I. Introduction

The idea that every American will have the opportunity to achieve their socioeconomic dreams is deeply rooted within our nation’s history.\(^1\) Shortly after the American Revolution, a wave of innovation sparked America’s Industrial Revolution.\(^2\) The Industrial Revolution led to many entrepreneurs amassing wealth through the creation of new industries.\(^3\) This consolidation of wealth led to a fear

---

\(^1\) See American Dream, DICTIONARY.COM (Oct. 12, 2020), archived at https://perma.cc/QWG3-58GE (defining the American Dream as “the ideals of freedom, equality, and opportunity traditionally held to be available to every American.”). See also Adam Barone, American Dream, INVESTOPEDIA (Mar. 27, 2020), archived at https://perma.cc/5TRZ-UUKX (describing that throughout history, the American Dream has been seen as an advantage to many individuals but not without its fair share of criticism).

\(^2\) See What Caused the American Industrial Revolution, INVESTOPEDIA (June 5, 2020), archived at https://perma.cc/QK2Y-X36C (discussing the first British-style textile mill that opened in America in 1790 which is viewed as the start of the American Industrial Revolution). See also Industrial Revolution, HIST. (Sept. 9, 2019), archived at https://perma.cc/TSY5-C77W (noting important dates of industrial revolution occurring throughout history).

\(^3\) See The Unexpected History of American Capitalism, HUFFPOST (Dec. 3, 2016), archived at https://perma.cc/8F3W-ZKZM (stating that the term “capitalism” was created in reference to individuals amassing wealth through factories and other forms of business during the Industrial Revolution).

---

Copyright © 2022 Journal of High Technology Law and William Lawton. All Rights Reserved. ISSN 1536-7983.
amongst Americans that these powerful groups could start to form oligarchies.\footnote{See Brandon Tensley, How The American Dream Went From Meaning Equality to Meaning Capitalism, PACIFIC STANDARD (July 24, 2019), archived at https://perma.cc/D7FG-Q6KM (asserting that individuals tend to become worrisome about a small group of individuals attaining a majority of the wealth). The American people were very aware that this type of wealth can result in an oligarchy or a plutocracy that has the ability to command the government. Id.}

In response to this combination of fear and larger corporations’ questionable business practices in the late 1800’s, Congress passed the Sherman Antitrust Act of 1890 ("Sherman Act").\footnote{See Sherman Act, 15 U.S.C. §§ 1–7 (1890) (making contracts and trusts in restraint of trade illegal). See FTC Fact Sheet: Antitrust Laws: A Brief History, FTC (Oct. 12, 2020), archived at https://perma.cc/36T4-5TVS (detailing how the creation of massive trusts led to Congress enacting anti-trust legislation).} In addition to the Sherman Act, the Clayton Antitrust Act of 1914 ("Clayton Act") also aimed to curb specific types of unfair business practices and limit the power of large corporations within particular economic markets.\footnote{See Clayton Act, 15 U.S.C. §§ 12–27 (1914) (expanding upon the Sherman Act’s list of prohibited business practices). The Clayton Act expands upon the Sherman Act by making price discrimination, exclusive dealings, mergers and acquisitions, and other things illegal. Id. The act also creates a private right of action for individuals that were injured by acts which are forbidden under antitrust law. Id. See also Robinson-Patman Act 15 U.S.C. § 13 (1936) (amending § 13 of the Clayton Act by declaring the practice of price discrimination against particular companies to be illegal). See also James Chen, Understanding Antitrust Laws, INVESTOPEDIA (July 31, 2020), archived at https://perma.cc/HDP6-UWEZ (listing the various types of business practices and procedures that antitrust legislation is aimed at eliminating).} Additionally, Congress enacted the Federal Trade Commission ("FTC") to enforce the Sherman Act and Clayton Act.\footnote{See FTC Act, 15 U.S.C. § 45(a) (1914) (creating the FTC and giving it the power to prevent unfair and deceptive business acts). See also Our History, FTC (Oct. 12, 2020), archived at https://perma.cc/7SZZ-GNV5 (explaining when and why the FTC was established). The FTC was created in 1914 after former President Woodrow Wilson “signed the Federal Trade Commission Act into law.” Id. As a member of the executive branch, the FTC was created for the protection of consumers and for the promotion of fair practices and behaviors amongst businesses. Id. See also Marvin Ammori, Monopolies: Antitrust Law Protects Consumers, Not Competitors, WIRED (Oct. 16, 2012), archived at https://perma.cc/S8W5-L7F9 (discussing the changes that have occurred in the interpretation and application of the three major antitrust acts over the last century).} Since enacting the Sherman and Clayton Acts, as well as the FTC as an enforcement agency, the
government has prosecuted oppressive monopolistic behavior with varying success.\(^8\)

In light of litigation trends within the United States (“U.S.”), American courts are more likely to side with corporations and trusts, while courts in other nations are more likely to side with consumers and competitors. As this trend continues, domestic courts should adjust their statutory analysis to correspond with the foundational concepts of early American antitrust litigation, and those ideals of modern foreign antitrust litigation, to better serve American consumers. A discussion of the policy rationales and legislative intent behind the Sherman and Clayton Acts affirms Congress’s intent to curb behavior that place restraints on trade or have the potential to become monopolistic.\(^9\) Furthermore, foreign antitrust trends highlight that foreign courts are much more likely to deem restraints on trade as anticompetitive behavior, even when there is no direct impact on consumers.\(^10\) As massive companies like Qualcomm, Apple, Facebook, and Google continue to develop a larger share of their respective markets, the U.S. must employ effective antitrust policy techniques to stop these companies from placing illegal restraints on trade that harm the competitive equilibrium of the economy. Early antitrust litigation and foreign antitrust policy make clear that Qualcomm’s business practices should be viewed as monopolistic.

---

\(^8\) See Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA (Aug. 2, 2019), archived at https://perma.cc/9S76-4RSL (discussing when, why, and how the Sherman Act was used against U.S. corporations). The government did not bring antitrust suits against all companies that violated the Sherman Act or the Clayton Act. *Id.* Particular monopolies were able to “build up a reliable infrastructure and deliver low-cost service to a broader base of consumers than competing firms.” *Id.* Lawsuits were not brought against these companies because of the infrastructure they were creating and because they offered great dividends to investors. *Id.* See also Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARVARD BUS. REV. (Dec. 15, 2017), archived at https://perma.cc/5D8W-K9R6 (discussing the different eras of antitrust litigation). Up until the mid 2010s, there was very little antitrust litigation. *Id.* Recently, there is a progressive trend toward enforcing antitrust laws, especially within the digital sectors of the economy. *Id.*

\(^9\) See infra Section II.C–D (discussing the introduction of the Sherman, Clayton, & FTC Act, the legislative intent behind the statutes, and early antitrust litigation revolving around alleged antitrust violations).

\(^10\) See infra Section III.C–D (discussing the case of *Microsoft Corp. v. Commissioner* as well as the intended policy goals behind the EU’s antitrust litigation).
behavior because they place restraints on trade in violation of the Sherman Act.\textsuperscript{11}

II. History

A. The Founding of America & Early Economic Systems

The original settlers of the U.S. came from England in the early 1600's for two reasons: entrepreneurial opportunity and escaping religious persecution.\textsuperscript{12} Early settlers attempted to mirror the feudal system of England, however, by the 1800’s, the American North and the American South had developed their own distinct economic systems.\textsuperscript{13} These distinct economic systems, divided by issues relating

\textsuperscript{11} See infra Section IV.A–D (analyzing the Qualcomm decision in light of domestic Supreme Court precedent, foreign court decisions, and foreign policy rationale and concluding that the Ninth Circuit should have found Qualcomm’s business practices to have a restraint on trade).

\textsuperscript{12} See Jamestown Colony, HIST. (Aug. 28, 2020), archived at https://perma.cc/79MJ-NR4X (explaining the Virginia company’s reason for establishing the Jamestown Colony in 1607). The purpose of the settlement was to search for precious minerals such as gold and silver in America. Id. The first profitable endeavor by the colony was actually their export of tobacco. Id. See also Mayflower Departs England, HIST. (Sept. 15, 2020), archived at https://perma.cc/K97U-QG4G (detailing why and when the Mayflower departed England for America). Around 30 members of the Mayflower’s voyage were Puritans trying to escape the rule of the “Church of England, which they found corrupt.” Id. To fund their trip, Puritans received the backing of a London stock group. Id. The other 70 members of the trip were called the London Adventurers, members of the stock group that were promised a good share of the colony’s profits. Id.

\textsuperscript{13} See Satyananda Gabriel, Why Did Feudalism Fail in the American Colonies?, MT. HOLYOKE (Oct. 14, 2020), archived at https://perma.cc/K287-JZAB (explaining why the economic system of feudalism failed in early American settlements). See also Elizabeth A.R. Brown, feudalism, BRITANNICA (Oct. 13, 2020), archived at https://perma.cc/Q43L-S5VA (describing the origin and development of feudalism throughout history); James Parisot, Has America always been capitalist?, OPEN DEMOCRACY (Feb. 17, 2019), archived at https://perma.cc/JQV7-5TTN (discussing different systems of economics that have been used at various points of American history). Family farms and a patriarchal system where individuals provided for themselves reigned supreme in early American history. Id. There were also “capitalist interests” in society in the form of the companies that funded the original colonies. Id. The American South had developed an economic system that revolved around capitalism. Id. Slave masters owned and controlled the life and bodies of their slaves as well as each slave’s individual labor. Id. A system of checks and balances was implemented where other slave owners, politicians, and poor white
to slavery and state rights, led to the Civil War between the North and South.\textsuperscript{14} The North went on to overpower and defeat the South, thereby emancipating all slaves and setting the stage for a new economic agenda.\textsuperscript{15} As a result of the war, members of the Union grew wealthy and strengthened the North’s economic foundation, while the Southern economy crippled.\textsuperscript{16} Following the War, industrialization and production began to increase in the North, which allowed affluent entrepreneurs to garner significant economic influence within particular markets.\textsuperscript{17}

\textbf{B. The Formation of Capitalism and Large Corporations}

Capitalism is an economic system where the means of production are controlled by private individuals or corporations.\textsuperscript{18} working-class individuals would patrol the night and capture runaway slaves to return them to their owners. \textit{Id.}

\textsuperscript{14} See Civil War – Causes, Dates, & Battles, HIST. (June 23, 2020) [hereinafter Civil War], archived at https://perma.cc/FGV8-VUDD (stating the causes of the feud between the North and South as well as significant dates and battles in the war). Tensions that had been brewing for years between the North and South finally came to a boil with the election of Abraham Lincoln as the sixteenth president of the United States. \textit{Id.} “Fundamental economic differences” existed between the North and South. \textit{Id.} The North had well established manufacturing and industry while the South still relied heavily on large scale agricultural endeavors made up most of enslaved workers. \textit{Id.} The South seceded from the United States in an attempt to keep the backbone of their economy (slave production of cotton and tobacco) alive. \textit{Id.} See also Peter Schwartzstein, How the American Civil War Built Egypt’s Vaunted Cotton Industry and Changed the Country Forever, SMITHSONIAN MAG (Aug. 1, 2016), archived at https://perma.cc/5FQP-L4X5 (explaining the impact of the Civil War on Southern cotton production). The North was able to blockade a majority of Southern ports during the Civil War which meant the Confederacy struggled to export cotton. \textit{Id.}

\textsuperscript{15} See Civil War, supra note 14 (noting that General Robert E. Lee surrendered to General Ulysses S. Grant on April 9, 1965).

\textsuperscript{16} See The End of the War, LUMEN LEARNING (Oct. 15, 2020), archived at https://perma.cc/BX78-EZBV (examining the outcome of the Civil War ending). Republicans from the Union had begun industrializing particular trades and services in an attempt to make the economy more efficient throughout the war. \textit{Id.} The Confederacy, on the other hand, was destroyed both physically and figuratively. \textit{Id.} The ideologies that the South was built upon were in ruins and their infrastructure in many key cities were destroyed. \textit{Id.}

\textsuperscript{17} See id. (noting that Cornelius Vanderbilt amassed a great fortune by building a transportation system in the North).

\textsuperscript{18} See Jim Chappelow, Capitalism, INVESTOPEDIA (Apr. 6, 2020), archived at https://perma.cc/YXS2-EFY4 (explaining the economic system of capitalism and its various forms). Capitalism is a system where “private individuals or businesses own
Following the North’s lead, progressive Southerners began industrializing the South in an attempt to rebuild the economy. The Industrial Revolution in the North and South led to the creation of large corporations, comprised of small groups of individuals holding much of the wealth, with capitalism serving as a foundational pillar of American economics in the post-Civil War era. Notably, James capital goods.” Id. Production is based on the supply of a product by producers as well as the demand for the product by consumers. Id. This is seen as a market economy, as opposed to other forms of economic systems such as socialism which is seen as a command economy where the production of goods is planned without knowing the demand for such goods. Id. See also Peter J. Boettke, capitalism, BRITANNICA (Sept. 23, 2020), archived at https://perma.cc/5GH9-JH5C (stating that capitalism has dominated western society since the breakup of feudalism). Capitalism as we know it has only been around since the sixteenth century. Id. However, antecedents of capitalism existed throughout the ancient world. Id. The difference between modern and ancient capitalism is the manner in which individuals used the capital they had accumulated. Id. Modern capitalism involved the use of capital to enlarge production and reinvest money in fruitful endeavors while the antecedent to capitalism used accumulated wealth to “invest in economically unproductive enterprises, such as pyramids and cathedrals.” Id. See also capitalism, DICTIONARY.COM (Nov. 4, 2020), archived at https://perma.cc/4EW9-RZNN (defining capitalism).

19 See John Louis Recchiuti, The New South, KHAN ACAD. (Oct. 15, 2020), archived at https://perma.cc/DZ3S-9G9J (analyzing the approach progressive Southerners were attempting to take in order to reconstruct the Southern economy). Northerners invested in textile mills throughout the South because the labor costs in this region was half of the cost in the North. Id. While progressive Southerners looked toward industrialization to build the economy, conservative Southerners turned to sharecropping. Id. Sharecropping and tenant farming were systems in which white landlords (often former plantation slaveowners) entered into contracts with impoverished farm laborers to work their lands. Those who worked the fields shared a portion of the crop yield with the landlord as payment for renting the land. Under the sharecropping system, the landlord typically supplied the capital to buy the seed and equipment needed to sow, cultivate, and harvest a crop, while the sharecropper supplied the labor. Id.

20 See James Chen, Industrial Revolution, INVESTOPEDIA (July 29, 2020), archived at https://perma.cc/U6PR-6ESC (discussing how the creation of factories during the Industrial Revolution were “responsible for the creation of capitalism and the modern cities of today.”). Many employment opportunities were created as a result of the Industrial Revolution. Id. In addition, increased education and innovation resulted in more motivated workers which led to inventions such as “the sewing machine, X-ray, lightbulb, calculator, and anesthesia.” Id. See also Parisot, supra
Duke and John D. Rockefeller were entrepreneurs who fortuitously employed capitalist ideologies to create large corporations during the late 1800’s. Shortly thereafter, other large corporations, such as J.P. Morgan’s U.S. Steel Corporation (“U.S. Steel”), began to form by utilizing capitalist ideologies as a foundational business model.

C. The Sherman Act & Early Supreme Court Antitrust Litigation

As corporations like U.S. Steel, Standard Oil, and American Tobacco grew larger and larger, public outcry erupted as a result of the prices of goods set by these companies. In response to the techniques used by these companies to set high prices for their goods, which were viewed by many as restraints on trade, Congress passed the Sherman Act of 1890. The Sherman Act was the first piece of legislation

note 13 (noting that capitalism also has roots in slavery because slave owners profited off of their slaves).
21 See Recchiuti, supra note 19 (detailing the innovation that led to capitalism in the South). James Duke invented a cigarette rolling machine because of the growing tobacco market which allowed him to create the American Tobacco Company in 1890. Id. See also Standard Oil, BRITANNICA (Mar. 24, 2020), archived at https://perma.cc/8H8E-RG75 (detailing the formation of the Standard Oil company and its impact on the oil trade from the mid 1800s to present day). From 1870 to 1911, Standard Oil “controlled the refining of 90 to 95 percent of all oil produced in the United States.” Id. The firm also controlled almost all of the marketing and transportation of the oil they produced. Id.
22 See About U.S. Steel, U.S. STEEL CORP. (Oct. 16, 2020), archived at https://perma.cc/5NQ9-R3A5 (explaining when and how U.S. Steel was founded). See also The Founding of U.S. Steel and the Power of Public Opinion, HARV. BUS. SCH. (Oct. 22, 2020), archived at https://perma.cc/X5N4-HZHH (explaining how U.S. Steel became such a large and powerful company). U.S. Steel had a capitalization of $1.4 billion dollars and had control over many subsidiaries ranging from mines to producers of steel. Id. During the time when U.S. Steel was a powerhouse company, the demand for steel was skyrocketing as cities were being built, automobiles were beginning to be manufactured, and World War I was occurring. Id.
23 See Beattie, supra note 8 (stating the public was enraged at the price-fixing by larger corporations). See also Will Kenton, Price Fixing, INVESTOPEDIA (Sept. 16, 2019), archived at https://perma.cc/MVJ4-LEHI (explaining the act of price fixing). Price fixing occurs when producers set the price of a product as opposed to allowing the price to occur naturally through market forces. Id. This typically occurs when businesses that are in competition agree to sell their goods or services at similar prices. Id.
24 See Sherman Act, 15 U.S.C. §§ 1–7 (1890) (prohibiting contracts or combination in restraint of trade or the monopolization of a particular trade). See also The
passed by the U.S. Congress which aimed to reduce contracts, combinations, or agreements on restraint of trade, as well as the monopolization or attempted monopolization of a trade or service. Following the enactment of the Sherman Act, there was a serious disagreement between members of Congress about the meaning of the term “restraint on trade.”

The Sherman Act outlaws “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.” Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are “per se” violations of the Sherman Act; in other words, no defense or justification is allowed.

25 See Brian Duignan, Sherman Antitrust Act, BRITANNICA (Feb. 16, 2022), archived at https://perma.cc/CV5P-LG4Y (explaining the Sherman Act in greater detail). The act’s first provision “outlaws all combinations that restrain trade between states or with foreign nations.” Id. The act’s second provision makes it illegal for any American business to monopolize trade or commerce. Id. See also Daniel E. Feld, What constitutes “attempts to monopolize,” within meaning of § 2 of Sherman Act (15 U.S.C.A. § 2), 27 A.L.R. Fed. 762 (2015) (discussing how courts have interpreted the meaning of “attempt to monopolize” within the Sherman Act). There is a general agreement amongst courts that businesses at the minimum must have engaged in an overt act with the specific intent of monopolizing. Id. Many courts however disagree over what constitutes specific intent in the formation of a monopoly thus leading to different outcomes. Id. Another requirement amongst most courts is showing an attempt to monopolize which can be proven with the showing that there is “dangerous probability” of monopolization. Id.

26 See RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992: HISTORY, RHETORIC, LAW 13–26 (Oxford Univ. Press 1996) (detailing the debate surrounding the specific language to be used within the statute). Senator Sherman’s initial antitrust bill read as follows: “That all arrangements, contracts, agreements, trusts, or combinations . . . made with a view, or which tend to prevent full and free competition . . . or which tend to advance the cost to the consumer . . . are hereby declared to be against public policy, unlawful, and void.” Id. at 13. After going to committee, the bill returned and looked nothing like its predecessor. Id. With new
approach, interpreted the Act’s language to prohibit all restraints of trade, while the other, following the common law approach of the term “restraints on trade,” argued that the language should only be applied to unreasonable restraints of trade.\textsuperscript{27}

\textit{Northern Securities Corp. v. U.S} was one of the first cases where the Supreme Court interpreted and applied the Sherman Act.\textsuperscript{28} Northern Securities Corporation was a holding company that possessed over ninety percent of Northern Pacific Railroad Company’s stock, in addition to seventy-five percent of Great Northern Railroad Company’s stock.\textsuperscript{29} The two railroad tracks, one beginning from the Great Lakes, and the other from the Mississippi River, ran parallel to one another all the way to the Pacific Ocean.\textsuperscript{30} The government brought suit alleging that Northern Securities Corporation violated § 1 of the Sherman Act because it combined two railroad companies’ stock into a single holding company and restrained trade.\textsuperscript{31} The Supreme

language in place dealing with restraints on trade and monopolizing trade, the bill passed within a week. \textit{Id.} at 14.

\textsuperscript{27} See \textit{id.} at 13–14 (explaining how at common law, a contract was not seen as a restraint on trade unless it was deemed to be unreasonable). Based on the ideology of liberty of contract, the common law camp did not want to interfere with contracts that were reasonable in nature. \textit{Id.}

\textsuperscript{28} See \textit{N. Sec. Corp. v. United States}, 193 U.S. 197, 360 (1904) (affirming the finding of the lower court that the defendants have no cause with which to set aside the lower courts decree). The Supreme Court upheld the circuit court’s decree which enjoined the holding company from voting its stock of the separate railroads, exercising any control over the separate railroads decisions, and enjoined the holding company from receiving any dividends from either of the railroads. \textit{Id.} at 328.

\textsuperscript{29} See \textit{id.} at 326 (detailing the organization of Northern Securities incorporation in the state of New Jersey). In lieu of stockholders retaining their own individual shares in Northern Pacific and Great Northern, Northern Securities Corporation was organized as a holding company that would hold the stocks of both railroads. \textit{Id.} The Court went on to say that this was a conceived scheme under the leadership of Hill and Morgan, who were also defendants, to be the custodian of stock for two competing railroads. \textit{Id.}

\textsuperscript{30} See \textit{id.} at 320 (explaining that both companies operated and competed on parallel railroad lines). “[T]he two companies were engaged in active competition for freight and passenger traffic, each road connecting at its respective terminals with lines of railway, or with lake and river steamers, or with seagoing vessels.” \textit{N. Sec. Corp.}, 193 U.S. at 320. The two separate lines, “[both] main and branches,” each owned about 9,000 miles of separate but parallel rail lines. \textit{Id.}

\textsuperscript{31} See \textit{id.} at 317–18 (stating the grounds on which the government’s claim rested). The purpose of the government’s suit was to enforce the provisions of the Sherman Act against Northern Securities Corporation. \textit{Id.} The Court reasoned that this combination of two railroads into one through the use of a holding company
Court affirmed the circuit court’s decree which broke down the holding company.\textsuperscript{32} This type of trade restraint was the very thing that the Sherman Act aimed to prevent.\textsuperscript{33} The Supreme Court further stated that the Sherman Act was aimed at “all direct restraints” of trade imposed by contracts and combinations, not just those that were unreasonable in their nature.\textsuperscript{34}

In the 1800’s, cigarette manufacturing became a more effective industry largely due to the overwhelming influence from large corporations entering into agreements with competitors to obtain market control.\textsuperscript{35} Cigarette production was centered in New York where inefficient operations hampered the output of the product.\textsuperscript{36} As time passed, machines began to replace inefficient humans in cigarette manufacturing which allowed for greater levels of production at lower costs.\textsuperscript{37} In 1907, the U.S. brought an action against The American extinguished competition and placed a restraint on trade which was the very thing that the Sherman Act aimed to prevent. \textit{Id.} at 326.

\textsuperscript{32}See \textit{id.} at 356 (affirming the circuit court’s decision and giving it the authority to execute its decree). The decree which ordered Northern Securities Corporation to be broken down was upheld, and the Court stated, “in execution of that act, and to defeat the efforts to evade it, could prohibit the parties to the combination from doing the specific things which, being done, would affect the result denounced by the act.” \textit{N. Sec. Corp.}, 193 U.S. at 356. “The decree . . . will destroy not the property interests of the original stockholders of the constituent companies, but the power of the holding corporation as the instrument of an illegal combination . . . which, if done, would restrain interstate and international commerce.” \textit{Id.} at 357–58.

\textsuperscript{33}See \textit{id.} at 360 (reasoning that based on the rules of construction and the language of the Sherman Act that this type of behavior is what the statute was created to prevent).

\textsuperscript{34}See \textit{id.} at 331 (proposing that any restraints on trade are considered to be illegal under the Sherman Act). The Supreme Court goes on to reason that the extinguishing of competition between competing companies is made illegal by the Sherman Act. \textit{Id.} The Court does not need to make a showing that the agreement at issue will restrain trade, rather the Court must make a showing that the intention of the agreement tends to restrain trade or tends to create a monopoly. \textit{Id.} at 332.

\textsuperscript{35}See D.T. Armentano, \textit{Antitrust History: The America Tobacco Case of 1911}, FEE (Mar. 1, 1971), archived at https://perma.cc/5QMD-RCF4 (detailing that although cigarettes began to appear in the 1850s, it was not until the 1880s that large scaling manufacturing of the product started).

\textsuperscript{36}See \textit{id.} (explaining why the cost of cigarettes production was so high). Cigarette firms had to pay individuals to hand roll all of their cigarettes which was inefficient and costly; also, the raw materials used to produce the cigarettes were expensive. \textit{Id.}

\textsuperscript{37}See \textit{id.} (proposing that the advent of cigarette rolling machines changed the game because “an expert ‘hand roller’ could make approximately 2,000 smokes a day, a properly operating cigarette machine could make 100,000.”). The average labor cost
Tobacco Company for continued violations of the Sherman Act because it controlled five subsidiary companies, and over fifty-nine accessory companies, all involved in the tobacco industry. The Supreme Court reasoned that the American Tobacco Company was in violation of §§ 1–2 of the Sherman Act because its agreements with subsidiary and accessory companies created a market with no competition. American Tobacco’s contracts and combinations restrained trade in violation of § 1 and created a company so large based on its contracts and stock options with subsidiary and accessory companies that it created a monopoly in violation of § 2. The Court granted a permanent injunction that would break down the

of producing cigarettes went from “85 cents per thousand without machines to 2 cents per thousand with machines,” allowing the companies to spend more money on advertising, which in turn helped to create a greater demand for the larger available supply of cigarettes. Id.

38 See United States v. Am. Tobacco Co., 221 U.S. 106, 142–43 (1911) (stating the charges brought against the American Tobacco Company and detailing the actions that led to Sherman Act violations). American Tobacco Company had five accessory corporations (American Snuff Company, American Cigar Company, American Stogie Company, MacAndrews and Forbes Company, and Conley Foil Company), which it exerted direct control over. Id. at 143. The Court also stated that through those companies or stock interests that American Tobacco Company exercised control and power over 59 subsidiary companies. Id. See also Armentano, supra note 35 (discussing the companies which American Tobacco acquired between the years of 1890 and 1907). It is estimated that in the 17-year span American Tobacco bought or had a large interest in close to 250 firms. Id. While some of the firms were other cigarette companies with brand recognition, many of the firms were deemed to be non-cigarette tobacco companies such as snuff producers. Id.

39 See Am. Tobacco Co., 221 U.S. at 184 (finding that the conjunction of American Tobacco Company’s acts was in direction violation of both § 1 and § 2 of the Sherman Act).

40 See id. (concluding the cumulative acts of the American Tobacco Company violated the Sherman Act). The Court believed that some of the restrictive acts of American Tobacco company on their own would not have been in violation of the Sherman Act. Id. at 182. However, the Court listed six different ways in which American Tobacco Company restricted trade and attempted to monopolize, and when considered together this was a violation of the law. Id. at 182–83. These acts were: (1) combination of companies originally in a trade war; (2) the increase in capital from the combination; (3) the purchase of stock in other tobacco companies; (4) taking control of these companies and using them as barriers to other companies joining the tobacco trade; (5) the purchase of tobacco plants not to use but to shut down; and (6) creating non-compete agreement with anyone who was a stockholder, employee, or manufacturer at any companies that American Tobacco shut down. Id.
infrastructure of the American Tobacco Company, therefore eliminating the monopoly.41

Another landmark Supreme Court decision came in *Standard Oil Co. of New Jersey v. U.S.* 42 The government filed an action against Standard Oil claiming that its use of trusts and combinations in the petroleum industry were a direct violation of §§ 1–2 of the Sherman Act.43 The Supreme Court reasoned that Standard Oil’s combinations of petroleum businesses into massive trusts and holding companies were restraints on trade within the petroleum market in violation of §

41 See id. at 187 (detailing the manner in which the lower court must address the dissolution of the American Tobacco Company on remand). The Court’s conclusion was guided by: (1) its duty to enforce the statute; (2) enforcing the statute with as little injury to the public as possible; and (3) properly taking into effect the vast private property interests which may be vested in individuals. *Am. Tobacco Co.*, 221 U.S. at 185. The lower court was directed to hear testimony and have evidence submitted by relevant parties in order to make sure the Court’s three guiding influences were taken into consideration when the American Tobacco Company was broken down. *Id.* at 187.

42 See Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 33 (1911) (explaining the elaborate scheme through which Standard Oil came to be responsible for over 90% of oil production). Rockefeller, as well as his brother and five other individuals, had stakes in Standard Oil Company of New Jersey as well as 33 other corporations responsible for the production of oil. *Id.* at 30.

43 See id. at 31 (detailing the specific claims the government asserted against Standard Oil and the grounds on which they were based).

That during said first period, the said individual defendants, in connection with the Standard Oil Company of Ohio, purchased and obtained interests through stock ownership and otherwise in, and entered into agreements with, various persons, firms, corporations, and limited partnerships engaged in purchasing, shipping, refining, and selling petroleum and its products among the various States for the purpose of fixing the price of crude and refined oil and the products thereof, limiting the production thereof, and controlling the transportation therein, and thereby restraining trade and commerce among the several States, and monopolizing the said commerce. *Id.* at 32. See also George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. CAL. L. REV. 499, 500 (2012) (detailing the process through which Standard Oil became one of the largest monopolies in history). Much of the crude oil produced in America was shipped to Europe. *Id.* However, it was produced in Pennsylvania, so while the oil itself was a valuable commodity, so was the business of transporting and shipping the oil. *Id.* Standard Oil’s practice of controlling every facet of crude oil sales from the original production, to the transportation, and the eventual exportation of the product allowed it to become such a powerful monopoly. *Id.*
I and created a monopoly in violation of § 2.\textsuperscript{44} Between 1870 and 1882, defendants that were associated with Standard Oil Company purchased significant amounts of stock and entered into various agreements with other companies engaged in purchasing and transporting oil throughout the U.S.\textsuperscript{45} By 1882, close to ninety percent of the petroleum industry, from manufacturing to delivery, was put into a trust and controlled by the defendants.\textsuperscript{46} The Supreme Court affirmed the ruling of the trial court by highlighting that Standard Oil placed a restraint on trade and was a monopoly in violation of the Sherman Act.\textsuperscript{47} The Supreme Court reasoned that, based on the sheer size of Standard Oil, and their power within the market, Standard Oil restrained trade and constituted a monopoly.\textsuperscript{48} However, in their decision, the Supreme Court modified the interpretation of the

\textsuperscript{44} See Standard Oil Co., 221 U.S. at 30–31 (stating that thirty-four corporations as well as seven individuals had appealed the decision of the lower court finding Standard Oil and its co-conspirators to be in violation of the Sherman Act). The initial charges brought by the government were against: Standard Oil Company of New Jersey, Standard Oil Company of California, Standard Oil Company of Indiana, Standard Oil Company of Iowa, Standard Oil Company of Kansas, Standard Oil Company of Kentucky, Standard Oil Company of Nebraska, Standard Oil Company of New York, Standard Oil Company of Ohio . . . sixty-two other corporations and partnerships . . . also seven individuals . . .

\textsuperscript{45} See id. at 32 (detailing the practices of Standard Oil where Rockefeller and other individuals composed partnerships for refining oil and combined the partnerships into one company). By 1872, Rockefeller and his partners owned all but a few of the oil refineries in Cleveland. Id. Rockefeller then combined his corporations with other Petroleum companies into a massive trust. Id.

\textsuperscript{46} See Standard Oil Co., 221 U.S. at 34 (detailing the elaborate scheme that was used to form one of the largest monopolies in the country’s history). All of the businesses that were combined into the massive Standard Oil trust were under the control of only nine trustees who were able to exert their power over the crude oil market. Id.

\textsuperscript{47} See id. at 81–82 (concluding that the trial court’s decision should be affirmed, but the decree should be slightly modified).

\textsuperscript{48} See id. at 74 (finding that the power and size of Standard Oil in the petroleum market created restraints on trade and resulted in a monopoly). The Court went on to state that contracts which restrain trade in violation of § 1 create a perennial violation of § 2 when they result in a monopoly. Id.
Sherman Act to include only contracts and combinations that placed undue restraints on trade in violation of the Sherman Act.\(^49\) In response to the ambiguous language of the Sherman Act, Congress enacted both the Clayton Act and Federal Trade Commission Act (“FTCA”), as part of a two-prong antitrust bill in 1914.\(^50\) Primarily, the Clayton Act was intended to strengthen the Sherman Act by declaring a wider range of unfair business practices as illegal.\(^51\) This part of the Clayton Act addressed loopholes that companies exploited under the vague language of the Sherman Act, such as price fixing and mergers.\(^52\) Furthermore, the FTCA created the FTC.\(^53\) The

\(^{49}\) See id. at 59–60 (analyzing the language of the Sherman Act through the meaning of its terms at common law). The Court stated that words which had a well-known meaning at common law should be presumed to have the same meaning unless there is evidence to the contrary. Standard Oil Co., 221 U.S. at 59–60. The Court then went on to introduce a new standard for antitrust violations: “it follows that it was intended that the standard of reason which had been applied at the common law, and in this country, in dealing with subjects of the character embraced by the statute, was intended to be the measure . . . .” Id. at 60.

\(^{50}\) See Adam Augustyn, Clayton Antitrust Act, BRITANNICA (Oct. 17, 2020), archived at https://perma.cc/Z52K-9Z58 (stating the purpose of Congress enacting the Clayton Antitrust Act of 1914). The Clayton Act was aimed at clarifying and strengthening some of the shortcomings of the Sherman Act. Id. While the Sherman Act was effective in some cases, its vagueness allowed corporations to find loopholes and engage in unfair business practices that were not per se illegal under the Sherman Act. Id. Although Theodore Roosevelt and William Howard Taft had both done their best to break up large corporations and trusts, big corporations were still continuing to grow, and a small group of individuals was in control of much of the country’s credit. Id. Congress feared that this group of individuals had too much power and could “plunge the nation into a financial panic.” Id.

\(^{51}\) See Clayton Act, 15 U.S.C. §§ 12–27 (1914) (strengthening antitrust laws by clarifying ambiguities within the Sherman Act). See also Augustyn, supra note 50 (explaining how the Clayton Act defined ambiguous terms within the Sherman Act). The Sherman Act declared a monopoly is illegal but did not necessarily define what a monopoly was. Id. The Clayton Act made it illegal for business owners to have particular types of holding companies. Id. Also, particular types of shipping agreements between competitors were determined to be illegal. Id. See also Troy Segal, Clayton Antitrust Act, INVESTOPEDIA (Feb. 4, 2020), archived at https://perma.cc/W9GZ-NWPA (reinforcing which business practices the Clayton Act makes illegal).

\(^{52}\) See id. (detailing the specific sections of the Clayton Act that were created in response to unfair business practices which were not violations of the Sherman Act).

\(^{53}\) See Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (1914) (creating the Federal Trade Commission). See also What We Do, FTC (Oct. 17, 2020), archived at https://perma.cc/9LYS-K8J2 (stating that the dual mission of the FTC is to promote competition and protect consumers). The FTC is a bipartisan federal agency
FTCA granted the FTC the power to bring cases against companies engaging in “unfair methods of competition” and “unfair or deceptive acts or practices.” The general mission of the FTC is to promote competition within the economy and protect consumers from unfair business practices. As a member of the executive branch, the FTC has the authority to investigate and prosecute trusts, corporations, or persons if they believe there is a violation of either the Sherman Act or the Clayton Act.

D. Later Antitrust Cases

In 1982, one of the largest corporations in America was deemed a monopoly by the District Court for the District of Colombia, resulting in a decree settlement pursuant to 15 U.S.C. § 16. At the
time of the suit, the American Telephone and Telegraph Corporation ("AT&T") was that largest telephone and telegraph provider in the U.S. The government argued that AT&T’s practice of requiring customers to rent phones from the company was a restraint on trade in violation of § 1. They also argued that AT&T’s bell system created a monopoly based upon its market power and geographical restraints of telecommunication services and equipment which was a violation of § 2. The court ordered AT&T to break up its large service area into smaller ones, called “Baby Bells,” which were brand new companies not under the company’s control which had “common social and economic characteristics but not so large as to defeat the intent of the decree.” With concerns over the potential power of these new “Baby Bells,” the court also ordered them to follow specific protocols.

on its power within the telecommunications market and the way it leveraged that power to force consumers to purchase its equipment).

58 See Andrew Beattie, AT&T’s Successful Spinoffs, INVESTOPEDIA (Oct. 31, 2019), archived at https://perma.cc/R8MD-ZRWZ (detailing the power of the services AT&T provided as well as the pros and cons of its forceful breakup). AT&T did not allow consumers to use phones manufactured by other companies on its service lines and it also did not sell its phones; therefore, consumers were forced to rent phones from AT&T. Id. After the breakup of Ma Bell, Baby Bells dropped these restrictions and consumers were able to buy their own phones which helped consumers and created a new market for the sale of phones by smaller companies. Id. A criticism of the breakup is the fact that cable providers and wireless cell phone providers would have eventually created a competitive market against AT&T, making the litigation unnecessary. Id.

59 See Am. Tel. & Tel. Co., 552 F. Supp. at 141 (asserting the governments claims against AT&T in relation to its violation of § 1).

60 See id. at 142 (asserting the governments claims against AT&T in relation to its violation of § 2).

61 See id. at 141 (proposing the changes which should be made to AT&T’s structure). The Court held that newly formed service areas must have similar social and economic foundations. Id.

62 See id. at 143 (discussing the protocols Baby Bells would have to follow in order to be in compliance with the decree against AT&T).

Operating Companies would not be permitted (1) to manufacture or market telecommunications products and customer premises equipment; (2) to provide interexchange services; (3) to provide directory advertising such as the Yellow Pages; (4) to provide information services; and (5) to provide any other product or service is not a “natural monopoly service actually regulated by tariff.”
A final example of antitrust litigation, premised upon a company’s significant economic growth and expansion, was in the case of U.S. v. Microsoft Corporation. The government filed suit against Microsoft on the grounds that its business practices, such as licensing restrictions and exclusionary contracts, were in violation of the Sherman Act. After reviewing the district court’s ruling, the circuit court affirmed in part and reversed in part; concluding that only some of Microsoft’s business practices violated the Sherman Act. Particularly, the court found that Microsoft’s practice of tying their own applications, such as word processors and video software to the sale of their operating system, placed a restraint on trade. The court reasoned that Microsoft’s practice of only allowing its computer applications to work on its own operating system created a scenario where consumers were forced to choose Windows as their operating system.

Id. See also Adam Hayes, Baby Bells, INVESTOPEDIA (Dec. 5, 2020), archived at https://perma.cc/XLL3-DUC3 (describing the court order “Baby Bells”). Nine separate “Baby Bells” were assigned a part of the bell trademark as a part of the court ordered decree to break up AT&T. Id. Before the regional breakup, AT&T dominated the telecommunications market having around an 80% market share. Id. This forced breakup was able to help consumers by lowering prices for phones and competitors by allowing new companies to enter the telecommunication market and to sell telecommunication products. Id.

63 See United States v. Microsoft Corp., 253 F.3d 34, 45 (D.C. Cir. 2001) (stating that the district court found Microsoft corporation to be in violation of the Sherman Act). See also Andrew Beattie, Why Did Microsoft Face Antitrust Charges in 1998?, INVESTOPEDIA (Mar. 30, 2020), archived at https://perma.cc/DKW8-XHZQ (providing a simplistic description of the reason the Department of Justice (“DOJ”) brought antitrust charges against Microsoft).

64 See Microsoft Corp., 253 F.3d at 45 (listing the Sherman Act claims that the government sought to bring against Microsoft).

65 See id. at 46 (finding that the district court’s decision was proper in some regards; however, part of its decision needed to be overturned).

66 See id. (stating the Court’s decisions upon appeal).

Accordingly, we affirm in part and reverse in part the District Court’s judgment that Microsoft violated §2 of the Sherman Act by employing anticompetitive means to maintain a monopoly in the operating system market; we reverse the District Court’s determination that Microsoft violated §2 of the Sherman Act by illegally attempting to monopolize the internet browser market; and we remand the District Court’s finding that Microsoft violated § 1 of the Sherman Act by unlawfully tying its browser to its operating system.

Id.
system over competitors which was a direct violation of § 2. The Microsoft decision had a resounding effect on the way modern antitrust litigation has been approached by the government and courts.

III. Facts

A. Overview of Recent American Antitrust Litigation

Since the rulings in antitrust litigation such as Microsoft, technology has become increasingly intertwined with our daily lives. Large technology companies such as Amazon, Microsoft, and Facebook have an overwhelming impact on the way individuals conduct their daily activities. As a result, lawmakers in the House of

---

67 See id. at 55 (highlighting the Court’s reasoning that Microsoft’s position in the market created a “chicken-and-egg” scenario). Since consumers preferred computers that had more applications available, and because developers prefer to create applications for computers consumers will use, Microsoft had a dominant market share that needed to be addressed. Id.

68 See Richard Blumenthal & Tim Wu, What the Microsoft Antitrust Decision Taught Us, THE N.Y. TIMES (May 18, 2018), archived at https://perma.cc/JV48-NDZC (discussing the massive ramifications that arose out of the Microsoft decision). Between 1970 and 1999, there was an average of 15 antitrust suits brought by the government each year. Id. Now, there are an average of three brought per year. Id.

69 See Microsoft Corp., 253 F.3d at 45 (providing an overview of the government’s claim against Microsoft). See also Mickeel Allen, Technological Influence on Society, BCTV (Nov. 7, 2019), archived at https://perma.cc/E9HF-ZLYT (detailing the influence that technology has had on society). We live in a world where advances in technology are extremely common. Id. While advancements in tools such as the internet and cellphones help to keep us connected, they also create a loss of privacy. Id.

70 See Spencer Weber Waller, The Omega Man or the Isolation of U.S. Antitrust Law, 52 CONN. L. REV. 123, 130 (2020) (explaining how companies such as Google, Facebook, and Amazon operate without restrictions and threat of antitrust enforcement in the United States). While these technology companies are able to engage in more anticompetitive practices in the United States, lawmakers in the European Union and other nations are cracking down on the behavior of these companies and taking enforcement actions. Id. See also Peter Eavis & Steve Lohr, Big Tech’s Domination of Business Reaches New Heights, THE N.Y. TIMES (Aug. 19, 2020), archived at https://perma.cc/GF7S-GXHJ (promulgating the strength that technology companies have in modern times). Apple, Alphabet, Amazon, Facebook,
Representatives began investigating the business practices of large tech companies.\textsuperscript{71} This has led experts to believe that, moving forward, there will be changes in the legal standards applied to antitrust law, with big technology as the focus.\textsuperscript{72} Additionally, policy disagreements became pervasive amongst antitrust regulators, such as state attorney generals, the FTC, and the Department of Justice ("DOJ").\textsuperscript{73} For example, in the FTC’s suit against Qualcomm Incorporated ("Qualcomm"), the DOJ publicly disagreed with the FTC’s theory of anticompetitive behavior, and subsequently filed statements against its position.\textsuperscript{74} \textit{Qualcomm} is an important case because it exemplifies the reluctance of contemporary courts to find antitrust violations by large technology companies.\textsuperscript{75}

\section*{B. FTC v. Qualcomm Inc.}

In January of 2017, the FTC filed a complaint for equitable relief in the Northern District of California against Qualcomm for violations of the Sherman and FTC Acts on the grounds that its patent licensing practices affected market equilibrium and excluded and Microsoft make up more than twenty percent of the stock market’s total worth. \textit{Id.} During the pandemic, the reach of these companies has increased as they have had an overwhelming impact on our daily lives. \textit{Id.} These companies shape how we “work, communicate, shop, and relax.” \textit{Id.}

\textsuperscript{71} See Cecilia Kang & David McCabe, \textit{House Lawmakers Condemn Big Tech’s ‘Monopoly Power’ and Urge Their Breakups}, \textit{The N.Y. Times} (Oct. 6, 2020), archived at https://perma.cc/Y7FQ-AZVC (detailing the house of representative’s investigation into large technology companies). The report stated that Facebook, Google, Microsoft, and Amazon all turned from “‘Scappy’ start-ups into ‘the kinds of monopolies we last saw in the era of oil barons and railroad tycoons.’” \textit{Id.}

\textsuperscript{72} See Eleanor Tyler, \textit{ANALYSIS: The Big Trend in Antitrust Law 2020 is Uncertainty}, \textit{BLOOMBERG L.} (Nov. 4, 2019), archived at https://perma.cc/LDU3-MGFF (detailing recent antitrust trends and their focus on technology and digital markets). Tyler believes that fundamental disagreements between U.S. antitrust regulators will lead to “conflicting legal standards.” \textit{Id.} Given the global reach of many of these companies, international concerns about antitrust behavior will also remain relevant. \textit{Id.}

\textsuperscript{73} See id. (stating that there is disagreement amongst antitrust regulators which leads to “corporate actors facing potentially conflicting legal standards”).

\textsuperscript{74} See id. (stating that the DOJ disagreed with the FTC’s case against Qualcomm and went on to file an appellate brief against the FTC upon their district court’s victory).

\textsuperscript{75} See generally Blumenthal & Wu, supra note 68 (discussing the lack of antitrust oversight following the decision in \textit{Microsoft}). Despite the market power and consolidation of many large technology companies, the number of antitrust suits brought each year on average has dropped considerably since 1999. \textit{Id.}
competitors from competing within both the CDMA and LTE chip market. Qualcomm is a company that creates technologies which help to power smartphones and tablets. The FTC sought permanent injunctive relief against Qualcomm to halt its interrelated business practices involving baseband processors (“modems”) which harmed competition and caused restraints on trade for rival chip manufacturers and original equipment manufacturers (“OEMs”). The FTC asserted, and the district court agreed, that Qualcomm’s business practices

See FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 675–76 (N.D. Cal. 2019) (giving a detailed timeline of the government’s investigation, findings, and fines). In September of 2014, the FTC notified Qualcomm that they would begin investigating particular business practices that Qualcomm engaged in. Id. at 774. See also Richard G. Gervase, Jr. et al., Ninth Circuit Reverses FTC Win in FTC v. Qualcomm, Finding No Antitrust Violation From Qualcomm’s Licensing of its Standard-Essential Patents, NAT’L L. REV. (Aug. 13, 2020), archived at https://perma.cc/BN2M-UY9D (stating the basis of the FTC’s suit against Qualcomm). See also Equitable Relief, NOLO (Nov. 10, 2020), archived at https://perma.cc/E7EF-5T55 (defining equitable relief as a nonmonetary judgement typically used when monetary damages would not suffice in repairing the claimed injury). Equitable relief can involve ordering a particular action(s) or it can be an order to refrain from engaging in something. Id. See also Shara Tibken, Qualcomm-FTC lawsuit: Everything you need to know, CNET (May 22, 2019), archived at https://perma.cc/Z869-587R (providing a summary of Qualcomm’s practices and the court proceedings). See also What is CDMA and what does it mean for your phone?, ALLCONNECT (July 30, 2020), archived at https://perma.cc/VP5F-3ZZF (defining CDMA as “Code Division Multiple Access” and explaining that it is a type of cellphone network). See also What is LTE?, T-MOBILE (Mar. 27, 2021), archived at https://perma.cc/6WWV-E5WD (defining LTE as “Long Term Evolution” and explaining that it is “a standard of wireless data transmission.”). See generally Qualcomm Inc., FTC (Nov. 25, 2019), archived at https://perma.cc/9XBK-DSY4 (providing the case summary as well as the case timeline which consists of the official complaints, orders, motions, briefs, and rulings that were filed by the FTC, Qualcomm, and the Court).

77 See Abby Hamblin, What exactly does Qualcomm do? Here’s what you should know about the San Diego company., THE SAN DIEGO UNION-TRIB. (Mar. 12, 2018), archived at https://perma.cc/8YMC-VP3D (detailing the various business fields that Qualcomm is engaged in). Qualcomm develops modem chips for smartphones and tablets as well as “operating systems, user interfaces, graphics and camera processing functions, among other innovations.” Id.

78 See Qualcomm, 411 F. Supp. 3d at 669 (stating the outcome the FTC sought should it meet its burden of proving a violation of antitrust laws). To bring a claim under the Sherman Act, the FTC must first establish that Qualcomm possessed monopoly power within the relevant antitrust market to meet the first element of § 2 of the Sherman Act. Id. at 683. If Qualcomm possesses monopoly power within the relevant market, then the FTC must show “that Qualcomm’s conduct is an unreasonable restraint of trade under § 1 or exclusionary conduct under § 2.” Id.
harmed competition and restrained trade in both the CDMA and LTE market and the cellphone market itself.  

First, Qualcomm refused to sell its modem chips to OEMs unless the OEM signed a separate patent license agreement. The Northern District of California reasoned that Qualcomm’s patent licensing agreement and enforcement tactics constituted anticompetitive business practices. Second, the FTC argued that Qualcomm also declined to license their Standard Essential Patents (“SEPs”) to rival modem manufacturers. The district court held that

79 See id. at 669 (explaining the FTC’s claims against Qualcomm as well as the legal basis of those claims). Qualcomm’s practices hurt rival chip manufacturers because they restrained trade created barriers of entry for chip manufacturers and this created a monopoly which harmed OEMs because Qualcomm’s market share was so large that many companies were forced to buy chips from Qualcomm. Id. at 697–98.  

80 See id. at 698 (explaining one of Qualcomm’s anticompetitive behaviors against OEMs). Qualcomm typically licenses its patents on a “portfolio basis” which means that a licensee pays for and receives rights to all three categories of Qualcomm patents — Cellular SEPs, Non-cellular SEPs, and non-SEPs.” Qualcomm, 411 F. Supp. 3d at 672. Qualcomm began entering into Subscriber Unit License Agreements (“SULA”) where OEMs could practice Qualcomm’s patents without fear of suit from Qualcomm in exchange for a royalty from the end user device (a mobile phone). Id. at 673. By only selling its modems with a patent license agreement, Qualcomm refused to sell its chips exhaustively. Id. at 698. By avoiding exhaustion, Qualcomm retained its patent license and used its “chip monopoly power to coerce OEMs to sign patent license agreements.” Id. See also Quanta Comp. Inc. v. LG Elec. Inc., 553 U.S. 617, 626 (2008) (stating that “[t]he longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item.”). See generally Patent Exhaustion: Everything You Need to Know, UP COUNSEL (Nov. 11, 2020), archived at https://perma.cc/U9RW-48P3 (providing an overview of the doctrine of patent exhaustion).  

81 See Qualcomm, 411 F. Supp. 3d at 743–44 (summarizing the anticompetitive nature of Qualcomm’s dealings with OEMs and the injury suffered as a result). Qualcomm engaged in various tactics to enforce its patent licensing agreement. Id.  

To enforce those licensing practices, Qualcomm has cut off OEMs’ chip supply, threatened OEMs’ chip supply, withheld sample chips, delayed software and threatened to require the return of software, withheld technical support, and refused to share patent claim charts or patent lists. In addition, Qualcomm has required OEMs to grant QCT cross-licenses (often royalty-free) to OEMs’ patent portfolios and charged OEMs higher royalty rates on rivals’ chips.  

Id. Combinations of these tactics were used against over 15 OEMs. Id. at 698–743. The use of these tactics by Qualcomm all but assured that OEMs would sign the licensing agreement and resulted in exclusivity in the modem market. Id. at 698.  

82 See id. at 743–44 (explaining Qualcomm’s anticompetitive behavior against rival modem chip manufacturers). If rivals are not granted a license to Qualcomm’s SEPs
this refusal to license constituted anticompetitive behavior because it violated Qualcomm’s fair, reasonable, and non-discriminatory (“FRAND”) commitments to standard setting organizations (“SSOs”). FRAND commitments require companies to license their SEP’s on fair terms to other companies that adhere to this standard. Lastly, the court reasoned that Qualcomm’s exclusionary deals with Apple constituted restraints on trade that produced exclusive dealings within the market and, thus, were restraints on trade. Based on overwhelming evidence of Qualcomm’s anticompetitive behavior, the district court ordered five equitable remedies against Qualcomm.

then “a rival cannot sell modem chips with any assurance that Qualcomm will not sue the rival and its customers for patent infringement.” Qualcomm, 411 F. Supp. 3d at 744. See generally Abraham Kasdan & Michael J. Kasdan, Recent Developments In The Licensing Of Standards Essential Patents, NAT'L L. REV. (Aug. 30, 2019), archived at https://perma.cc/66TZ-5F8J (explaining the standards through which SEPs are regulated).

See Qualcomm, 411 F. Supp. 3d at 751 (detailing Qualcomm’s commitment as an SEP holder to engage in FRAND licensing of their patent). Barring the current litigation, Qualcomm as well as other SEP holders, have advanced the understanding that these patents should be licensed to rivals using FRAND practices. Id. Qualcomm had previously licensed its SEPs to rivals but stopped upon the conclusion that it was “more lucrative” to only license SEPs to OEMs. Id. at 751. The Court believed that this practice prevented entry to the market and hampered rivalry in the market. Id. at 744. Qualcomm attempted to argue that the refusal to license rivals was not anticompetitive but rather procompetitive because there would not be multi-level licensing which would lead to lower costs and alignments of royalties. Id. at 756.

See Frand Licensing: Everything You Need to Know, UPCOUNSEL (Feb. 23, 2021), archived at https://perma.cc/6Z6Z-UHEJ (providing an overview of FRAND licensing requirements in relation to SEPs and SSOs).

See Qualcomm, 411 F. Supp. 3d at 766 (explaining how Qualcomm’s exclusionary deal with Apple “substantially foreclosed competition” within the market). Qualcomm’s own records detailed that its exclusive dealing contracts with Apple could have eliminated competition within the modem chip market. Id. These deals foreclosed Apple from purchasing chips from Qualcomm’s rivals but also stripped Qualcomm’s rivals of the benefits of having had a customer as large as Apple. Id. at 766–67.

See id. at 820–24 (detailing the equitable remedies ordered by the Court). First, Qualcomm cannot “condition the supply of modem chips on a customer’s patent license status,” and it must negotiate or renegotiate license terms without threatening to cut off access to modem chips. Id. at 820. Second, Qualcomm must make its SEPs available to competitors on FRAND terms. Id. at 821. Third, Qualcomm cannot enter into “express or de facto dealing agreements” with customers seeking modem chips. Qualcomm, 411 F. Supp. 3d at 822. Fourth, Qualcomm cannot interfere with the ability of customers to “communicate with a government agency
Following the decision delivered by the district court, Qualcomm swiftly filed an order to stay two of the injunctions pending an appeal.\textsuperscript{87} Qualcomm was granted a stay regarding the district court’s injunction while the decision was pending appeal.\textsuperscript{88} After de novo review of the district court’s conclusions of law, the Ninth Circuit reversed the district court’s judgement and vacated their injunctions arguing that the decision was beyond the scope of the Sherman Act.\textsuperscript{89} The Ninth Circuit reasoned that Qualcomm’s “no license, no chip” policy, where OEMs had to purchase patent licensing agreements to subsequently purchase modems, was not anticompetitive because there was no showing that this policy had an impact on Qualcomm’s competitors.\textsuperscript{90} Turning then to the licensing of SEPs to rival about a potential law enforcement or regulatory matter.” \textit{Id.} Lastly, Qualcomm is to report to the FTC annually to ensure compliance with the previously stated injunctions. \textit{Id.} at 824.

\textsuperscript{87} See FTC v. Qualcomm Inc., 935 F.3d 752, 757 (9th Cir. 2019) (granting a stay on two of the district court injunctions). The circuit court granted a stay for the injunctions stating, “(1) ‘Qualcomm must make exhaustive SEP licenses available to modem chip suppliers,’ and (2) ‘Qualcomm must not condition the supply of modem chips on a customer’s patent license status’ and ‘must negotiate or renegotiate license terms.’” \textit{Id.}

\textsuperscript{88} See \textit{id.} at 755 (granting Qualcomm’s request for a partial stay pending appeal). Upon weighing relevant factors, the Ninth Circuit granted a stay against two of the district court’s injunctions. \textit{Id.} at 757. \textit{See also} Fed. R. Civ. P. 8(a)(2) (detailing what is required of a party when they request relief through a court of appeals); Nken v. Holder, 556 U.S. 418, 426 (2009) (listing considerations the Court takes into account when considering a stay pending appeal). The Court considers: (1) whether the applicant is likely to succeed on the merits; (2) if the applicant will suffer injury without a stay; (3) if the issuance of a stay will harm the interest of another party in the proceeding; and (4) the public’s interest in the matter. \textit{Id.}

\textsuperscript{89} See FTC v. Qualcomm Inc., 969 F.3d 974, 982 (9th Cir. 2020) (explaining the procedural context leading up to the Ninth Circuit’s opinion). Upon granting a stay, the Ninth Circuit stated that the district court’s ruling was either “‘a trailblazing application of the antitrust laws’ or ‘an improper excursion beyond the outer limits of the Sherman Act.’” \textit{Id.} The decision was reversed and vacated. \textit{Id.} at 1005.

\textsuperscript{90} See \textit{id.} at 1001 (reasoning that even if Qualcomm had caused harm to OEMs, it is not an antitrust violation because harm must be caused in the relevant market). “A threshold step in any antitrust case is to accurately define the relevant market, which refers to ‘the area of effective competition.’” \textit{Id.} at 992 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018)). The OEMs are Qualcomm’s customers, not its competitors, and therefore the district court’s ruling was aimed at the wrong market. \textit{Id.} The circuit court also pointed out that the royalties paid to Qualcomm, which were seen by many as high, could not be anticompetitive because OEMs were able to discipline Qualcomm and lower prices “through arbitration claims, negotiations, threatening to move to different chip suppliers, and threatened or actual antitrust litigation.” \textit{Qualcomm}, 969 F.3d at 1001.
companies, the Ninth Circuit found that Qualcomm had no duty to deal with any competitors because antitrust laws were enacted to promote competition and not to help competitors in their day-to-day dealings. The key difference between the rulings of the district court and circuit court was the application and understanding of relevant antitrust statutes and case law, as applied to the facts of Qualcomm.

The Northern District of California defined the relevant market as the market for both CDMA modem chips and LTE modem chips, and the Ninth Circuit subsequently affirmed. In its analysis, the Northern District of California court analyzed Qualcomm’s licensing practices to OEMs and modem chip sales to rival competitors, as interdependent, however OEMs were not a competitor of Qualcomm. By reviewing the harm caused to OEM’s, the district analyzed anticompetitive behavior within the wrong market. In relation to licensing of SEPs, the district court found that Qualcomm’s “no license, no chip” policy was anticompetitive to rival chipmakers, whereas the Ninth Circuit found this practice to have no effect on the

91 See id. at 993 (citing Brunswick Co. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 488 (1977)) (noting that “antitrust laws, including the Sherman Act, ‘were enacted for ‘the protection of competition, not competitors.’”). The Court reasoned that Qualcomm is not under any antitrust duty to license its chips to competitors. Id. at 1005. Next, the Court reasoned that even if Qualcomm breached its FRAND conditions (a conclusion the Court did not reach), an antitrust suit would not be the method through which to remedy that injury. Id. Instead, a claim for such a breach lies in contract or patent law. Id.

92 See id. (noting that anticompetitive behavior is illegal under federal law but “hypercompetitive behavior is not.”). The Court’s job is not to punish Qualcomm for having successful and cunning business practices, rather its job is to interpret whether the practices destroy competition based on the facts and evidence presented by the FTC. Qualcomm, 969 F.3d at 1005.

93 See id. at 992 (quoting FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 683 (N.D. Cal. 2019)) (reiterating the district court’s finding of a relevant market).

94 See id. at 993 (restating the district court’s analysis that led to it intertwining two distinct markets). Modem chip suppliers are the relevant market for Qualcomm’s alleged anticompetitive behavior. Id. at 992. OEMs are a separate market, not one for modems but rather “cellular services generally.” Id.

95 See Qualcomm, 969 F.3d at 933 (stating that OEMs of cellular services are not competitors of Qualcomm but rather customers for its modems). Even if Qualcomm’s licensing practice with OEMs was a harm to consumers, they “are not ‘anticompetitive’ in the antitrust sense—at least not directly—because they do not involve restraints on trade or exclusionary conduct in ‘the area of effective competition.’” Id. at 992 (quoting Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018)).
relevant market.\textsuperscript{96} By reversing the district court’s decision, the Ninth Circuit distinguished between anticompetitive behavior and hypercompetitive behavior.\textsuperscript{97}

C. European Policy and Reasoning Relating to Antitrust Law

The European Union (“EU”) is a group of twenty-seven countries that has united to create a stronger and more unified front.\textsuperscript{98} The EU is governed by treaties which serve as the primary law for all member states.\textsuperscript{99} Various forms of “secondary law” are formed based on “principles and objectives” set forth in the treaty.\textsuperscript{100} The Treaty on

\textsuperscript{96} See id. at 1005 (concluding that Qualcomm’s policy of not licensing its SEPs to rival chip makers did not violate antitrust law). The policy is chip supplier neutral and does not harm the relevant market. \textit{Id.} Although Qualcomm does not license its chips to rivals, it allows rivals to practice its patent royalty free using CDMA ASIC agreements. \textit{Id.} at 995. Rivals can practice Qualcomm’s SEPs “before selling their chips to downstream OEMs.” \textit{Id.} at 996.

\textsuperscript{97} See \textit{Qualcomm}, 969 F.3d at 1005 (concluding that Qualcomm’s practices did not violate antitrust law). Qualcomm’s practices have been disruptive in the market because of their innovation, but their market dominance does not translate to anticompetitive behavior. \textit{Id.}

\textsuperscript{98} See \textit{The EU in brief}, EUR. COMM’N (Nov. 14, 2020), archived at https://perma.cc/VJ2J-P3EF (stating that the European Union is “a unique economic and political union between 27 EU countries that together cover much of the continent.”). One purpose of the European Union was to create a stronger currency in order to strengthen the economy and promote growth. \textit{Id.} Another purpose of the union is to force governing countries and their institutions to become “more transparent and democratic.” \textit{Id.}

\textsuperscript{99} See generally \textit{Types of EU law}, EUR. COMM’N (Nov. 14, 2020), archived at https://perma.cc/DGM2-2CMK (comparing primary to secondary laws within the European Union). Treaties for the European Union are agreed upon by all member states and “set out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its members.” \textit{Id.}

\textsuperscript{100} See id. (stating that EU treaties create distinct types of secondary law which “includes regulations, directives, decisions, recommendations and opinions.”). Regulations, a type of secondary law, are, “legal acts that apply automatically and uniformly to all EU countries as soon as they enter into force, without needing to be transposed into national law. They are binding in their entirety on all EU countries.” \textit{Id.} Directives, another type of secondary law, require EU countries to achieve a certain result, but leave them free to choose how to do so. EU countries must adopt measures to incorporate them into national law (transpose) in order to achieve the objectives set by the directive. National authorities must communicate these measures to the European Commission.
the Functioning of the European Union (“TFEU”), along with the Treaty on European Union (“TEU”), are the two primary treaties which govern the EU.  

One function of the treaties is to promote competition amongst companies that operate in the EU. TFEU Article 101 and Article 102 serve as the primary antitrust enforcement tool within the European Union. The European Commission is responsible for enforcing the antitrust laws of TFEU Article 101 and Article 102 within the EU’s internal market. Similar to § 1 of the Sherman Act, TFEU Article 101 prohibits agreements that restrain or distort competition. TFEU Article 102, which mirrors § 2 of the Sherman Act, prohibits companies from taking a dominant position within the market. The Court of Justice of the European Union (“CJEU”) is
tasked with settling legal disputes and ensuring that the laws of the EU are uniformly applied across all member nations.\(^{107}\) Decisions by the European Commission that find companies in violation of antitrust laws are subject to legal review.\(^{108}\)

Microsoft was under investigation by both the U.S. and the EU in the early 2000s.\(^{109}\) The European Commission engaged in a legal review of Microsoft because the company refused to license its interoperability information and bundled its operating system with Windows Media Player.\(^{110}\) By refusing to license its intellectual property rights, Microsoft was engaged in an abusive use of their dominant position within the market.\(^{111}\) The court then concluded that

\(^{107}\) See Court of Justice of the European Union, EUR. COMM’N (Nov. 15, 2020), archived at https://perma.cc/CGE5-TPCG (explaining what the Court of Justice of the European Union does, its composition, and how it works). The court system is composed of the General Court (which is comparable to a U.S. district or trial court) and the Court of Justice (which deals with appeals). Id.

\(^{108}\) See TFEU Key Actors, supra note 104 (discussing the process through which European Commission decisions are subject to judicial review). Under Article 263 of TFEU, the court can review both the Commission’s finding of fact as well as their legal analysis in relation to the facts. Id.

\(^{109}\) See John P. Jennings, Comparing the US And EU Microsoft Antitrust Prosecutions: How Level Is the Playing Field?, I ERASMUS L. & ECON. REV. 71, 71–72 (2006) (introducing the claims brought against Microsoft in both the United States and European Union and discussing how the separate litigations reached different outcomes). While the litigation was grounded in similar business practices, the United States and European Union outcomes were drastically different. Id. at 71.

The United States reached a settlement with Microsoft that was seen by many to be extremely lenient and favorable toward Microsoft. Id. The European Union handed down a severe fine and imposed remedial measures which forced Microsoft to end many of its business practices. Id. The European Union also continued to monitor Microsoft and its practices following the decision of the court. Id. at 72. See also Robert Brewington, A Case for Global Cooperation When Enforcing United States Antitrust and European Union Competition Laws Against Modern Technology Companies, 48 U.S.F. L. REV. 501, 508–11 (2014) (comparing and contrasting the Microsoft litigation in the United States with the Microsoft litigation occurring in the European Union). The litigation in both the United States and European Union occurred in the early 2000s and was based on Microsoft’s practice of tying products together which forced consumers to buy many of Microsoft’s computer applications. Id. This harmed both competitors of Microsoft and consumers. Id.

\(^{110}\) See Case T-201/04, Microsoft Corp. v. Comm’n of the European Communities, 2007 E.C.R. II-03601, para. 1331–33 (detailing the violations of Microsoft under Article 81 and 82 of the EC).

\(^{111}\) See id. at para. 1333 (stating that it is not per se illegal to refuse to license IP rights). However, in the present case there was such a strong public interest in maintaining effective competition that the permitted interference by the counsel was allowed. Id.
tying the Windows operating system to the Windows Media Player software constituted abusive tying under European Commission Law. The court concluded that these practices led Microsoft to become the market leader, and also had an effect on adjacent markets.

D. Differences Between American and European Antitrust Policy

The Sherman Act and the Clayton Act, as well as TFEU Article 101 and Article 102, are aimed at prohibiting agreements between companies that can impact trade, and further prohibiting companies from becoming monopolies. While the statutes appear to mirror each other, key differences exist which impact the manner of interpretation and how they are applied. One key difference between the legislative and regulatory systems is that all U.S. antitrust violators can face criminal sentencing, while only some signatory nations of the EU impose criminal penalties for antitrust violations.

112 See id. at para. 1334 (finding that the process of tying products together is not justified and thus illegal under Article 82 of the EC).
113 See id. at para. 1366 (concluding that Microsoft’s practices were in violation of relevant treaties and that the fines imposed by the European Commission were not excessive).
114 See Larry Bumgarder, Antitrust Law in the European Union, 8 GRAZIADO BUS. REV. 1, 1 (2004) (comparing and contrasting antitrust law in the United States and European Union). See also Mariah Witt, Don’t Google It: The European Union’s Antitrust Parade (“Enforcement”) Against America’s Tech Giants, 21 SAN DIEGO INT’L L. J. 365, 377 (2019) (noting the specificity of U.S. antitrust laws in comparison to EU competition law). U.S. antitrust legislation is so specific that it potentially allows larger companies to know which types of behaviors it can get away with. Id. On the other hand, EU competition law is so broad and vague that it allows the European Union to find violations in various types of business behavior. Id.
115 See Maria Coppola & Renato Nazzini, The European and U.S. Approaches to Antitrust and Tech: Setting The Record Straight – A Reply to Gregory J. Werden and Luke M. Froeb’s Antitrust and Tech: Europe and the United States Differ, and It Matters, COMPETITION POL’Y INT’L (May 4, 2020) [hereinafter European and U.S. Approaches to Antitrust], archived at https://perma.cc/K4R5-VZM9 (detailed ten differences that exist between European and U.S. antitrust enforcement). The largest difference is that the European Union has a much lower threshold for what it deems to be anticompetitive behavior by businesses. Id.
116 See Sanford M. Pastroff & Tilman Kuhn, Antitrust Law in the United States and European Union: Key Differences, ABA (Nov. 15, 2020), archived at https://perma.cc/CJ2J-LUSK (discussing the differences for violators of antitrust law in America and the European Union, including prospective jail time and fines).
Companies that have large markets in both systems must be wary of their actions, as certain conduct may be permitted under one system and deemed illegal under another.\textsuperscript{117} The biggest difference between the two systems is the subject matter that each system aims to protect based on slight differences in statutory language.\textsuperscript{118}

TFEU competition law is very narrow as Article 101 specifically prohibits agreements which impact competition while Article 102 prohibits business practices which create dominant positions in the market.\textsuperscript{119} The Sherman Act is much broader as § 1 prohibits restraints on trade while § 2 prohibits monopolization or attempted monopolization.\textsuperscript{120} The initial drafting of the Sherman Act, which did not pass, mirrored the current language of TFEU Article 101.

\textsuperscript{117} See Bumgardner, supra note 114 (finding that companies may face different outcomes depending on which jurisdiction they attempt new business practices in).

\textsuperscript{118} See id. (explaining the difference in policy rationale between antitrust laws in the United States and European Union). U.S. antitrust law is aimed at protecting consumers while EU competition law is aimed at promoting competition within the European Union. Id. See also Roger D. Blair & D. Daniel Sokol, The Goals of Antitrust: Welfare Standards in U.S. and EU Antitrust Enforcement, 81 Fordham L. Rev. 2497, 2514 (2013) (explaining that EU competition analysis is much more doctrinal than U.S. antitrust law which focuses heavily on economic analysis). Economists instigated a switch from per-se to rule of reason within American courts which has made economic analysis a larger part of U.S. courts analyzing Sherman Act violations. Id. at 2515. In contrast, EU courts do not rely as heavily on the opinion of economists in their decisions. Id. EU competition law is more concerned with the effect that restraints on trade and dominant market positions have on consumer choices even if intervention can have an adverse impact on efficiency within the relevant market. Id. at 2535. See also Brewington, supra note 109, at 503 (reasoning that while the Sherman Act aims to stop any business practices, which foster a dominant position in the market or could lead to a dominant position in the relevant market, Article 102 only governs business behavior where a firm already has a dominant position). See also Waller, supra note 70, at 130 (noting that U.S. antitrust law is aimed at breaking down monopolies while EU competition law is aimed at stopping abuse of dominant positions). The distinct terminology related to the different laws, breaking down monopolies versus stopping abuse of dominant positions can have an effect on the application of the EU and U.S. laws. Id.

\textsuperscript{119} See TFEU Art. 101, supra note 105 (stating that it is prohibited for companies to engage in agreements that prevent, restrict, or distort competition within the internal market); TFEU Art. 102, supra note 106 (stating that it is prohibited for companies to take a dominant position within the internal market).

\textsuperscript{120} See Sherman Act, 15 U.S.C. § 1 (1890) (declaring illegal any contracts, combinations, or trusts which place a restraint on trade); Sherman Act, 15 U.S.C. § 2 (declaring illegal monopolization or attempted monopolization within the market for a particular good).
because its language prohibited contracts that impacted competition.\(^{121}\) While the “restraint on trade” and “monopolize or attempt to monopolize” language of the Sherman Act is broader than the language of TFEU Article 101 and 102, domestic courts have interpreted it more narrowly, which has led scholars to believe that EU antitrust enforcement sets a lower threshold for the types of business activities that violate antitrust laws.\(^{122}\) Furthermore, U.S. antitrust laws require that anticompetitive business practices result in consumer harm to constitute a violation of the Sherman Act, while the European Union only requires that anticompetitive business practices have an impact on competition in order to justify enforcement of the antitrust statutes.\(^{123}\)

IV. Analysis

A. Supreme Court Precedent Applied to Qualcomm

Based on early Supreme Court precedent and foreign antitrust policy, the Ninth Circuit should have affirmed the Northern District of California’s holding that Qualcomm’s business practices were violations of § 1 and § 2 of the Sherman Act.\(^{124}\) Using precedent set

\(^{121}\) See Peritz, supra note 26, at 13 (discussing the original wording of the Sherman Act that more closely mirrored that of TFEU Article 101 and TFEU Article 102).

\(^{122}\) See European and U.S. Approaches to Antitrust, supra note 115 (arguing that the European Union maintains a lower threshold for conduct it deems anticompetitive). The European Union has different standards for anticompetitive behavior based upon the conduct at issue. Id. See also Blair & Sokol, supra note 118, at 2510 (noting that EU competition law is aimed at fairness). An analysis of a potential TFEU Article 101 and 102 violation takes into consideration both the effects that potential business practices may have on consumer choices and on competition within the market generally. Id. at 2512. See also Brewington, supra note 109, at 503 (stating that in the United States, it is believed that firms need over a fifty percent share within the relevant market for their position to be seen as dominant while in the European Union only a thirty-eight percent share is required to be in a dominant position). EU competition laws are much more stringent in their governance of competition within the market. Id. at 504. See also Waller, supra note 70, at 132 (noting that the “attempts to monopolize” language in § 2 of the Sherman Act is rarely used in litigation due to the challenging nature of such a showing).

\(^{123}\) See Bumgardner, supra note 114 (focusing on the differences between antitrust litigation based on harming consumers versus harming competition).

\(^{124}\) See United States v. American Tobacco Co., 221 U.S. 106, 184 (1911) (holding that based on the sheer size of American Tobacco’s market power they were in violation of § 2 of the Sherman Act); Standard Oil Co. of N.J. v. United States, 221
forth in *Northern Securities Co.*, the Ninth Circuit should have ruled that Qualcomm’s contracts with Apple were a restraint on trade because they forced Apple to purchase CMDA chips exclusively from Qualcomm which placed a restrain on trade by not allowing apple to purchase chips for its products from Qualcomm’s competitors.¹²⁵ In *Northern Securities Co.*, the Supreme Court found that Northern Securities Corporation was in violation of § 1 of the Sherman Act because of the nature and market power of the holding company.¹²⁶ The Supreme Court reasoned that the antitrust laws were enacted to eliminate the restriction of free competition in interstate commerce.¹²⁷ Some experts agree with the Supreme Court’s finding that Qualcomm was not in violation of § 1 of the Sherman Act because they did not conspire with another company to restrict trade—rather, they entered into an agreement with another company for the benefit of both

¹²⁵ See FTC v. Qualcomm Inc., 969 F.3d 974, 986 (2020) (detailing the exclusionary agreement between Apple and Qualcomm). While the agreement cut off Apple from the market which in and of itself could be seen as a restraint on trade, it also hurt Qualcomm’s rival chip manufacturers because a large section of its market was also cut off. *Id.*

¹²⁶ See *N. Sec. Corp.*, 193 U.S. at 327 (finding that the combination of various competing railroad companies could put a restraint on commerce). *See also* 15 U.S.C. § 1 (prohibiting contracts, combinations, and trusts which place restraints on trade).

¹²⁷ See *N. Sec. Corp.*, 193 U.S. at 337 (holding that the destruction or restriction of free competition within interstate commerce is anticompetitive restriction). When stockholders of Northern Pacific and Great Northern combined their stocks into Northern Securities Corporation and organized a holding company, it was clear that the sole purpose of the agreement was to eliminate competition between two parallel railroad lines which competed with each other. *Id.* at 326.
parties. If The Ninth Circuit applied the reasoning from *Northern Securities Co.* to Qualcomm’s contracts with Apple they would have found Qualcomm to be in violation of § 1 of the Sherman Act because its agreement restrained the ability of Apple and rival chip manufacturers to operate within a free market.

Similarly, in *American Tobacco*, the Supreme Court found that the defendants, through contracts and conspiracies with five accessory corporations and over fifty subsidiary companies, restrained trade and were a monopoly within the relevant market. The Supreme Court reasoned that the American Tobacco Company was in violation of § 1 of the Sherman Act based on the manner in which they contracted to control subsidiaries, and also in violation of § 2 of the Sherman Act due to the sheer number of companies under American Tobacco Company’s control created a monopoly that impacted the market for tobacco based on the control it exerted over that sector of the economy. Based on this precedent, Qualcomm could argue that they are not in control of an equivalent market share by buying out competitors to serve as subsidiaries of Qualcomm—rather, they are only made up of three separate companies, and therefore unable to effectuate the level of market power exerted by the American Tobacco

---

128 See *Qualcomm*, 969 F.3d at 986 (detailing how Qualcomm’s agreements with Apple were one sided and thus not an agreement between the two companies to restrict trade). Qualcomm’s deal with Apple forced Apple to purchase a certain number of chips from Qualcomm and did not allow it to purchase chips from other suppliers such as Intel. *Id.* While Apple and Intel complained this was anticompetitive behavior, Qualcomm did not conspire with these companies to restrict trade. *Id.* at 992.

129 See *id.* at 986 (finding that Qualcomm’s deals with Apple in 2011 and 2013 offered Apple billions of dollars in incentives). These incentives were contingent on the fact that Apple buys its chips exclusively from Qualcomm and that Apple purchase a certain amount of the chips each year. *Id.* Both Apple and Intel complained that this was anticompetitive behavior that made it impossible for competitors to compete within the modem chip market. *Id.*

130 See *United States v. American Tobacco Co.*, 221 U.S. 106, 148 (1911) (outlining the charges and claims made against the American Tobacco company). American Tobacco was charged with violating § 1 of the Sherman Act because it engaged in contracts and combinations which placed restraints on trade and subsequently violated § 2 because the company grew so large as to be deemed a monopoly. *Id.*

131 See *id.* at 184 (reasoning that American Tobacco was in violation of § 1 and § 2 of the Sherman Act because of the sheer number of companies within its control and its control within the tobacco market).
Company.\textsuperscript{132} However, the FTC could counter such an argument that differentiates between the market power obtained by the American Tobacco Company and that of Qualcomm by arguing that Qualcomm possess sixty-five percent of the particularized market for OEM’s and chip suppliers.\textsuperscript{133}

Another example of anticompetitive practices occurred in \textit{Standard Oil}, where the Supreme Court found that the defendants’ petroleum conspiracy was an attempt to restrain commerce and trade within the petroleum industry.\textsuperscript{134} The Supreme Court reasoned that Standard Oil could have violated either § 1 or § 2 of the Sherman Act because its practices and conspiracies were aimed at purposefully destroying the potential of any competition.\textsuperscript{135} Qualcomm could argue that unlike Standard Oil, its practices were not a direct attempt to place restraints on trade resulting in violation of § 1 and § 2 of the Sherman Act, instead, they were attempts to maximize profit which indirectly caused anticompetitive effects within the market.\textsuperscript{136} While it is true

\begin{footnotesize}
\textsuperscript{132} See FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 669–70 (N.D. Cal. 2019) (detailing the makeup of Qualcomm). Qualcomm Technologies Inc. (“QTI”) operates essentially all of the business for Qualcomm CDMA Technologies (“QCT”) and Qualcomm Technology Licensing (“QTL”), but the facts do not stipulate that it owns shares in any OEMs or other companies involved in other facets of cellphone manufacturing. \textit{Id.} at 670.
\textsuperscript{133} See \textit{Qualcomm}, 969 F.3d at 984 (stating Qualcomm’s market share for cell phone modem chips). This market share allows Qualcomm to force companies like Apple into exclusive chip purchasing deals. \textit{Id.} at 986. These deals hurt both Apple, who is unable to seek lower prices elsewhere and rival chip manufacturers who are not able to offer their products to Apple at a lower or competitive price to Qualcomm. \textit{Id.}
\textsuperscript{134} See Standard Oil Co. of N.J v. United States, 221 U.S. 1, 31 (1911) (explaining that multiple defendants conspired to enter their petroleum companies into trusts which put a restraint on trade). The defendants obtained interests in multiple partnerships, corporations, and so on, all of which had ties to petroleum. \textit{Id.} at 32. The defendants were engaged in “purchasing, shipping, refining, and selling petroleum” throughout the United States. \textit{Id.}
\textsuperscript{135} See \textit{id.} at 74 (finding that Standard Oil could be in violation of both § 1 and § 2 of the Sherman Act). The Supreme Court reasoned that Standard Oil’s sheer control over various subsidies and aspects of the petroleum market could have been a violation under § 1 of the Sherman Act. \textit{Id.} The Court then went on to reason that based on the sheer size of the company, it could have also been viewed as a monopoly or an attempt to monopolize in violation of § 2. \textit{Id.}
\textsuperscript{136} See \textit{Qualcomm}, 969 F.3d at 992 (arguing that even if Qualcomm’s business practices were anticompetitive, the district court’s analysis considered a broader market than it should have). The district court considered Qualcomm’s practices in the cellular service market as a whole. \textit{Id.} The proper market, and in fact the only market that Qualcomm was affecting with its practices, was the one for cellphone manufacturing.
\end{footnotesize}
that Qualcomm does not control the purchasing, distribution, manufacturing, and shipping of all relevant products, they still have market shares of over sixty-five percent in two separate chip markets, and their practices have the potential to destroy competition. Such a large market share creates the potential to obstruct entry into this market, and some argue that this clearly illustrates an intent “to drive others from the field, and to exclude them from their right to trade.”

B. Northern District of California versus the Ninth Circuit

The Northern District of California properly ruled in favor of the FTC in its case against Qualcomm. The FTC claimed that Qualcomm was engaged in multiple business practices that were anticompetitive and had potential to affect rivals as well as consumers. In district court, the FTC met its burden of showing that Qualcomm violated § 1 of the Sherman Act by illustrating the manner in which Qualcomm had an agreement with Apple that restrained trade. The district court properly found Qualcomm’s exclusionary

modem chips. Id. Qualcomm’s practices affected modem chip suppliers but not the larger cellular service market. Id.

See id. at 984 (illustrating that as of 2018, Qualcomm had around a 79% market share for CDMA modem chips and about a 64% market share for premium LTE modem chips). These numbers dropped from 90% and 70% (respectively) so the Court reasoned that Qualcomm’s dominance in the market was “receding” because Intel and Mediatek were finding ways to compete within the market. Id. at 983–84.

See Standard Oil Co., 221 U.S. at 78 (finding that when companies restrain trade or monopolize, they can destroy trade and often have the intent to create barriers to entry for other companies in the relevant market).

See FTC v. Qualcomm Inc., 411 F. Supp. 3d 658, 696 (N.D. Cal. 2019) (quoting Cascade Health Sols. v. PeaceHealth, 515 F.3d 883, 894 (9th Cir. 2008)) (holding that “[a]nticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way.”).

See id. at 697 (outlining the burden the FTC must prove to meet its case and road mapping the Court’s analysis).

See id. at 743–44 (summarizing how Qualcomm’s unique practices resulted in anticompetitive behavior against OEMs). To show a violation of § 1, the FTC had to show (1) that an agreement existed and (2) that the agreement itself restrained trade. Id. at 697. The FTC met its first burden by showing that Qualcomm had a transitional agreement with Apple to purchase its chips from Qualcomm. Id. at 763. The FTC met its second burden by showing that the deal was highly incentivized for Apple to buy its chips strictly from Qualcomm and also had substantial penalties to Apple in the form of clawback provision which imposed penalties on Apple if it “purchased any modem chips from a Qualcomm rival.” Id.
deal with Apple to be a violation of § 1 of the Sherman Act because Qualcomm’s incentives to Apple, which included hundreds of millions of dollars, essentially cut them off from working with other companies and therefore restrained trade.¹⁴² The FTC met its burden of showing that Qualcomm violated § 2 of the Sherman Act by showing that Qualcomm had a monopoly within the chip market share, dealt exclusively with OEM’s, and had unreasonably high royalty rates which barred rivals from competing with them and excluded new companies from entering the market.¹⁴³ Applying the holding set forth in *Cascade*, the district court properly concluded that Qualcomm violated the Sherman Act by engaging in anticompetitive behavior, which, on the merits, impaired the opportunities of rivals and did not further competition.¹⁴⁴

¹⁴² *See Qualcomm*, 411 F. Supp. 3d at 764 (finding that an agreement existed between Qualcomm and Apple). The Court soundly reasoned that due to the incentives for Apple to purchase strictly from Qualcomm as well as the potential penalties if Apple was to purchase chips elsewhere, Apple was effectively cut off from working with other companies. *Id.* at 764. Qualcomm’s incentives to Apple included hundreds of millions of dollars in incentives for Apple that were contingent on Apple purchasing at least 115 million chips directly from Qualcomm in a given year. *Id.* at 729. The number of chips that Apple was to purchase each year rose from 125 million to 150 million in subsequent years. *Id.* If Apple purchased fewer than 80 million chips from Qualcomm in a given year, then it did not receive any of the incentive funds from Qualcomm. *Id.* at 763. Lastly, the agreement with Apple contained a clawback provision which stated that if Apple sold products with chips from any other manufacturers, Apple would not receive any more incentive funds and Apple would even have to pay back the incentive money it had already received to Qualcomm. *Id.*

¹⁴³ *See Qualcomm*, 411 F. Supp. 3d at 797 (affirming that Qualcomm’s collective business practices resulted in anticompetitive behavior toward other companies). To show a violation of § 2, the FTC had to show “‘(1) the possession of monopoly power in the relevant market’; and (2) ‘the willful acquisition or maintenance of that power’ through exclusionary conduct . . . .” *Id.* at 681 (quoting United States v. Grinnell Corp., 384 U.S. 563, 570–71 (1966)). The FTC met its first burden of showing “possession of monopoly power in the relevant market” by showing that Qualcomm forecasted a 79% share of the CDMA modem chip market which was the relevant market through which the district court could analyze a potential antitrust violation. *Id.* at 683–91. The FTC met its second burden by showing that Qualcomm’s market for chips, exclusionary dealings, and high royalty rates create barriers for competitors which allow Qualcomm to maintain its dominant position. *Id.* at 698.

¹⁴⁴ *See id.* at 797 (finding that Qualcomm’s interrelated business practices are anticompetitive practices that impair rivals opportunities on the merits). Qualcomm’s practices attack all facets of its rivals’ businesses and these practices result in the harming of competition which can directly or indirectly lead to consumer harm. *Id.*
The Ninth Circuit overturned the district court’s ruling in *Qualcomm* and held Qualcomm’s business practices to be hypercompetitive as opposed to anticompetitive.145 The court then stated that Qualcomm, “exercised market dominance in the 3G and 4G cellular modem chip markets . . . and its business practices have played a powerful and disruptive role in those markets . . .,” but their practices are not violations of the Sherman Act.146 Rather than focusing on the market impact of Qualcomm’s business tactics in its entirety, the Ninth Circuit chose to focus on the fact that the FTC identified the cellular equipment market as opposed to chip manufacturer market in its Sherman Act analysis, which subsequently impacted the FTC’s ability to prove that Qualcomm had violated the Sherman Act.147 Even assuming rival chip manufacturers were the relevant antitrust market, as opposed to OEM’s, the Ninth Circuit could have found that Qualcomm violated § 1 of the Sherman Act which does not require an analysis regarding market power.148 Instead, the Ninth Circuit allowed a company with seventy-nine percent market share in CDMA modem chips, and a sixty-four percent market share in premium LTE modem chips, to avoid the Sherman Act’s hammer, based on the fact that Qualcomm’s practices showed “economic muscle” as opposed to

145 See FTC v. Qualcomm Inc., 969 F.3d 974, 1005 (9th Cir. 2020) (stating that “[a]nticompetitive behavior is illegal under federal antitrust law. Hypercompetitive behavior is not.”). The Ninth Circuit went on to reason that Qualcomm’s business practices were disruptive and showed vigor but that they did not destroy competition. *Id.* The Court was reluctant to punish Qualcomm for its success. *Id.*

146 See *id.* (stating that the Court’s job is not to punish Qualcomm for successful business practices). The job of the appellate court was to analyze whether or not the FTC had met its burden of proving a Sherman Act violation. *Id.* The Ninth Circuit concluded that the FTC did not meet its burden of showing that via “Qualcomm’s practices . . . [Qualcomm] ‘unfairly intends to destroy competition itself.’” *Id.* (quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993)).

147 See *Qualcomm Inc.*, 969 F.3d at 1005 (stating the FTC failed to identify the relevant antitrust market in its claim). The Ninth Circuit also went on to state that Qualcomm is under no antitrust duty to license its chips to rival manufacturers. *Id.* The Ninth Circuit believed that the proper course of action to be taken in relation to licensing of chips and FRAND requirements would be patent law or contract law as opposed to antitrust law. *Id.*

148 See Sherman Act, 15 U.S.C. § 1 (1890) (promulgating that contracts, trusts, or conspiracies in restraint of trade or commerce is illegal); *Qualcomm*, 411 F. Supp at 681 (holding a violation of § 1 FTC has to show (1) that a contract existed and (2) the contract restrained trade).
anticompetitive behavior. This highlights the unsettling trend of recent antitrust litigation in the U.S. where large corporations are free to engage in anticompetitive behaviors in a particular market as long as there is no direct harm to consumers.

C. European Case Law and Policy applied to Qualcomm

Conversely, in Microsoft, the European Commission reasoned that Microsoft was in violation of competition laws because the company used its dominant position in the market in an abusive manner. The commission reasoned that Microsoft’s acts violated the EU’s competition laws. A strong public interest presided in maintaining effective competition, therefore the commission felt it was permitted to interfere with Microsoft’s abusive business practices. Similarly, Qualcomm used its dominant position in the market in an abusive manner which likely would have violated EU competition

---

149 See Qualcomm, 969 F.3d at 983–84 (stating that from 2011-2017, Qualcomm’s share in the CDMA and LTE modem chip market dropped from 90% to 79% and 70% to 64%, respectively). The Court used this fact as support for the idea that Qualcomm’s market power was waning. Id. at 984. The Court reasoned that Qualcomm “has asserted its economic muscle ‘with vigor, imagination, devotion, and ingenuity.’” Id. at 1005 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)). The Court distinguished good business practices that can create fiercer competition from those that are so good they crush competition. Id.

150 See Ammori, supra note 7 (stating that the focus of antitrust legislation has changed since the implementation of the Sherman and Clayton Act). When the acts were introduced, their intent was to regulate competition so that monopolies did not come to exist in the first place. Id. As time passed, antitrust laws became less about competition and began to focus more on whether or not the consumer was being harmed. Id. Harming competitors on its own is no longer an antitrust violation if you are benefiting consumers. Id. Instead, it must be shown that by harming a competitor, you are directly harming a consumer as well. Id.

151 See Case T-201/04 Microsoft Corp. v. Comm’n of the European Communities, 2007 E.C.R. II—03601 para. 1331 (finding that Microsoft’s failure to license its intellectual property rights to rival firms was a violation of competition law).

152 See id. at para. 1331 (finding that Microsoft engaged in two new forms of abuse that were prohibited within the market). By tying its operating system to its media play software, Microsoft restrained trade and abused the market from a dominant position. Id.

153 See id. at para. 1334 (explaining that Microsoft engaged in the process of tying which is illegal under EU competition law). Microsoft made up such a large segment of the operating system market and by forcing individuals who purchased its operating system to also purchase its media play software, Microsoft was effectively making it so consumers would not purchase media play software from other corporations. Id.
Qualcomm’s practices involved agreements, such as those with Apple and OEM’s, that harmed competition and it also maintained a majority share in the CDMA and LTE chip markets which gave it a dominant position in the market. It is likely that the aforementioned EU precedent would permit the domestic regulators to interfere with Qualcomm’s practices as a matter of public policy in order to maintain more effective competition.

If the Ninth Circuit had based its decision in Qualcomm on the policy rationale underlying EU antitrust laws, it is likely that the Ninth Circuit would have upheld the decision of the district court. In Qualcomm, the Ninth Circuit’s reasoning concerning the FTC’s failure to meet its burden of establishing that Qualcomm violated the Sherman Act, is directly centered around the lack of harm that resulted for consumers, as well as the FTC’s failure to establish the proper antitrust market. It is clear from the facts of the case that cell phone manufacturers, in addition to CDMA and LTE chip manufacturers,

---

154 See Qualcomm, 969 F.3d at 985 (stating that Qualcomm’s competitors claimed Qualcomm’s business practices resulted in harm to its competitors within the relevant market).
155 See id. (describing how Qualcomm refused to sell its chips to OEMs unless they took licenses to practice Qualcomm’s SEPs). These interrelated practices led to a greater market share which began to frustrate rival chip makers. Id. Qualcomm’s competitors even claim that these practices “have hampered or slowed their ability” to grow or keep a customer base. Id.
156 See id. at 985–86 (detailing that Qualcomm’s practices have resulted in limited growth for some companies). Other companies have even been unable to enter the market or forced out of the market entirely due to Qualcomm’s practices. Id.
157 See Bumgardner, supra note 114 (stating that EU antitrust laws aim to protect competitors while American antitrust law is aimed at promoting competition). EU antitrust legislators are more “receptive to concerns about large mergers or anti-competitive conduct.” Id. See also Jennings, supra note 109, at 81 (stating that there are prevalent similarities in the language of EU competition laws and U.S. antitrust laws). While the similarities exist, different political considerations and underlying rationale results in the different applications of the law. Id. U.S. antitrust law is focused on protecting consumers, in contrast to EU competition law which is aimed at promoting the competitive process. Id.
158 See Qualcomm, 969 F.3d at 990 (stating that for conduct to be anticompetitive, it must harm the competitive process which therefore harms the consumer). Harming one competitor with a showing of nothing else does not meet the burden. Id. Antitrust laws are not directed at competitive behaviors (even if they are severely competitive) but rather at conduct which destroys competition and affects consumers. Id.
were harmed by Qualcomm’s practices.159 If the Ninth Circuit applied the policy rationale underlying earlier domestic case law and EU competition law, which consider the overall harm to competition, it is likely that the court would have sided with the FTC because of the effect that Qualcomm’s business practices had on both OEM’s and chip suppliers.160

**D. Tying it all together**

The utilization of trends and rationales from early American case law, in addition to European case law would be beneficial to modern antitrust litigation.161 The U.S. should restructure its approach to antitrust enforcement, especially as technology companies begin to create larger shares in the relevant markets.162 Federal agencies should

159 See id. at 985 (stating that Qualcomm does not sell its chips to OEMs unless the OEM also purchases a license to practice its SEP). The Court then goes on to state that these practices have made Qualcomm a “major player” in the realm of cellular technology; however, because it is not an OEM, the circuit court improperly chose the relevant antitrust market. Id. 

160 See Bumgardner, supra note 114 (noting that the protection of competitors is at the heart of EU competition law). This differs immensely from American antitrust law (as seen by the Ninth Circuit’s decision in Qualcomm) which at its core is about promoting competition. Id. 

161 See Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 32 (1911) (arguing that based on the sheer size of Standard Oil and its market power, it could be deemed a monopoly); Bumgardner, supra note 114 (distinguishing American antitrust law which focuses on promoting competition from EU competition law which focuses on protecting competitors within similar markets). See also Witt, supra note 114, at 377 (contrasting the specificity of U.S. antitrust law with the vague language of EU competition law). The European Union has a much easier time enforcing competition law because the language of TFEU article 101 and article 102 are vague which makes it easier for courts to find violations based on various business behaviors. Id. 

162 See Tyler, supra note 72 (stating that larger tech companies such as Google, Apple, and Amazon are all being investigated for potentially distorting markets and monopolizing). There are conflicting views about antitrust enforcement in the United States which has the potential to hurt both corporations and consumers. Id. 

See also Waller, supra note 70, at 130 (stating that companies such as Google, Facebook, Amazon, and other technology companies operate with essentially no
work together, rather than in opposition, to break down monopolies such as Qualcomm, Facebook, Google, and Amazon.\textsuperscript{163} To achieve this, U.S. courts will need to focus less on direct consumer harm and look at the overall effects of anticompetitive behavior on competitors themselves, much like earlier U.S. case law and EU antitrust statutes.\textsuperscript{164} Lastly, Congress could revise the Sherman Act to its original language which focuses on trade and, more specifically, the impact anti-competitive behavior has on competitors.\textsuperscript{165}

V. Conclusion

Precedent establishes that Qualcomm’s practices are anticompetitive, not hypercompetitive. Based on Qualcomm’s exclusionary contracts with Apple, forced contracts with OEMs, and its majority share within the CDMA and LTE chip market, the Ninth Circuit should have found that Qualcomm was in violation of §§ 1–2 of the Sherman Act. Even if these practices do not have a direct effect on consumers, EU policy rationale should be adopted by U.S. courts because the EU rightfully protects competitors from harm which creates a more competitive market for consumers. The point of antitrust law should be to promote and protect competition throughout the entire market. The U.S. practice of engaging in antitrust litigation when consumers are harmed is flawed and allows for violations that fall out of the jurisdiction of by not directly harming consumers. As long as the U.S. continues to follow these flawed antitrust standards,
companies like Qualcomm, Facebook, Google, and Amazon will continue to grow bigger while crushing their competition with no repercussions.