# Anti-Competition, Anti-Consumer:

# A Critical Examination of American Antitrust Enforcement

“You're gouging on your prices if

You charge more than the rest.

But it's unfair competition

If you think you can charge less.

A second point that we would make

To help avoid confusion:

Don't try to charge the same amount:

That would be collusion!” (Grant 2009)

Cory Boyer

Austrian Student Scholar’s Conference

**Abstract:** This paper sets out to provide a critique of American antitrust enforcement, both in historic and modern settings. Three cases are singled out for study: *Standard Oil Co. of New Jersey v. United States* (1911), *United States v. Microsoft Corp.* (2001), and *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc*. (2023). By providing a survey and analysis of the literature on these cases, this paper's purpose is threefold: to provide an overview and analysis of the historical cases, to demonstrate how the errors in the government and courts' logic have pervaded into the modern Microsoft case, and to better illuminate the special interests and rent-seeking prevalent in each of these cases. Through a thorough evaluation, guided by a praxeological understanding of economics, this paper concludes that Microsoft has demonstrated a greater degree of preparedness in their 2023 case than they did in 2001, due in large part to similarities between the 2023 case and the two historical examples. The history of the American antitrust system is assessed in the conclusion.

**Keywords:** Antitrust law, Standard Oil, Microsoft, Activision Blizzard, special interests

**JEL Classification:** K21

**Acknowledgements:** I am grateful for the guidance and mentorship provided by the faculty of the Grove City College economics department: Dr. Herbener, Dr. Fuller, and Dr. Ritenour. I am also appreciative of Thomas J. DiLorenzo and Dominick Armentano, two authors whose works guided my research and grounded it in the Austrian tradition. I would further like to thank my peers in ECON 420 for their suggestions while writing this paper. Finally, for their aid throughout the proofreading process, I extend my most sincere gratitude to my fellow scholars Joshua Hamon, Corey Kendig, Alex Sodini, Michael Halley III, and Jacob Feiser.

## I. Introduction

Since the passage of the Sherman Antitrust Act in 1890, the regulatory apparatus of the American government has purported to protect competition in the marketplace by quashing monopolistic practices. As safeguards of competition, however, the Sherman Act and similar pieces of legislation often fall short of their desired ends. The inadequate economic foundations and flawed utilization of antitrust regulation have been widely discussed in the literature, which begs the question: how are pervasive problems in the historical application of antitrust laws in the United States reflected in modern cases, and how have they altered the actions of firms going through these proceedings? The faulty reasoning and special interests at work in historic applications of antitrust law are reflected in modern cases and have altered the strategies of the defendants in these proceedings. The historical examples this paper will examine are *Standard Oil Co. of New Jersey v. United States* (1911) and *United States v. Microsoft Corp.* (2001), and this analysis will be extended to the ongoing case *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc*. (2023).

The purpose of this paper is threefold: first, to provide an overview and analysis of the two historical cases which is more objective than that generally presented in much of the anti-monopoly orthodox literature; second, to demonstrate that there is truly nothing new under the sun with respect to the systemic errors in U.S. antitrust enforcement; and third, to shed light on the influence of special interests and rent seekers.[1] The cases selected for examination are historically significant, relevant to modern antitrust enforcement, and applicable to the case surrounding the current Microsoft-Activision merger. *Standard Oil Co. of New Jersey v. United States* (1911) was the first landmark case in U.S. antitrust law and underscored the consumer

[1] A deep examination of monopoly theory is outside the scope of the paper. However, its development has been guided by praxeological principles and the work of several Austrian economists; notably, Rothbard (2009, 629-754) and Mises (1998, 354-375).

welfare intention[2] of antitrust regulation. *United States v. Microsoft Corp.* (2001) was decided in the context of a growing computer software market the courts failed to adequately comprehend. Additionally, both cases were rife with influence from special interests and rent-seekers. The flaws demonstrated throughout the *Standard Oil* and *Microsoft* cases are reflected in Microsoft's current court battle surrounding their attempt to acquire Activision-Blizzard, and their influence on the parties at work in the case is apparent.

## II. *Standard Oil Co. of New Jersey v. United States* (1911)

In order to truly understand the antitrust suit against Standard Oil, it is crucial to examine the socio-political landscape in the United States at the time the company gained its power. The so-called "Progressive Era" at the turn of the 20th century was a time of rapidly-shifting economic, social, and political conditions that gave rise to increased government involvement in American life. Interests ranging from "big business groups, anxious to replace a roughly laissez-faire economy [with] a new form of mercantilism… [and] newly burgeoning groups of intellectuals, technocrats, and professionals… anxious for power and lucrative employment at the hands of the State" to "arms manufacturers… [and] labor unions" managed "to transform America into a welfare-warfare imperial State, where people's daily lives were controlled and regulated to a massive degree" (Rothbard 2017, 37-38). Perhaps no one felt the impact of this paradigm shift more so than "robber-barons" such as John D. Rockefeller.

Like many of the other heads of trusts in his day, Rockefeller was able to take advantage of the rapidly evolving market to grow Standard Oil's market share. In fact, during the ten years following the company's founding in 1870, its market share rocketed from 4% to a staggering 85% (DiLorenzo 2017). This dominance led to increased scrutiny from government actors and

[2] For a more detailed look at the consumer welfare conception of U.S. antitrust enforcement, see Wilson (2019).

the progressive journalists known as "muckrakers," who felt threatened by the emergence of large trusts. In Standard Oil's case, the aggregation of several factors allowed these interested parties to negatively influence the public's perception of the trust. At its inception, Standard did not seem to hold any advantage in efficiency over the rivals they quickly grew to dominate; rather, their rapid rise seemed to coincide with the rebates they received through agreements with railroads (Lamoreaux 2019, 96). Rockefeller also earned himself, and consequently his company, a reputation for using underhanded tactics to ward off regulators. Under his direction, Standard Oil was politically active, seeking to prop up friendly party bosses and pressure prosecutors to stay away (Lamoreaux 2019, 97). However, the forces that sought to weaken Standard Oil's position could not be quelled forever, and, from 1910 to 1911, Standard Oil found itself before the Supreme Court.

Chief Justice Edward White authored the Court's decision, in which he provides a statement of the purpose of antitrust regulation:

> the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce (Standard Oil Co. v. United States, 221 U.S. 1, 58, 1911).

White also states that without restrictions on monopoly, companies that dominate their market will wield the power to fix prices, restrict output, and reduce the quality of their product without competitors being able to punish them for doing so (Standard Oil Co. v. United States, 221 U.S. 1, 52, 1911). In order to determine whether Standard Oil was guilty of monopolizing the market for refined petroleum, the Supreme Court turned to the "rule of reason."

There are two types of rules used by the Court to determine whether an action taken by a firm is a violation of the Sherman Antitrust Act: the *per se* rule and the rule of reason. In *Standard Oil*, the rule of reason was used to govern the court's analysis of the facts at hand. This method of evaluation calls for an "extensive evidentiary study of (1) whether the practice in question in fact is likely to have a significant anticompetitive effect in a relevant market and (2) whether there are any procompetitive justifications relating to the restraint" (U.S. Department of Justice, 2017). In other words, the court in *Standard Oil* was tasked with weighing the magnitude of the benefits of the trust's actions against the limitations these actions placed upon other firms' ability to compete. White, in applying the rule of reason, began from three undisputed facts: "[t]he creation of the Standard Oil Company of Ohio… [t]he organization of the Standard Oil Trust of 1882… [and] the increase of the capital of the Standard Oil Company of New Jersey and the acquisition by that company of the shares of the stock of the other corporations" (Standard Oil Co. v. United States, 221 U.S. 1, 70, 1911). Upon analyzing the progression of the Standard Oil Trust past this starting point, White concluded that,

> no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view (Standard Oil Co. v. United States, 221 U.S. 1, 76, 1911).

In summary, the Court ruled that if Standard Oil was allowed to exist in that present state, the market would suffer harm far exceeding the benefits it reaped from Standard's superior efficiency; as a result, the trust should be dissolved.

Analysis of the Decision

A closer examination of the Supreme Court's reasoning reveals several key flaws. First, it is unclear that Standard Oil rose to prominence through any means other than its superior efficiency and the entrepreneurial foresight of John D. Rockefeller; therefore, it should not have faced accusations of monopolization. In regard to Rockefeller, the "robber-baron" at the head of the trust, DiLorenzo (2017) argues that there is a distinction between "market entrepreneurs" and "political entrepreneurs"; Rockefeller is, contrary to popular belief, one of the former. Unlike the "political connivers and manipulators" of his time, Rockefeller managed to grow his company by "selling a newer, better… [and] less expensive product on the free market" (DiLorenzo 2017). In addition, it is unclear whether Standard Oil was truly a monopoly in the sense that it would have been able to defend its high market power from potential entrants as its share of the refined petroleum industry had plummeted by 24% in the 11 years preceding the Supreme Court's decision (DiLorenzo 2017).

The second flaw in the Court's ruling derives from its use–or, rather, its misuse–of the rule of reason.[3] Armentano (1982) argues that an unbiased examination of the Court's decision reveals that, in fact, the rule of reason was not properly applied through a sophisticated analysis of the facts surrounding Standard Oil's business practices during the time period in question; rather, the Court resorted to the assignment of ill intent to the trust based on its dominance (72-73).[4] Had the rule of reason been applied as required, it is possible that the ruling in the case

---

[3] Justice Harlan, in his concurrence/dissent, went a step further than White. He argued that the purpose of the Sherman Act was to prohibit *all* purported restrictions of competition, not just "undue" restrictions, and that the Court should not have adopted a rule of reason at all (Standard Oil Co. v. United States, 221 U.S. 1, 83, 97, 1911).
[4] The Supreme Court's willingness to accept an *ex facto jus oritur* approach to legal interpretation in the years preceding the *Standard Oil* decision is certainly noteworthy. *Muller v. Oregon* (208 U.S. 412, 1908) marked a shift in the temperament of the Court, as it was finally willing to rely (in large part) on statistical evidence to make its decision. Louis Brandeis presented a unique type of brief which contained "only two scant pages of 'law' and over a hundred of extralegal sources" (Mason 1987, 199). This case, decided a mere three years before *Standard Oil*, could certainly play a part in explaining how the court's application of the rule of reason was governed more by statistical considerations than a full-bodied analysis of the actions undertaken by the firm in question.

would have been reversed. Chief Justice White contended that Standard Oil's practices would have been detrimental to the petroleum market, namely through price increases, restrictions in output, or decreases in quality (Standard Oil Co. v. United States, 221 U.S. 1, 52, 1911). However, Standard Oil was never able to use its iron grip on the market to restrict its production and raise prices, nor did it ever demonstrate this intention (Rothbard 2017, 96). Instead, prices fell and output skyrocketed under Standard Oil's watch, leading to demonstrable benefits reaped by consumers.

Finally, the main charges brought by the government can be disproven. Although a veritable plethora of allegations were brought against Standard Oil, three stand out as particularly notable: the issue of the supposedly collusive rebates the company received from railroad companies, the practice of buying out competitors, and accusations of predatory pricing. On the issue of railroad rebates, which many during this time period saw as proof of foul play by Standard Oil, Rothbard (2017) writes that all refineries received rebates from the railroad industry; in fact, some smaller competitors received larger rebates than Standard Oil (95). These "volume discounts" offered by railroads are fairly standard; Cornelius Vanderbilt publicly offered equal rebates to any competitors who could match Standard Oil's output (DiLorenzo 2017). The accusation that these railroad rebates gave Standard Oil an anticompetitive advantage and allowed them to increase their efficiency is a reversal of the truth; Standard Oil became the most efficient firm in the market and was then able to reap the rewards of their superior production through volume discounts on shipping.

The proposition that Standard Oil pursued total control of the market through mergers is equally unsubstantiated. Even though Standard Oil was easily the largest firm in the market for refined petroleum, they never would have been able to take total control of said market due to the

sheer quantity and size of some of their notable competitors (DiLorenzo 2017). Rockefeller's practice of buying competitors to bolster Standard Oil's position in the market quickly ran into roadblocks as he inadvertently created a market for "the building of oil refineries solely for the purpose of 'forcing' Rockefeller to buy them" (Rothbard 2017, 95). These refineries were often built so hastily that they were incapable of actually refining oil, leading Rockefeller to give up on the idea of achieving a monopoly through mergers (Rothbard 2017, 95-96). Even when examining the heyday of Standard's acquisitions of competitors, the question of what harm was suffered by the market as a result remains unanswered. This "horizontal integration" simply reallocated assets from small, poorly-managed oil refineries to more efficient uses (DiLorenzo 2017). If anything, these mergers benefited consumers by allowing Standard Oil to produce a higher quantity of oil and sell it at lower prices, as the company was known to do.

The accusation of predatory pricing is rebutted by both economic theory and an empirical analysis of Standard Oil's actions. In his analysis of "cutthroat competition," Rothbard (2009) writes that predatory pricing occurs when "a 'big' firm, for example, deliberately sells below the most profitable price… The 'stronger' firm, with the capital resources to endure the losses, then drives the 'weaker' firm out of business" (681). However, he points to several arguments against the efficacy of this practice and the supposed harm it causes consumers. First, he argues that it is natural in markets for efficient firms to survive while less efficient firms fail due to consumer preferences, a process that, he writes, "harms no owner of any factor it employs and injures only the entrepreneur who miscalculated in his advance-production decisions" (Rothbard 2009, 681). Even after this hypothetical dominant firm is able to force other producers out of business, freeing itself to raise prices for consumers, "[w]hat is there to prevent this monopoly gain from attracting other entrepreneurs who will try to undercut the existing firm and achieve some of the

gain for themselves? What is to prevent new firms from coming in and driving the price down to competitive levels again" (Rothbard 2009, 684). No firm, regardless of its size, can sustain losses indefinitely. Firms that desire to practice predatory pricing as a strategy to weed out competitors require a high level of profit to subsidize these practices, a level of profit that predatory pricing theory merely assumes into existence (DiLorenzo 2017).

Firms engaging in predatory pricing are also not immune to consumer preferences and will only succeed if customers accept their product at lower prices over the alternatives provided by competitors: "For selling a product at very low prices, even at short-term losses, is a bonanza to the consumers, and there is no reason why this gift to the consumers should be deplored… if the consumers were really indignant about this form of competition, they would scornfully refuse to accept this gift and instead continue to patronize the allegedly 'victimized' competitor" (682). In other words, even if one firm is successful in driving others out of the market through predatory pricing, this is not a reflection of that firm acting anticompetitively; it shows that this firm was better able to meet consumer preferences than were its competitors.

Most importantly, though, the charges of predatory pricing brought in this case are not based in reality. John S. McGee (1958), upon examining the facts presented during trial, wrote that he "[could] not find a single instance in which Standard used predatory price cutting to force a rival refiner to sell out, to reduce asset values for purchase, or to drive a competitor out of business," ultimately concluding, "I do not believe that Standard even tried to do it; if it tried, it did not work" (157). While it is certainly true that Standard's reign atop the petroleum market led to dramatic price decreases, this was not a result of some anticompetitive agenda forwarded by Rockefeller and Standard Oil; rather, it was born out of the company's "quest for efficiency and customer service" (DiLorenzo 2017).

Special Interest Influence

If the case against Standard Oil was not conceived out of sound economic analysis nor on the basis of anticompetitive behavior undertaken by the company, what caused it to ultimately be brought to trial? An investigation into the factors at play during the Progressive Era reveals one possible answer: special interests.[5] The first party whose motivations merit further exploration is Ida Tarbell, one of the aforementioned muckrakers and author of *The History of the Standard Oil Company*, a "classic of antibusiness propaganda" that helped to shift the public perception of the company (DiLorenzo 2017). Of course, it is not uncommon for investigative journalists to publish criticisms (often exaggerated) of large and powerful corporations, and in most cases it would not be worth noting as an example of special interests at work. However, this instance is substantial due to the fact that Tarbell's brother served as the treasurer for one of Standard Oil's competitors, the Pure Oil Company (DiLorenzo 2017). Some would argue that this fact is still not significant, as fears of exploitation by unchecked monopolies could have been the primary motivation for this work. It is curious then, as Rothbard (2017) points out, that Tarbell's only noteworthy anti-monopoly publication targeted Standard Oil and that she was complimentary of various trusts throughout her other works (410, note 25). Private actors, however, were the least of Rockefeller and Standard Oil's problems throughout this era.

Through Rockefeller's conflicts with Teddy Roosevelt and his political benefactors (namely, the Morgan family), Standard Oil was placed squarely in the crosshairs of powerful businessmen and politicians. Increased oil refining capabilities in Russia challenged Standard Oil's dominance in the European oil market, and the breakdown of potential collusive

[5] While it is important to note the existence of ulterior interests, it is equally crucial to acknowledge that the people responsible for these criticisms of and actions against Standard Oil were not solely motivated by these considerations. In the spirit of fairness, the purpose of this paper is not to disparage the character of these individuals; rather, this analysis seeks to provide a more balanced view of the issues inherent in the Standard Oil case than is commonly presented in the literature.

agreements led to a struggle for dominance between Rockefeller and the Rothschild and Morgan families known as the International Oil War (Rothbard 2017, 230-233). This event marked a point of no return for the relationship between the Rockefellers and the Morgans, whose influence can be found throughout the Roosevelt administration generally and the *Standard Oil* lawsuit specifically. Notably, Roosevelt's attorney general, Philander Knox, was a former lawyer for the Morgan family (Rothbard 2017, 233).

The Rockefellers certainly did not improve their situation through their aforementioned political activities, as they repeatedly aggravated Roosevelt during his years as president. As Roosevelt sought to codify unprecedented business regulations in the form of the Bureau of Corporations Bill, John Rockefeller Jr. lobbied senators in an attempt to stop the bill from passing into law (Rothbard 2017, 218-219). In contrast, the Morgan interests sought to ingratiate themselves with Roosevelt and his administration. George Perkins, a Morgan partner, was critical to the bill's passage (Rothbard 2017, 218). Is it any wonder, then, that once Roosevelt began to build his reputation as a trust-buster, his demarcation between "good" and "bad" trusts often seemed to include Morgan trusts among the examples of the former and their opponents (Rockefeller's Standard Oil chief among them) as cases of the latter (Rothbard 2017, 12)? Roosevelt himself admitted that political considerations were at the forefront of his mind in *Standard Oil*, whether or not he was willing to admit that these factors were the driving force behind the antitrust suit. In his testimony before Congress, Roosevelt (1912) stated, "[Standard Oil] antagonized me before my election, when I was getting through the Bureau of Corporations bill, and then I promptly threw down the gauntlet to it" (193). Sadly, *Standard Oil* does not stand alone as an egregious misuse of antitrust law in the United States; instead, it is merely one of

many examples which can help to illuminate the issues endemic to the antitrust system as a whole.

## III. *United States v. Microsoft Corp.* (2001)

Much like Standard Oil, Microsoft's dominance can only be understood through the lens of the emerging market for its product. Melese (1998) elucidates Microsoft's "natural monopoly"[6] in the realm of operating systems and describes how they leveraged this advantage into an "'unnatural monopoly' in software applications." In short, Microsoft was able to promulgate its products by "convincing PC makers to accept its software as a condition for licensing its operating system" (Melese 1998). Microsoft's 2001 appeal was also notable as it was the culmination of a years-long legal battle between Microsoft and federal regulators. The source of the government's ire in this case was Microsoft's practice of bundling their web browser, Internet Explorer, with Windows. Microsoft had agreed to a settlement with the Department of Justice in 1995 which barred them from requiring companies to tie their software into their operating system in order to license it (Melese 1998). The government argued that Microsoft violated the terms of the settlement through its treatment of Internet Explorer, but Microsoft countered by citing the fact that the nature of operating systems had changed since 1995. According to Melese (1998), "Microsoft claim[ed] that the definition of an operating system has grown to include an integrated web browser." The government found this argument uncompelling, and *United States v. Microsoft Corp.* began in 1998.

The case was first heard in district court and was appealed in 2001. The district court found Microsoft guilty of three violations: "Microsoft had maintained a monopoly in the market

[6] It is certainly worth noting that, despite the vast amount of ink that has been spilled on the supposed natural monopolies held by many large firms, there is great debate as to whether or not a natural monopoly is actually possible in the absence of government intervention. Armentano (2022) writes about this debate within the Austrian tradition.

for Intelcompatible PC operating systems… attempted to gain a monopoly in the market for internet browsers… [and] illegally tied two purportedly separate products, Windows and Internet Explorer" (U.S. v. Microsoft Corp., 253 F.3d 34, 2001). Microsoft took issue with the lower court's findings and its proposed penalties, which would have forced Microsoft to break up. On appeal, the court affirmed the first finding in part, reversed finding two, and remanded the third back to a lower court due to the fact that an application of the rule of reason, rather than the *per se* rule, was necessary to determine whether the alleged tying violation had actually occurred. The appeals court argued that the procedure undertaken by the district court had been inappropriate. While "the District Court itself appears to have conceded the existence of acute factual disagreements between Microsoft and plaintiffs," it did not permit an evidentiary hearing; therefore, "the District Court erred… by consulting only the evidence introduced during trial and plaintiffs' remedies phase submissions, without considering the evidence Microsoft sought to introduce" (U.S. v. Microsoft Corp., 253 F.3d 34, 2001). The appeals court also agreed with Microsoft that the proposed remedy should be overturned "for the additional reason that the court has failed to provide an adequate explanation for the relief it ordered" (U.S. v. Microsoft Corp., 253 F.3d 34, 2001). The appeals court's decision was certainly an improvement over that of the district court, but it did not outright strike down two of the district court's findings of wrongdoing.

Analysis of the Decision

The first charge brought by the district court was that Microsoft had maintained a monopoly in the market for operating systems. However, as Armentano (2019) notes, "[t]o arrive at a so-called monopoly market share, the trial court accepted a definition of the relevant market ('single user desktop PCs that use an Intel-compatible chip') that conveniently excluded all of

the computers and networking software made by Microsoft's major rivals." This finding emphasizes a key flaw in antitrust law: when the market is defined narrowly enough, any firm is a monopolist. If the market was defined in a less restrictive manner, then it is unlikely that Microsoft could still have been classified as a monopolistic firm. This definition excluded "all of the operating systems sold at retail, those downloaded from the Web, and all 'naked' computers shipped without any operating system installed at all" (Armentano 2019). Due to this flawed, overly restrictive conception of the relevant market, the courts erroneously found that Microsoft had monopolized the market for operating systems.

The additional count remanded by the appeals court was the illegal tying of Internet Explorer and Windows. This bundling agreement was seen as an anticompetitive measure undertaken with the goal of driving competitors (namely, Netscape's Navigator browser) from the market. However, this narrow view is economically flawed. This bundling was first and foremost beneficial for consumers. Armentano (1998) points out that consumers seek to maximize the total amount of products they can obtain for the least cost; from this viewpoint, receiving Internet Explorer with Windows is preferable to the two being separate. In addition, the bundling arrangement did not "coerce" manufacturers into accepting Internet Explorer. Market forces dictated that it was more profitable to provide additional free features to consumers, and competition would have driven out those producers who withheld the browser (Armentano 1998). Finally, the assertion that Microsoft attempted to leverage a "natural monopoly" in operating systems into an "unnatural monopoly" in software, as claimed by Melese (1998), is fallacious. Microsoft's elevated market share in operating systems only existed via the government's restriction of the definition of the market, which casts doubt on the idea that Microsoft ever possessed a "natural monopoly" which they could leverage. In fact, Netscape was

the dominant firm in the market for internet browsers; Microsoft was merely a company that sought to compete by slashing the cost of their browser for consumers (Armentano 2019). The idea that these actions precluded Netscape from competing in the market is equally dubious, as "PC users downloaded millions of copies of Netscape's browser during the period of alleged exclusion" (Armentano 2019). In fact, Microsoft did not even prevent competing software from being downloaded on its own operating system (Armentano 1998). It is clear, then, that the charges that survived the appeals process in some capacity are not backed by sound economic analysis.

The proposition that Microsoft's dominance was dangerous to consumers is equally inimical to the truth. Since Microsoft had no government protection against competition, there was no reason to fear Microsoft "exploiting" consumers because artificially high prices[7] and "monopoly profits" would induce entry into the market. Melese (1998) provides the example of AT&T, once seen as a monopolist in the telecommunications industry, as an example of a firm whose dominant market position quickly crumbled in the face of strong competition. Microsoft rose to dominance in an emerging market, and, by satisfying consumer preferences better than competitors, they have been able to maintain this control until the present day. The argument that they provided consumers with free goods in a competitive environment in an attempt to drive other firms out of business and then ratchet up prices is a misrepresentation of the facts of the case.

[7] In addition, it is unclear whether such concepts as a "competitive" and "monopoly" price actually exist. Rothbard (2009) writes, "In the market, there is no discernible, identifiable competitive price, and therefore there is no way of distinguishing, even conceptually, any given price as a 'monopoly price'" (688).

Special Interest Influence

This prosecution was, like that of Standard Oil, fueled in part by a variety of individuals and corporations with sometimes clouded motivations.[8] The first individual whose actions must be examined is Judge Thomas Penfield Jackson, who presided over the district court which passed down the decision Microsoft appealed. In the appellate court, it was found that Judge Jackson had acted inappropriately in handling the case:

> we vacate the Final Judgment on remedies, because the trial judge engaged in impermissible ex parte contacts by holding secret interviews with members of the media and made numerous offensive comments about Microsoft officials in public statements outside of the courtroom, giving rise to an appearance of partiality. Although we find no evidence of actual bias, we hold that the actions of the trial judge seriously tainted the proceedings before the District Court and called into question the integrity of the judicial process (U.S. v. Microsoft Corp., 253 F.3d 34, 2001).

While the court did not go as far as to attribute bias to Judge Jackson's work on the case, his harsh treatment of Microsoft is curious to observe.[9] Whether driven by some personal vendetta against the company or his general views, it is troubling to see that the judge who ruled that Microsoft should be broken up seemed to harbor some disdain towards the firm or its lawyers. As a result, the appellate court ruled that the divestiture proposed by the trial court would not be upheld and that Judge Jackson would not be allowed to preside over the remanded bundling charge.

The case against Microsoft was also bankrolled by a variety of Microsoft's competitors, who brought government officials amicable to their cause forward to legitimize their proposed suit. Netscape, Microsoft's rival in the market for internet browsers, sponsored a meeting with Senator Orrin Hatch which proved to be the beginning of the prosecution effort (DiLorenzo

---

[8] See note 5. This section is not an attempt to disparage any of these individuals or corporations, but to shed light on the interests at work in the Microsoft prosecution that have been woefully underrepresented in orthodox analyses of this case.

[9] See Heilemann (2001, 157-158) for specific examples of Judge Jackson's conduct during trial.

2001). This meeting was, in reality, an "anti-Microsoft three-ring circus," during which lawyers and representatives for "a number of Microsoft's competitors, including Netscape, Sun, and Sabre," sought to demonstrate that Microsoft intended "to gain a chokehold over all of online commerce" (Heilemann 2001, 23). The case sprung forth quickly, with "resumé-building bureaucrat[]… Joel Klein" and Senator Hatch, the "political benefactor[]" of Microsoft's competitors, providing support to the prosecution on the governmental level (DiLorenzo 2001). Hatch even managed to bring Bill Gates forward to testify at a hearing on Capitol Hill, during which "not a single member of the Senate Judiciary Committee… offered a serious defense of Microsoft" (Heilemann 2001, 83). This testimony served as means for the anti-Microsoft interests to gauge the government's support for a potential prosecution, and these forces in turn saw that few, if any, members of Congress would seriously object.

The primary force in support of the case both financially and logistically was the group ProComp, which consisted of a variety of ex-government officials and Microsoft competitors. Notably, the group employed Bob Dole, a former senator from Kansas. Despite the fact that Dole "ha[d] come down strongly against government regulation, even where Microsoft is concerned," he quickly changed his tune after his hiring at ProComp for an undisclosed amount of money (McCabe 1998). ProComp was not, however, the only supporter of the prosecution. Sun Microsystems, a Microsoft competitor which had been represented at the Netscape-sponsored meeting with Senator Hatch, "invested $3 million in… an actual mock case against Microsoft to be presented to the Clinton-Gore 'Justice' Department" (DiLorenzo 2001). Additionally, John Doerr, a venture capitalist and supporter of the prosecution, was able to leverage his close friendship with the Vice President into a meeting between the anti-Microsoft forces and John Podesta, President Clinton's Chief of Staff (DiLorenzo 2001). More so than in *Standard Oil*,

there was explicit cooperation between those in business and government who had some vested interest in the failure of Microsoft. Is it any wonder, then, that DiLorenzo (2001) called the case "the most odious example in all of antitrust history of the law being used by a cabal of sour-grapes competitors to thwart competition in their industry"?

## IV. *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc.* (2023)

The video game industry has undergone a tremendous upheaval since the days of *Pac-Man* and *Donkey Kong* in arcades. The first gaming console, the Magnavox Odyssey, was released in 1972, bringing interactive digital entertainment into the home for the first time (BBC, n.d.). Since then, seven additional generations of home consoles have come and gone. Previous giants within the industry have gone out of business, replaced by new competitors. Within the relatively young ninth generation of consoles, only two firms have thrown their hats into the ring thus far: Sony and Microsoft, two firms which have been diametrically opposed since the sixth generation of gaming in what has come to be known as the "Console Wars." In their efforts to make their own console more attractive, Microsoft has embarked on an effort to purchase Activision-Blizzard, one of the premier firms in the market for video games. This move caught the attention of federal regulators, who summarily moved to block the acquisition through the application of antitrust law.

The FTC's initial complaint seeking an injunction against the proposed merger contains four arguments in favor of the government's claim that the market would be negatively affected. The FTC first asserts that "Microsoft and Sony control the market for high-performance video game consoles" (Federal Trade Commission 2023, 4). If the merger was allowed, the FTC alleges that "Microsoft would have the ability and increased incentive to withhold or degrade Activision's content in ways that substantially lessen competition" (Federal Trade Commission

2023, 4). Indeed, history seems to demonstrate that the FTC may be correct that Microsoft intended to make Activision's games exclusive after the merger, as "Microsoft has acquired over ten third-party studios and their titles in recent years to expand its offerings… [and] has frequently made those acquired titles exclusive to its own consoles" (Federal Trade Commission 2023, 6). The FTC also accuses Microsoft of pursuing vertical integration – "through its in-house game studios, it develops and publishes popular video game titles such as Halo" – and argues that a merger with Activision would empower Microsoft in this quest (Federal Trade Commission 2023, 4-6). Finally, the FTC lays out the dangers posed by Microsoft's dominance in the realms of "cloud gaming" and subscription services. These arguments fail to demonstrate a trustworthy economic foundation, and many of them run parallel to past claims brought against Standard Oil and Microsoft.

Analysis of the Complaint and Microsoft's Amended Strategy

Much like in the two historical cases, the government's case contains several key errors; however, unlike in their 2001 case, Microsoft has managed to alter their business strategy to greatly increase their chances of victory. The first issue comes in the form of the FTC's definition of the relevant market as "high-performance video game consoles" (Federal Trade Commission 2023, 4). By this definition, the FTC clearly states that they mean only Microsoft's "Xbox Series X|S" and Sony's "PS5" (Federal Trade Commission 2023, 11). This conception of the market for video game consoles, however, clearly employs the same ruse the government used in its 2001 definition of operating systems: it seriously limits the market to eliminate relevant competition. No reasonable person would argue that there are more than two companies in the market as defined by the FTC, but this is not because Sony and Microsoft form a duopoly

in the gaming industry. Instead, this definition is restricted in such a way that it excludes several crucial competitors.

Nintendo has been arguably the most iconic brand in gaming post-1980. Since the release of the Nintendo Entertainment System during the third generation of gaming, Nintendo has maintained a dedicated fan base through its ability to produce in-demand home and portable consoles as well as video games. The only reason that Nintendo is not a competitor in the market for "high-performance video game consoles" is because they have not produced one, opting instead to continue onward with the highly successful Nintendo Switch. As of this year, the Nintendo Switch surpassed the PlayStation 4, Sony's entry into that generation of gaming consoles, in total sales (Bošnjak 2023). Considering the fact that the total sales of Microsoft's Xbox One were dwarfed by the PlayStation 4, it is hard to conceive of a reason why the government would craft a definition of the market that excludes Nintendo unless, as in 2001, they are simply seeking an unfair definition with which they can easily defeat Microsoft (Warren 2022).

Nintendo is not the only relevant competitor who is excluded. The FTC shrewdly only includes console gaming in its relevant market in order to ignore gaming on personal computers. Steam, a massive online gaming service, saw 132 million users per month in 2021 (Steam 2021). Given that the Xbox One sold 58 million units worldwide and the Xbox Series X has sold a mere 21 million units, it is clear that Steam has been a serious competitor to Microsoft (and all in-home video game consoles) throughout the two most recent generations of gaming (Statista 2023a; Statista 2023b). Personal computer services such as Steam have been a staple of the gaming community for decades, so it is hard to conceive of a reason for its exclusion from the government's proposed market. In addition, recent attempts at entry into the market for video

game consoles have been made by major firms pioneering virtual reality headsets. Meta's Quest has sold nearly 20 million units to date, belying the government's claim that "the same trio of companies… have been manufacturing consoles for decades with no meaningful new competition." (Heath 2023; Federal Trade Commission 2023, 11). This categorization of the market likewise ignores the revenue titan of the gaming world: "casual" games. This category, which includes mobile games and digitized versions of several popular board and word games, "account[s] for over 50% of all video game revenue" (Caporal 2023). In summary, the government has once again proposed a definition of the relevant market which is at best misleading and at worst a purposeful misrepresentation.

The government's second charge, that Microsoft's purchase of Activision would restrict competition, is likewise flawed. First and foremost, it is impossible for the government to ascertain Microsoft's intentions *ex ante*, and the firm's recent actions have driven this point home. While the government can certainly argue that Microsoft's history of restricting games produced by the companies they have purchased in the past could prove troublesome to competitors, thus far Microsoft's actions have completely laid that accusation to rest. Sony and Microsoft agreed to a 10-year deal which would keep the Call of Duty franchise – Activision's key product – on Sony's consoles as part of Microsoft's battle to push the merger through (Warren 2023). Microsoft proceeded to render this charge obsolete by going even further, "formally submitt[ing] a new plan… to transfer the streaming rights to license all current and future Activision games to Ubisoft Entertainment, a rival game publisher" (Weise, Browning, and McCabe 2023). This key concession means that even if Microsoft wished to restrict Activision games to their own streaming platforms, they would be unable to do so. The government leveled similarly unfair accusations of intent to restrict production against Standard

Oil in their landmark 1911 antitrust suit. Microsoft expected this challenge to be brought up during this case, and prepared a knockout blow to counter these claims beyond a shadow of a doubt.

Another critique of this charge is historical in nature. If the government wants to examine historical examples of Microsoft's mergers within the gaming industry, it is only fair to examine the results of these practices. A quick glance at sales figures over the past few generations of video game consoles (the period during which these mergers took place) reveals an irrefutable truth: Sony is competitively dominating Microsoft. During the eighth generation of gaming, the Xbox One sold less than half as many units as Sony's PlayStation 4 (Warren 2022). This trend has continued in the ninth generation, with Sony's PlayStation 5 outselling the Xbox Series X "roughly two-to-one" so far (Shirey 2023). If these mergers, which the government cites as a threat to the competitive marketplace, are so lucrative, then why has Sony remained uninterested in pursuing this strategy? The answer is that Sony, the company which has demonstrated both superior foresight and ability to fulfill consumer preferences, recognizes that these mergers are not an effective way to pursue a monopoly. This phenomenon was also observed in *Standard Oil*, and these measures were similarly ineffective then.

The third charge is so inconsequential that it is barely worth mentioning. The government is certainly correct that Microsoft produces first-party games; however, this point is easily dismissible. Since the inception of home console gaming, every major company has produced first-party games. Sony, the supposedly victimized competitor in this market, produces wildly popular franchises such as Uncharted and The Last of Us through their subsidiary Naughty Dog, LLC. Nintendo is perhaps the prime example of producing first-party games, as they have released some of the most successful franchises of all time exclusively for their own companies.

Through controlled studios such as Sora Ltd., Nintendo has consistently released new entries in various series such as Mario, Pokémon, The Legend of Zelda, and Kirby. If the government wishes to decry this practice as vertical integration when Microsoft does it, it should stand in equally vigorous condemnation of Sony and Nintendo.

The final component of the government's complaint centers around Microsoft's advantage in the emerging markets for cloud gaming and subscription services. The FTC contends that the Microsoft-Activision merger would make Xbox Game Pass exponentially more attractive than PS Plus, and Microsoft would be able to successfully leverage this interest into an advantage in the console market. However, this proposition is unpersuasive. Microsoft has been losing the Console Wars for two generations of gaming despite their edge in the total number of patrons of their subscription service and the variety of mergers they have already engaged in (Peppiatt 2022). The prospect of this particular merger flipping the console market, which swings two-to-one in Sony's favor, through further improvements to Microsoft's already-dominant Xbox Game Pass seems dubious.

The FTC's claims in regard to Microsoft's advantage in cloud gaming can be countered in a similar manner. Cloud gaming's popularity is a relatively recent development within the gaming world as the capabilities of technology increase rapidly. This revolutionary development utilizes "remote servers in data centers" and requires only "a reliable internet connection to send gaming information to an app or browser installed on the recipient device," meaning that cloud gaming services "[eliminate the] need to download and install games on a PC or console" (Roach and Parrish, 2021). Microsoft has quickly asserted itself as the dominant firm in the cloud gaming realm, holding a market share of 60-70% with Xbox Cloud Gaming, while Steam's Nvidia GeForce Now service and Sony's PlayStation Cloud combine for a mere 20-40% of the

market (Clark and Weatherbed, 2023). Again, however, this tremendous advantage has not translated into a higher user base for Microsoft gaming products. PlayStation and Steam far dwarf the number of Xbox users, regardless of developments within the market for cloud gaming.

Microsoft's pledge to allow Ubisoft to license Activision Blizzard's games further counters the FTC's claims in the realms of subscription and cloud gaming, as it is now impossible for Microsoft to decide that Activision's games should only appear on Game Pass and not PS Plus. This judicious decision demonstrates how Microsoft's prior experience in dealing with government-led antitrust suits has prepared them to nip many of the charges brought against them in the bud. The firm's actions during this trial demonstrate a far superior strategy than the one they employed in 2001 and a better understanding of antitrust proceedings in the United States, certainly aided in large part by their previous experience.

Special Interest Influence and Microsoft's Counter

As in the aforementioned historical cases, special interests from competing firms are back in full force. Unlike in these cases, however, Microsoft has come forward with a clear strategy to mitigate their influence on the prosecution. Sony has been the largest industry voice in support of blocking the merger, submitting a 22-page document to regulators in the UK describing the anticompetitive harm they believe would arise if the merger was allowed to go through (Saed 2022). Domestically, Sony has been a part of the FTC's case, although this process has largely been a public relations embarrassment. They and the FTC have engaged in a variety of "documented hypocrisy… and utter cluelessness" during the proceedings (Tassi 2023). Luckily for them, Microsoft swiftly acted to remove them from the table altogether and allow them to save face by negotiating for their blessing to carry out the merger. Microsoft's original offers to

Sony were even more favorable than the accepted 10-year Call of Duty deal: they first offered to "[keep] all existing Activision console titles on Sony, including future versions in the Call of Duty franchise or any other current Activision franchise on Sony [consoles]" (Warren 2023). Microsoft's downfall in their operating systems battle was the rival firms involved in the case. These firms were able to spur on government support for the prosecution through lobbying and funding, and Microsoft remained virtually on its own.

In this case, however, Microsoft has chosen to placate these rivals. Microsoft quickly leapt into negotiations with Sony, which included offers "[to] keep[] 'all existing Activision console titles on Sony, including future versions in the Call of Duty franchise or any other current Activision franchise on Sony [consoles]'" (Warren 2023). The company has also chosen to cooperate with other potential competing interests before they were able to become a factor in this case at all: "[Microsoft] made an agreement with Nintendo to bring Call of Duty to Switch. And it entered into several agreements to, for the first time, bring Activision's content to several cloud gaming services" (Weise, Browning, and McCabe 2023). Microsoft's decision to give the licensing rights for Activision games to Ubisoft is also a prudential move, as Ubisoft was one of Activision's largest competitors before the merger. Microsoft has also positioned itself to receive aid from allies in this case. "[S]even venture capital firms filed a 'friend of the court' brief in support of the Microsoft-Activision deal… [and] 30 [additional] venture capital firms [wrote a statement to] fully endorse the positions stated in the original 'friend of the court' brief" (Palmer 2023). Microsoft has managed to better defend itself against intra-industry interests this go-around, but there are other factors at play in this prosecution.

Officials in government are still an issue for Microsoft, however. Lina Khan, the overzealous and ideological FTC chairwoman, has spearheaded the Microsoft prosecution. While

her tenure as the head of the FTC has been relatively short, it has not been free from controversy. Khan has been an outspoken critic of big tech firms in the past, so much so that "the FTC's top ethics officer [wrote a memo] recommending that Khan recuse herself from the Meta/Within case" (Barthold 2023). Fortunately for those in favor of competition, Khan's efforts have thus far been an abject failure.[10] In a refreshing turn of events, it has been Microsoft outfoxing government regulators throughout this case, but this should not detract from the danger Khan and the FTC pose to competition in the United States. Many of her critics in government have accused her of overstepping her bounds, with Representative Jim Jordan going as far as to claim that she had acted to "[give] herself and the FTC 'unchecked power'" in her pursuit of big tech regulation (Yang 2023). The prosecution of Microsoft cannot be properly understood without contextualizing it within the *modus operandi* of the current FTC leadership: Khan believes that the government should have increased power to regulate markets, and her apparent disapproval of big tech has given her the means to pursue this power.

## V. Conclusion

History tends to repeat itself, and this has certainly been the case in U.S. antitrust enforcement. The faulty economic reasoning and special interests at work in historic applications of antitrust law are reflected in modern cases and have altered the strategies of the companies going through these proceedings. This phenomenon is demonstrated through an analysis of *Standard Oil Co. of New Jersey v. United States* (1911), *United States v. Microsoft Corp.* (2001), and *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc.* (2023). *Standard Oil* parallels Microsoft's current predicament through both the government's condemnation of mergers and the attribution of anticompetitive intentions to the defending firms' actions. *Microsoft*'s (2001)

[10] The FTC's antitrust failures under Khan are not limited to the Microsoft case. See Kang (2023) for further examples.

influence has come back in full force through the FTC's deceptive definition of the relevant market and unsound conception of a volatile technological market. These cases further reveal that, as Armentano (1998) asserts, it is near-impossible to properly apply a 19th-century law to the technological markets of the 21st century.[11]

Given the sheer number of instances in which the shortcomings of American antitrust enforcement are laid bare, its critics have clearly been proven right. Yet more and more antitrust lawsuits emerge from the regulatory apparatus of the U.S. government, proving that there is still a need to shed light on these pervasive issues. The United States has seen a slew of antitrust cases since the *Standard Oil* decision, and more of these historical cases can obviously be included to demonstrate the unsound foundation of modern-day charges. The depth of knowledge on *F.T.C. v. Microsoft Corp., and Activision Blizzard, Inc.* will also increase with time, particularly on the issue of rent-seeking parties who aim to dip their hands into the proverbial cookie jar; as such, it is important that this case is re-examined after a sufficient amount of time passes.

There was a flicker of hope for the safety of the American gaming market when the FTC dropped their case during 2023, but they quickly extinguished it by deciding to move forward in September (Nightingale 2023). While it seems likely that Microsoft will be victorious in this suit due to the FTC's recent struggles in court, we can safely assume that the market will be in a worse position should they lose. In the wake of *Standard Oil*, the output of petroleum was restricted, prices rose, and competition was constrained through further government intervention. As DiLorenzo (2017) writes, capitalism gave way to modern mercantilism. These negative

[11] Perhaps it would be better to say that it is absurd to apply this 19th century law in any instance. Armentano (1982) notes, through an analysis of a gamut of previous antitrust cases, that the courts' condemnation of supposed monopolization has ranged from confused to downright outlandish; to cite one specific instance, "Alcoa's superior skill, foresight, and industry were condemned as 'exclusionary' and illegal" by Judge Learned Hand (111-112).

market effects are the precise reason that it is crucial that American antitrust enforcement is continuously critiqued despite the fact that a vast quantity of literature has already been written on the subject. Consumers have the most to lose if markets are less competitive, and this has been, paradoxically, the effect of antitrust regulation. If the glut of economically-unsound antitrust cases continues to grow, consumers will continue to suffer, subsidizing the government's "antitrust" snipe hunts, which line the pockets of less efficient businesses and other rent-seekers.

# Bibliography

Armentano, Dominick. 1982. *Antitrust and Monopoly: Anatomy of a Policy Failure*. New York, NY: John Wiley & Sons.

Armentano, Dominick. 1998. "Antitrust and Microsoft." The Ludwig von Mises Institute. Last modified September 1, 1998. Accessed October 10, 2023. https://mises.org/library/antitrust-and-microsoft.

Armentano, Dominick. 2019. "Antitrust Policy Is Both Harmful and Useless." The Ludwig von Mises Institute. Last modified February 21, 2019. Accessed October 10, 2023. https://mises.org/library/antitrust-policy-both-harmful-and-useless#4d.

Armentano, Dominick. 2022. "A Critique of Neoclassical and Austrian Monopoly Theory." The Ludwig von Mises Institute. Last modified June 25, 2022. Accessed October 15, 2023. https://mises.org/library/critique-neoclassical-and-austrian-monopoly-theory.

Barthold, Corbin K. 2023. "Falling Upward." *City Journal*, August 17, 2023. https://www.city-journal.org/article/ftc-chair-lina-khan-fails-upward.

BBC. n.d. "The 8 Generations of Video Game Consoles." Accessed 2/1/2024. https://www.bbc.co.uk/archive/the-8-generations-of-video-game-consoles/zvcjkty

Bošnjak, Dominik. 2023. "Nintendo Switch Has Now Surpassed PS4 Sales." *Game Rant*, February 7, 2023. https://gamerant.com/nintendo-switch-surpassed-ps4-sales/.

Caporal, Jack. 2023. "Video Game Spending Statistics." *The Ascent: A Motley Fool Service*, November 1, 2023. https://www.fool.com/the-ascent/research/video-game-spending-statistics/.

Clark, Mitchell and Jess Weatherbed. 2023. "Google Stadia Barely Made a Dent in the Cloud Gaming Market." *The Verge*, February 9, 2023. https://www.theverge.com/2023/2/9/23591989/google-stadia-cloud-gaming-market-share-eu.

DiLorenzo, Thomas J. 2001. "The Microsoft Conspiracy." The Ludwig von Mises Institute. Last modified March 1, 2001. Accessed October 10, 2023. https://mises.org/library/microsoft-conspiracy.

DiLorenzo, Thomas J. 2017. "The Truth About the 'Robber Barons.'" The Ludwig von Mises Institute. Last modified November 1, 2017. Accessed October 10, 2023. https://mises.org/library/truth-about-robber-barons.

Federal Trade Commission. 2023. "Complaint for a Temporary Restraining Order and Preliminary Injunction Pursuant to Section 13(b) of the Federal Trade Commission Act." Accessed November 19, 2023. https://www.cand.uscourts.gov/wp-content/uploads/cases-of-interest/FTC-v-Microsoft/FTCComplaint.pdf.

Grant, R. W. 2009. "Tom Smith and His Incredible Bread Machine." The Ludwig von Mises Institute. Accessed January 31, 2023. https://mises.org/library/tom-smith-and-his-incredible-bread-machine.

Heath, Alex. 2023. "This is Meta's AR/VR Hardware Roadmap Through 2027." *The Verge*, February 28, 2023. https://www.theverge.com/2023/2/28/23619730/meta-vr-oculus-ar-glasses-smartwatch-plans.

Heilemann, John. 2001. *Pride Before the Fall*. New York, NY: HarperCollins Publishers.

Kang, Cecilia. 2023. "F.T.C.'s Court Loss Raises Fresh Questions About Its Chair's Strategy." *The New York Times*, July 11, 2023. https://www.nytimes.com/2023/07/11/technology/lina-khan-ftc-strategy.html.

Lamoreaux, Naomi R. 2019. "The Problem of Bigness: From Standard Oil to Google." *The Journal of Economic Perspectives* 33, no. 3 (Summer): 94–117.

Mason, Alpheus T. 1987. "The Case of the Overworked Laundress." In *Quarrels That Have Shaped the Constitution*, edited by John A. Garraty, 193-208. New York, NY: Harper & Row, Publishers.

McCabe, Heather. 1998. "Anti-Microsoft Group Enlists Bob Dole." *Wired*, April 21, 1998. https://www.wired.com/1998/04/anti-microsoft-group-enlists-bob-dole/.

McGee, John S. 1958. "Predatory Price Cutting: The Standard Oil (N. J.) Case." *The Journal of Law & Economics* 1 (October): 137–69.

Melese, Francois. 1998. "Pile on Microsoft." The Ludwig von Mises Institute. Last modified February 1, 1998. Accessed October 10, 2023. https://mises.org/library/pile-microsoft.

Mises, Ludwig von. 1998. *Human Action: A Treatise on Economics*. Auburn, AL: The Ludwig von Mises Institute.

Nightingale, Ed. 2023. "FTC Resumes Case Against Microsoft's Acquisition of Activision Blizzard." *Eurogamer*, September 28, 2023. https://www.eurogamer.net/ftc-resumes-case-against-microsofts-acquisition-of-activision-blizzard.

Palmer, Jon. 2023. "37 VC Firms and Investors Advocate for a Thriving Innovation Ecosystem." *Microsoft*, December 5, 2023. https://blogs.microsoft.com/on-the-issues/2023/12/05/venture-capital-microsoft-activision-ftc-appeal/.

Peppiatt, Dom. 2022. "Xbox Game Pass Subscribers Way Ahead of PS Plus Tiers, Says Sony in Latest Attempt to Make Itself Look Small." *VG247*, November 24, 2022. https://www.vg247.com/playstation-ps-plus-behind-xbox-game-pass.

Roach, Jacob and Kevin Parrish. 2021. "What is Cloud Gaming?" *DigitalTrends*, March 29, 2021. https://www.digitaltrends.com/gaming/what-is-cloud-gaming-explained/.

Roosevelt, Theodore. 1912. Quote from: U.S. Congress. Hearing of the Committee on Privileges and Elections. "Campaign Contributions." (Date 9/10/1912). Text from *Testimony Before a Subcommittee of the Committee on Privileges and Elections United States Senate Sixty-Second Congress Second Session Pursuant to S. Res. 79*. Accessed 11/25/2023.

Rothbard, Murray N. 2009. *Man, Economy and State with Power and Market*. 2nd ed. Auburn, AL: The Ludwig von Mises Institute.

Rothbard, Murray N. 2017. *The Progressive Era*. Auburn, AL: The Ludwig von Mises Institute.

Saed, Sherif. 2022. "UK Government Publishes Sony and Microsoft's Full Arguments in Activision Blizzard Acquisition Case." *VG247*, November 23, 2022. https://www.vg247.com/microsoft-sony-arguments-activision-blizzard-acquisition-case-uk-government-cma.

Shirey, J. Brodey. 2023. "PS5 Console Sales Way Ahead of Xbox." *Game Rant*, July 27, 2023. https://gamerant.com/ps5-console-sales-xbox-numbers-comparison/.

Statista. 2023a. "Xbox One Lifetime Unit Sales Worldwide as of September 2023, By Region." Accessed December 1, 2023. https://www.statista.com/statistics/1005418/xbox-one-console-unit-sales-country/.

Statista. 2023b. "Annual Unit Sales of the Xbox Series X/S Worldwide from 2021 to 2023 YTD." Accessed December 1, 2023. https://www.statista.com/statistics/1124788/unit-sales-xbox-series-x-worldwide/.

Steam. 2021. "Steam - 2021 Year in Review." Accessed November 21, 2023. https://store.steampowered.com/news/group/4145017/view/3133946090937137590.

Tassi, Paul. 2023. "The FTC-Sony Case Against The Microsoft Activision Deal Is Very Bad." *Forbes*, June 25, 2023. https://www.forbes.com/sites/paultassi/2023/06/25/the-ftc-sony-case-against-the-microsoft-activision-deal-is-very-bad/?sh=4163bcb15cf0.

U.S. Department of Justice. 2017. “Elements of the Offense.” Accessed November 20, 2023. https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement.

Warren, Tom. 2022. “Microsoft Finally Admits Xbox One Sales Were Less Than Half of the PS4.” *The Verge*, August 15, 2022. https://www.theverge.com/2022/8/15/23306068/microsoft-xbox-one-sales-lifetime-versus-ps4-sales.

Warren, Tom. 2023. “Sony Agrees to 10-Year Call of Duty Deal With Microsoft.” *The Verge*, July 16, 2023. https://www.theverge.com/2023/7/16/23792215/sony-microsoft-call-of-duty-cod-deal-signed.

Weise, Karen, Kellen Browning, and David McCabe. 2023. “How Microsoft Turned the Tide in Its Regulatory Fight Over Activision.” *The New York Times*, October 13, 2023. https://www.nytimes.com/2023/10/13/technology/microsoft-activision-antitrust-regulators.html.

Wilson, Christine S. 2019. “Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get.” Luncheon Keynote Address at George Mason, February 15, 2019.