equipped to handle competition issues in the digital markets and decry Congressional efforts to

https://www.brookings.edu/blog/techtank/2022/06/14/why-amazon-is-wrong-about-the-american-innovation-and-online-choice-act/.

[89] As per the text of the *American Innovation and Online Choice Act* (H.R.3816), a "covered platform" is a firm that (a) "has at least 50,000,000 United States-based monthly active users on the online platform" or "has at least 100,000 United States-based monthly active business users on the platform" and (b) "is owned or controlled by a person with net annual sales, or a market capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index," and (c) "is a critical trading partner for the sale or provision of any product or service offered on or directly related to the online platform." See Congress.gov (2021), "Text - H.R.3816 - 117th Congress (2021-2022): American Choice and Innovation Online Act." June 24, 2021. https://www.congress.gov/bill/117th-congress/house-bill/3816/text

introduce new antitrust laws specifically for Big Tech. But, as noted by observers of these developments, "absent substantive regulatory laws, the U.S. and dozens of states have filed multiple antitrust charges against Google and Facebook, but none has moved to a trial yet and are likely years away from resolution."[90] There is wider agreement at the moment that the nature of digital markets is such that the two main antitrust entities of the U.S. government, the DoJ and the FTC—and many U.S. states—find it increasingly hard, given the nature of the current antitrust laws in the country, to convince courts when they bring antitrust cases against Big Tech.

There are, however, at least three similarities between baseball's antitrust saga and Big Tech's current brush with antitrust legislation that produce lessons for the latter from the former. First, Congress is currently in the same stage of "frequent threats and attempts" targeting Big Tech that lawmakers in the past did for many decades aiming their legislative guns at baseball's antitrust exemption. Beyond these threats and attempts—which still continue, as noted in sub-section 3.2—nothing substantial has occurred to completely eliminate baseball's antitrust immunity. And ditto for antitrust legislation against Big Tech, which would be in greater jeopardy if Democrats lose their majority in the House in the November 2022 mid-term elections.[91]

Second, current lawmakers face very similar demands as Specter and others faced: With baseball, the concern was to let America continue to enjoy baseball while ensuring the business

[90] Swartz, Jon (2021), "New Bills Aim at Apple, Google and Facebook as U.S. Attempts to Catch up to Europe's Big Tech Push." *MarketWatch* October 15, 2021. https://www.marketwatch.com/story/new-bills-aim-at-apple-google-and-facebook-as-u-s-attempts-to-catch-up-to-europes-big-tech-push-11634237758.

[91] Feiner, Lauren (2022), "Lawmakers Are Racing to Pass Tech Antitrust Reforms before Midterms." *CNBC LLC* June 6, 2022. https://www.cnbc.com/2022/06/04/lawmakers-racing-to-pass-tech-antitrust-tech-reforms-before-midterms.html.

of baseball would not abuse its antitrust exemption; with Big Tech, lawmakers face an almost identical pressure of ensuring its legislative actions reign in Big Tech but do not detract from Americans' enjoyment of Google Maps, Amazon Basics, and other popular digital products. For critics of the proposed legislation, these are real worries, as noted by Alec Stapp, Director of Technology Policy at the Progressive Policy Institute, Washington, D.C., on June 11, 2021, the day when the new bills were introduced in the House:[92]

> It makes no sense to apply a drastically different set of rules to a small handful of companies without clear evidence of consumer harms, and a compelling story for how these new rules would remedy those harms. On the contrary, radical measures such as line of business restrictions and bans on self-preferencing would destroy many of the integrated products consumers currently enjoy.
>
> Apple would no longer be allowed to make its own apps (the iPhone would arrive out of the box with an empty home screen). Google would no longer be allowed to offer Google Maps on Android devices or use it to show map results in search. Amazon would no longer be allowed to offer generic goods at lower prices (just as Walmart, Costco, and every other large retailer do). It's hard to see how these rules would benefit anyone other than the small handful of competitors that have been trying to use regulation to kneecap America's most successful companies.

Whether such scary scenarios for consumers would come to fruition would depend on the details in the final versions of the bills and on how the new laws, if these bills do become law,

[92] Progressive Policy Institute (2021), "PPI Statement on New Antitrust Legislation." *Progressive Policy Institute* June 11, 2021. https://www.progressivepolicy.org/pressrelease/ppi-statement-on-new-antitrust-legislation/.

would be enforced. Similar to the scenario with baseball's antitrust immunity, lawmakers will need to walk a tightrope to avoid taking actions they might regret later.

Finally, both with baseball and Big Tech, there is no consensus among lawmakers for new antitrust legislation, beyond occasionally issuing verbal threats. While there is bipartisan support within the House and Senate Judiciary Committees and the antitrust subcommittees, this level of consensus among lawmakers is not obtained outside of these committees and subcommittees. Even within the Democratic Party that has generally been championing these bills, there is a difference in policy stance towards the proposed legislation: Lawmakers from tech-heavy states, such as California, are not on board to the same extent as the rest of their party colleagues. Moreover, as with baseball where lawmakers generally displayed considerable inertia, there is a perceptible preference for the status quo among most lawmakers with regard to new antitrust legislation for digital markets. Whether this is the result of ideological beliefs in light regulation and limited government, the effects of intense lobbying by Big Tech, or something else is hard to tell.

The inevitable outcome, thus far, of the seemingly intractable tussle between U.S. lawmakers and the tech industry has been frustration and confusion for both Big Tech and technology startups.[93] Expectedly, a section of the tech industry comprising smaller tech firms such as Yelp, Sonos, DuckDuckGo, and Spotify have urged lawmakers of both parties to support

[93] Swartz, Jon (2021)

legislation that would modernize antitrust laws to ensure a level playing field.[94] For these firms at least, the adoption of these bills would quash the prevailing uncertainty.

Given the similarities between the antitrust experiences and contexts of baseball and Big Tech, there are indeed transferable lessons from the former to the latter. First, the longer a privilege—including an anomalous one—stays entrenched, the harder it becomes to eliminate it. While *stare decisis*—the legal principle to respect precedent—would always be an obstacle to change, as was evidenced with baseball's antitrust exemption, the resistance to change is more resolute with the passage of time. In the context of antitrust targeted at Big Tech, lawmakers have undoubtedly been taking their time but are fast running out of that luxury. A quicker process would likely ensure greater success, which directly leads to the second lesson.

Second, Specter and other lawmakers who thought likewise, most likely understood the enormity of the task involved in eliminating baseball's antitrust exception, even though it was a faulty immunity in the first place. As such, to ensure a modicum of success and to achieve at least the most preferred objectives for themselves and their constituents, they arguably settled for more modest outcomes. With Big Tech, there is a sense that lawmakers are being overly ambitious by proposing numerous bills that cut across a large swath of the digital business world. And the larger the scope, the greater the time it takes to not only understand all of the current and potential impacts of the proposed legislation and the issues involved but also to bring a sufficient number of lawmakers on board as would be required to pass the legislation. A larger scope also means that convincing the required number of lawmakers becomes even more arduous as they

[94] CNBC (2022), "U.S. Bill to Rein in Big Tech Backed by Dozens of Companies Including Spotify and Yelp." *CNBC LLC* June 14, 2022. https://www.cnbc.com/2022/06/13/us-bill-to-rein-in-big-tech-backed-by-dozens-of-companies.html.

become increasingly uncertain of the true ramifications of the proposed bills. As such, a more modest yet carefully targeted and prioritized legislative effort would be advisable for Congress in its antitrust battle against Big Tech.

Finally, new legislation that is more understanding of the nature of business and that is cognizant of the dynamism of digital markets would stand a higher chance of greater all-round support. It was reasonably evident, at least in some of Senator Specter's pronouncements, that while he detested baseball's antitrust exemption he was also acutely aware of the operational imperatives that characterized the business of baseball. In other words, avoiding the bombastic rhetoric against Big Tech that is apparently engaged in by some lawmakers to placate their supporters and constituents would be a helpful gesture as it inadvertently signals a lack of understanding of the digital markets business.

5 Conclusion

The current efforts by a section of lawmakers to address a growing concern over the market power and dominance of big technology firms—Big Tech—is laudable. However, the findings of this study lead to the conclusion that these efforts call for moderation in scope and rhetoric, which are changes in approach that should alleviate a related issue of time overrun with seeing new legislation become law. Examining each of the proposed laws for their various merits and demerits was outside the scope of this study, but a summary evaluation of the bills indicate that Congress must ready itself for substantial push-back from Big Tech. Just as with baseball and its desire to maintain its antitrust immunity, it does appear that Big Tech would be keen to stave off antitrust laws for the digital marketplace. That should effectively serve as heightened motivation for lawmakers to adopt new antitrust laws for the digital economy but without destroying its

dynamism or the popular products that digital businesses offer. It is a tough ask but one that is not impossible.