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Dislike: Facebook's Anticompetitive Monopoly on Social Media and Why U.S. Antitrust Laws Must Adapt to the Technological Era

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DISLIKE: FACEBOOK'S ANTICOMPETITIVE MONOPOLY ON SOCIAL MEDIA AND WHY U.S. ANTITRUST LAWS MUST ADAPT TO THE TECHNOLOGICAL ERA

Elizabeth I. Nielson[*]

ABSTRACT

Although Facebook started as a way to connect with college classmates, it has grown into one of the largest technology companies in the world. Facebook is no longer solely a way to connect with classmates. Instead, it is the powerhouse of social networks and dominates the online advertising business. Facebook has grown at an unprecedented rate—acquiring businesses and gathering users' privacy along the way—partially because of the failure of U.S. antitrust laws to adequately protect against anticompetitive and monopolistic behavior in the technological arena.

Historically, antitrust laws have used the consumer welfare standard to determine if entities are engaging in anticompetitive and monopolistic behavior. However, as technology continues to develop in the twenty-first century, the way consumer welfare is measured must be revised. This Comment outlines the development and history of antitrust laws to illustrate how the current antitrust model fails to adequately capture anticompetitive and monopolistic behavior in the technological arena. Using Facebook as a case study, this Comment shows how Big Tech harms consumers in ways not traditionally thought of—loss of control over data and privacy, lack of innovation, and decline in business startups—and outlines ways Congress and courts must approach U.S. antitrust laws to better encapsulate Big Tech. These methods promote preserving the competitive process and market structure while giving consumers a voice in the protection of their privacy and data.

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I. INTRODUCTION

The United States has a "monopoly problem,"[1] and the world's eyes are currently focused on the four Big Tech companies: Amazon, Apple, Google, and Facebook.[2] According to an estimate from NYU economist Thomas Philippon, "monopolies and oligopolies cost the average American household some $5,000 a year."[3] Breaking up Big Tech companies like Facebook appears to have strong majority support among Americans.[4] According to a survey conducted by Vox and Data for Progress between January 15–19, 2021, 59% of the 1,164 people surveyed supported breaking up Big Tech monopolies, with 24% who strongly support doing so.[5] Possible regulations of Big Tech monopolies mentioned to the survey respondents included "undoing Facebook's acquisition of Instagram" and "barring Amazon from being both an online marketplace and a seller in that marketplace."[6] Recognition of the United States' antitrust problem is the first step to addressing and resolving it.[7] Focusing on Facebook as a case study, this Comment will argue that U.S. antitrust laws are inadequate to regulate Big Tech and must be reworked to protect consumers.

Part II of this Comment discusses the laws and terminology of U.S. antitrust, gives a brief history of changes in U.S. antitrust laws leading to the twenty-first century's focus on technology, and explains the rationale behind U.S. antitrust laws. Part III reviews the recent antitrust lawsuits involving the four Big Tech companies. Part IV discusses Facebook as a case study of U.S. antitrust laws failing to apply to Big Tech. Part V analyzes how the traditional standard for evaluating U.S. antitrust violations does not work for measuring antitrust in the digital age. Part VI illustrates how current U.S. antitrust laws harm consumers. Finally, Part VII outlines ways that U.S. antitrust laws can be changed to better protect consumers in the digital age and the future.

II. OVERVIEW OF ANTITRUST

Antitrust laws seek to control the exercise of private economic power by monitoring monopolies and mergers and encouraging competition.[8] U.S.

1. Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131 (2018).
2. On October 28, 2021, Facebook's CEO, Mark Zuckerberg, announced a rebranding of "The Facebook Company" to "Meta." Press Release, Facebook (Oct. 28, 2021), https://about.fb.com/news/2021/10/facebook-company-is-now-meta/ [https://perma.cc/L69A-3BGN]. This Comment refers to the company as Facebook.
3. Emily Stewart, *America's Monopoly Problem Stretches Far Beyond Big Tech*, VOX (July 15, 2021, 12:40 PM), https://www.vox.com/the-goods/2021/7/15/22578388/biden-hearing-aids-executive-order-lina-khan [https://perma.cc/FKP6-KN2W].
4. Rani Molla, *Poll: Most Americans Want to Break Up Big Tech*, VOX (Jan. 26, 2021, 2:20 PM), https://www.vox.com/2021/1/26/22241053/antitrust-google-facebook-break-up-big-tech-monopoly [https://perma.cc/T3HD-3PQV].
5. *Id.; see also* Report with Underlying Data of Vox and Data for Progress Poll, DATA FOR PROGRESS, https://www.filesforprogress.org/datasets/2021/1/dfp_vox_tech_polling.pdf [https://perma.cc/2BVT-EPPN].
6. Molla, *supra* note 4; *see also* DATA FOR PROGRESS, *supra* note 5.
7. Khan, *supra* note 1, at 131.
8. *The Antitrust Laws*, FTC, https://www.ftc.gov/tips-advice/competition-guidance/guide-

antitrust laws historically focus on whether consumers pay more money because a company has cornered the market. U.S. antitrust laws are focused on money, and everything hinges on the financial responses of competitors and the monopoly itself to determine if there is, in fact, a monopoly that is restraining trade. This Comment argues that the way we look at monopolies in the digital realm must change so that we can adequately regulate modern-day technology monopolies engaging in anticompetitive conduct.

A. ORIGINS

Monopolies were illegal at common law because they imposed restrictions on "individual freedom of contract" and caused injury to the public.[9] Antitrust laws enacted by Congress in 1890 and 1914—the Sherman Act,[10] the Clayton Act,[11] and the Federal Trade Commission (FTC) Act[12]—reflected the "recognition that unchecked monopoly power poses a threat to our economy and our democracy."[13] In the 1930s, 1950s, and 1970s, Congress "reasserted this vision through subsequent antitrust laws, including the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart-Scott-Rodino Act of 1976."[14]

B. THE SHERMAN ACT

In 1890, Congress passed the country's first antitrust statute, the Sherman Act.[15] The Sherman Act's primary purpose is to "enable government agencies and private parties to enforce prohibitions against trade restraints and monopolization."[16] The Sherman Act prohibits monopolies in order to promote competition and to protect companies and consumers alike from unfair business practices. Section 2 of the Sherman Act makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[17] Both §§ 1 and 2 of the Sherman Act focus on stopping market control.[18]

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antitrust-laws/antitrust-laws [https://perma.cc/2VR5-7NF6].

9. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 55 (1911).

10. Sherman Act, Pub. L. No. 51-647, 26 Stat. 209, 209–210 (1890) (codified as amended at 15 U.S.C §§ 1–7).

11. Clayton Act, Pub. L. No. 63-212, 38 Stat. 730, 730–740 (1914) (codified as amended at 15 U.S.C. §§ 12–27).

12. Federal Trade Commission Act, Pub. L. No. 63-203, 38 Stat. 717, 717–724 (1914) (codified as amended at 15 U.S.C. §§ 41–58).

13. Staff of Subcomm. on Antitrust, Com. and Admin. Law of the H. Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digital Markets 391 (2020) [hereinafter Subcommittee Report]; *see also* Ganesh Sitaraman, Unchecked Power, New Republic (Nov. 29, 2018), https://newrepublic.com/article/152294/unchecked-power [https://perma.cc/PTD2-34FZ].

14. Subcommittee Report, *supra* note 13, at 391. *See generally* Thomas J. Horton, *Rediscovering Antitrust's Lost Values*, 16 U. N.H. L. Rev. 179 (2018) (noting the background of various amendments to the Sherman Act).

15. 15 U.S.C §§ 1–7.

16. ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 27 (5th ed. 2004).

17. 15 U.S.C. § 2.

18. GELLHORN ET AL., *supra* note 16, at 26.

However, the Sherman Act only prohibits restraints of trade that are "unreasonable."[19]

Furthermore, the Sherman Act does not prohibit the possession of monopoly power alone.[20] Monopolies can form because of natural and encouraged competition—in some circumstances, size is a result of a vigorous market.[21] Section 2 of the Sherman Act prohibits attempts and conspiracies to monopolize.[22] Judicial case law interpreting § 2 of the Sherman Act has focused on the "creation" or "maintenance" of a monopoly.[23] Courts focus on the monopoly's purpose, intent, and "drive to seize or exert monopoly power," rather than merely on whether a monopoly exists.[24] "An *unlawful* monopoly exists when one firm controls the market . . . by suppressing" and stifling competition through anticompetitive conduct.[25]

C. *STANDARD OIL CO. OF NEW JERSEY V. UNITED STATES*

One of the first major cases under the Sherman Act was *Standard Oil Co. of New Jersey v. United States*.[26] In that case, Standard Oil controlled almost 90% of the nation's refining capacity.[27] Standard Oil forced railroads to give it preferential rates, engaged in price discrimination, and spied on businesses to drive local competition from the market.[28] The Supreme Court of the United States, finding for the government, provided that a "restraint of trade" referred to a contract that made a "monopoly [or] the acts which produce the same result as a monopoly."[29] Those consequences included higher prices, reduced output, and reduced quality.[30]

This approach to § 2 of the Sherman Act established a minimum threshold for § 2 violations.[31] This threshold was "a showing of monopoly power and of conduct involving a restraint of trade . . . [that] demonstrated illegal purpose and intent."[32] The Court in *Standard Oil* did not prohibit monopoly power on its own; instead, the Court attempted to correct acts that created or sustained monopoly power.[33]

19. *The Antitrust Laws, supra* note 8.
20. GELLHORN ET AL., *supra* note 16, at 140.
21. *Id.*
22. 15 U.S.C. § 2.
23. GELLHORN ET AL., *supra* note 16, at 26.
24. *Id.* at 140.
25. *Antitrust Laws and You*, U.S. DEP'T OF JUST. (emphasis added), https://www.justice.gov/atr/antitrust-laws-and-you [https://perma.cc/SFY8-TA74] (Jan. 5, 2017).
26. 221 U.S. 1 (1911).
27. *Id.* at 33.
28. *Id.*
29. *Id.* at 61.
30. *Id.* at 52.
31. GELLHORN ET AL., *supra* note 16, at 142.
32. *Id.*
33. *Id.* at 142–43 (emphasis added).

D. THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION ACT

After *Standard Oil*, Congress passed the Clayton[34] and FTC Acts,[35] which banned price discrimination and anticompetitive mergers. The Clayton Act allows lawsuits against companies by any person who has been "injured in his business or property by reason of anything forbidden in the antitrust laws," such as, for example, conduct that violates the Clayton Act.[36] Section 7 of the Clayton Act of 1914 prohibits any transaction where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[37] In 1914, Congress passed the FTC Act to create an administrative agency responsible for antitrust enforcement.[38] Congress had two primary goals in creating the FTC. Congress sought "to ensure greater fidelity to congressional competition policy preferences" and "improve the development and implementation of antitrust policy."[39]

The FTC Act is much more limited than prior antitrust laws. For example, "[t]he FTC Act provides no criminal penalties and limits the FTC to obtaining equitable relief." Further, unlike the Clayton Act, "[n]either the Justice Department nor private parties can enforce the FTC Act."[40] The FTC Act empowers the FTC to:

> (a) prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; (b) seek monetary redress and other relief for conduct injurious to consumers; (c) prescribe rules defining with specificity acts or practices that are unfair or deceptive, and establishing requirements designed to prevent such acts or practices; (d) gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and (e) make reports and legislative recommendations to Congress and the public.[41]

E. MARKET POWER

Market power must be determined to assess the competitive significance of companies in the relevant market. Without market power, a company cannot force choices and prices on consumers or competitors.[42] A company with market power can charge more than its rivals or it can sell for less than the "market price" in order to undercut its rivals.[43] Defining the relevant market and

34. 15 U.S.C. §§ 12–27.
35. *Id.* §§ 41–58.
36. *Id.* § 15(a); *The Antitrust Laws, supra* note 8.
37. 15 U.S.C. § 18.
38. GELLHORN ET AL., *supra* note 16, at 35.
39. *Id.* at 37.
40. *Id.*
41. Summary of the Federal Trade Commission Act, FTC, https://www.ftc.gov/enforcement/statutes/federal-trade-commission-act [https://perma.cc/GD7T-LF4D].
42. GELLHORN ET AL., *supra* note 16, at 112.
43. *Id.*

determining a company's power within that market are essential in Sherman Act cases and challenges to mergers, usually under § 7 of the Clayton Act.[44]

F. CHANGES IN DOCTRINE BETWEEN 1960 AND 1980

1. The Harvard School

By the 1960s and 1970s, the courts and government agencies responsible for antitrust enforcement had adopted an economic theory developed by "a group of Harvard scholars who assumed that firms with market power would act in an anticompetitive manner."[45] These scholars argued that market concentration makes it more likely that companies will engage in anticompetitive conduct.[46] As such, these scholars disapproved of market concentration regardless of whether the conduct had a potential to benefit consumers by lowering prices and increasing output.[47] The key factor under this approach was the market share held by a firm. Under the Harvard School approach, courts and government agencies should act to prevent companies with market power from engaging in conduct that was otherwise permissible for companies without market power.[48]

2. The Chicago School

While the Harvard School approach made antitrust trial outcomes predictable, the Chicago School approach "revolutionized the antitrust field in the 1970s and 1980s."[49] The central focus of the Chicago School approach to antitrust is the concept of consumer welfare and was heavily influenced by a 1978 book by the late Judge Robert Bork.[50] Judge Bork argued that consumer welfare means "lower costs, reduced prices, and increased output of products and services desired by consumers."[51] Judge Bork believed that "[t]he only legitimate goal of American antitrust is the maximization of consumer welfare."[52] "All other possible goals of antitrust laws" were not important.[53] In other words, Judge Bork believed that companies should be free to collude as long as their anticompetitive behavior does not lead to higher prices for consumers.

The narrow focus on the welfare of the consumer alone has led courts and government agencies responsible for antitrust enforcement to worry mainly about "efficiency" in the markets, believing that greater efficiency will lower

44. *Id.* at 113.

45. Thomas A. Piraino, Jr., *Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century*, 82 IND. L.J. 345, 346 (2007).

46. *Id.* at 349.

47. *Id.*

48. *Id.* at 350.

49. Ianni Drivas, *Reassessing the Chicago School of Antitrust Law*, UNIV. OF CHI. L. SCH. (June 4, 2019), https://www.law.uchicago.edu/news/reassessing-chicago-school-antitrust-law [https://perma.cc/7NDR-P9Q5].

50. *Id.*

51. Piraino, *supra* note 45, at 350 (citing Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 7 (1966)).

52. Bork, *supra* note 51, at 7.

53. *Id.* at 7 n.1.

prices for consumers.[54] This focus has blinded enforcers to other harms caused by market concentration and "undue market power, including on workers, suppliers, innovators, and independent entrepreneurs," such as a lack of control over personal data, a loss of privacy, and a dearth of innovation and business startups.[55]

Several proponents of the Chicago School approach—such as Judges Bork, Posner, and Easterbrook—brought the theory with them when they moved to the federal bench.[56] As such, the Chicago School approach to antitrust became the dominant legal theory and appears to be the prevailing theory in antitrust laws today.[57]

3. Judge Bork's The Antitrust Paradox

In 1978, Judge Bork published *The Antitrust Paradox*, arguing that the tough antitrust policy of the time stood in the way of economic efficiency.[58] He insisted that the Sherman Act should focus on consumer welfare through price.[59] Judge Bork defined consumer welfare as total welfare, and the Supreme Court soon adopted Judge Bork's approach in *Reiter v. Sonotone Corp.*[60]

4. United States v. Microsoft Corp.

One of the biggest, if not the biggest, technology antitrust court cases to date is *United States v. Microsoft Corp*.[61] In the 1980s, Microsoft was one of the most successful software companies in the world.[62] However, on May 18, 1998, the Department of Justice (DOJ) and the attorneys general of multiple states filed antitrust charges against Microsoft.[63] One key issue in the case was whether Microsoft's bundling of software with its operating system was monopolistic.[64] The Government accused Microsoft of making it difficult to install software that would compete with Microsoft's Internet Explorer—namely Netscape Navigator.[65] After a failed attempt at mediated settlement, U.S. District Court Judge Jackson ordered Microsoft to break into two companies—an operating systems company and an applications company.[66]

54. Khan, *supra* note 1, at 132.
55. *Id.*
56. Piraino, *supra* note 45, at 351.
57. *See* Khan, *supra* note 1, at 132.
58. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 405 (1978).
59. *Id.*
60. *See* 442 U.S. 330, 343 (1979) (agreeing with Judge Bork's discussion of purposes of the Sherman Act). For a brief discussion of Judge Bork's notion of total welfare, see Lina M. Khan, Note, *Amazon's Antitrust Paradox,* 126 YALE L.J. 710, 720 n.38 (2017).
61. 253 F.3d 34 (D.C. Cir. 2001) (per curiam).
62. *See* Eric Reed, *History of Microsoft: Timeline and Facts,* THESTREET (Sept. 2, 2019, 1:21 AM), https://www.thestreet.com/technology/history-of-microsoft-15073246 [https://perma.cc/XD85-5F9U].
63. *Microsoft*, 253 F.3d at 47.
64. *Id.*
65. *Id.*
66. *Id.* at 48.

Microsoft appealed.[67] The D.C. Circuit Court of Appeals upheld only one of the district court's three findings.[68] The court of appeals reversed the district court's finding that Microsoft was illegally bundling the Microsoft Windows operating system and the Internet Explorer software.[69] The court of appeals also reversed the district court's finding that Microsoft had engaged in an illegal attempt to monopolize a browser market because the government failed "(1) to define the relevant market and (2) to demonstrate that substantial barriers to entry protect that market."[70]

The court of appeals affirmed in part the district court's holding "that Microsoft [had] violated § 2 of the Sherman Act by employing anticompetitive means to maintain a monopoly in the operating system market."[71] The court of appeals distilled the core of antitrust laws at the time, stating that "[t]he challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."[72]

Microsoft and the DOJ eventually settled after the DOJ dropped the demand that Microsoft split into two companies, and Microsoft agreed to share its interface with other companies (like Netscape).[73] However, *Microsoft* set the stage for antitrust litigation and technology early in the twenty-first century, and it continues to be one of the most influential cases in antitrust litigation.

G. RATIONALE

Congress intentionally drafted the antitrust statutes broadly.[74] Crucial terms in the Sherman, Clayton, and FTC Acts are not defined within the Acts.[75] Rather, current U.S. antitrust laws "proscribe unlawful mergers and business practices in general terms, leaving courts to decide which ones are illegal based on the facts of each case."[76] The statutes invite periodic refinement as we gain greater understandings of their applicability in time.[77] This structure gives the antitrust laws the flexibility to adjust and adapt to an evolving world.[78] Whether or not Congress uses this flexibility to regulate technology companies engaging in anticompetitive behavior is up for debate; yet, as this Comment will show, Congress's failure to update U.S. antitrust laws to respond to the novel ways in which technology companies have engaged in anticompetitive behavior has

67. *Id.* at 45.
68. *Id.* at 46.
69. *Id.*
70. *Id.* at 81.
71. *Id.* at 46.
72. *Id.* at 58.
73. Andrew Beattie, *Why Did Microsoft Face Antitrust Charges in 1998?*, INVESTOPEDIA, https://www.investopedia.com/ask/answers/08/microsoft-antitrust.asp [https://perma.cc/VDE5-Q7F6] (Oct. 25, 2021).
74. GELLHORN ET AL., *supra* note 16, at 39.
75. *Id.*
76. *The Antitrust Laws*, *supra* note 8.
77. GELLHORN ET AL., *supra* note 16, at 39.
78. *Id.*

created a slew of problems.

III. RECENT ANTITRUST LITIGATION

The Big Tech companies—Amazon, Apple, Google, and Facebook—each play an important role in our economy and society as the underlying infrastructure for exchanging communications, information, goods, and services. The massive prominence of just these four companies is reflected in their market capitalization. As of October 25, 2021, the combined valuation of these companies is approximately $7.17 trillion—approximately 18.35% of the total market capitalization of the S&P 500 (approximately $39.06 trillion).[79] Amazon, Apple, Google, and Facebook have purchased more than 500 companies since 1998.[80] As if to illustrate the lack of antitrust enforcement against these companies in the past, U.S. antitrust agencies did not block a single one of those acquisitions.[81] However, the tide may be turning. Over the last several years, Big Tech has been involved in a flurry of antitrust litigation that has not been seen since *Microsoft*.[82] What the United States needs now is a modern update of its antitrust laws to give the courts and government agencies the tools to protect consumers and businesses alike from anticompetitive practices.

A. PRIMED FOR AMAZON

Amazon is estimated to be among the largest private employers in the United States, with over 500,000 employees—second only to Walmart.[83] Amazon "operates across a wide range of direct-to-consumer and business-to-business markets, including e-commerce, consumer electronics, television and film production, groceries, cloud services, book publishing, and logistics."[84]

With such large success have belatedly come questions regarding Amazon's methods to attain it. To wit, European Union (E.U.) regulators filed an antitrust lawsuit against Amazon on November 10, 2020, accusing Amazon of using "data from companies that sell products on its platform to gain an unfair advantage over them."[85] The E.U.'s investigation found that Amazon was, and

79. *See* Iman Ghosh, *Which Companies Belong to the Elite Trillion-Dollar Club?*, VISUAL CAPITALIST (Aug. 23, 2021), https://www.visualcapitalist.com/which-companies-belong-to-the-elite-trillion-dollar-club/ [https://perma.cc/MS4G-KHGZ]; *S&P 500 Market Cap*, YCHARTS (Oct. 31, 2021), https://ycharts.com/indicators/sp_500_market_cap [https://perma.cc/D9E5-4X2S].

80. SUBCOMMITTEE REPORT, *supra* note 13, at 392, 406–50.

81. *Id.* at 387 ("Although the dominant platforms collectively engaged in several hundred mergers and acquisitions between 2000-2019, antitrust enforcers did not block a single one of these transactions.").

82. *See infra* Sections III.A–D.

83. Charles Duhigg, *Is Amazon Unstoppable?*, NEW YORKER (Oct. 10, 2019), https://www.newyorker.com/magazine/2019/10/21/is-amazon-unstoppable [https://perma.cc/JSC3-WASF]; Press Release, Amazon, Amazon.com Announces Second Quarter Results (July 30, 2020), https://s2.q4cdn.com/299287126/files/doc_financials/2020/q2/Q2-2020-Amazon-Earnings-Release.pdf [https://perma.cc/Y74Y-J2VE].

84. SUBCOMMITTEE REPORT, *supra* note 13, at 247.

85. *EU Charges Amazon in Antitrust Lawsuit, Alleges Unfair Competition*, CBC News (Nov. 10, 2020, 12:14 PM), https://www.cbc.ca/news/business/amazon-eu-antitrust-1.5796672

presumably still is, accessing real-time data from competitors that sell products on its platform to determine which goods to sell, how to price these goods, and how to market them.[86] Since E.U. regulators have no deadlines for bringing the case to an end, the litigation could go on for some time before a final decision is made.[87]

Meanwhile, in the United States, a class action lawsuit was filed against Amazon for antitrust violations on January 14, 2021, in the U.S. District Court for the Southern District of New York.[88] The complaint alleges that Amazon and publishers entered into price-fixing agreements in 2015, allowing publishers to increase their e-book prices by 30%.[89] The complaint further alleges that Amazon controlled approximately 90% of the e-book market in 2018 and used that incredibly high level of control to increase prices for customers.[90] With its continued growth, these cases are likely to be only the beginning of antitrust cases brought against Amazon.

B. THE BIG APPLE

Apple is the leading smartphone vendor in the United States, accounting for approximately 53% of the domestic market in Q2 2021, with more than 113 million iPhone users in the United States.[91] Apple's iOS operating system is one of the two dominant mobile operating systems in the United States, running on 44.3% of U.S. mobile devices.[92] Apple sold its two billionth iOS device in 2018[93] and its two billionth iPhone in 2021.[94]

Like Amazon, the methods of Apple's success have recently, and finally, come under antitrust scrutiny. In response to the 30% cut of all sales of apps

[https://perma.cc/Z95U-L3YC].

86. *Id.*

87. *Id.* Amazon is engaged in preliminary discussions with the E.U. regulators and has offered concessions to address their concerns, but Settlement talks can take months to wrap up, with no guarantee that both sides will reach an agreement. Foo Yun Chee, *Amazon Seeking to Settle EU Antitrust Investigations, Sources Say*, REUTERS, https://www.reuters.com/business/retail-consumer/exclusive-amazon-seeking-settle-eu-antitrust-investigations-sources-say-2021-11-09/ [https://perma.cc/MAZ4-Q9WS].

88. Class Action Complaint at 1, Fremgen v. Amazon.com, Inc., No. 1:21-cv-351 (S.D.N.Y. Jan. 14, 2021).

89. *Id.* at 3, 5–6.

90. *Id.* at 10–11.

91. *See* Team Counterpoint, *US Smartphone Market Share: By Quarter*, COUNTERPOINT, https://www.counterpointresearch.com/us-market-smartphone-share [https://perma.cc/L4SS-2VE7] (Aug. 16, 2021); S. O'Dea, *IPhone Users as Share of Smartphone Users in the United States* 2014-2021, STATISTA (Mar. 31, 2021), https://www.statista.com/statistics/236550/percentage-of-us-population-that-own-a-iphone-smartphone [https://perma.cc/VUW6-TGAH].

92. *See* Bridget Poetker, *The Mobile Operating Systems That Matter Right Now (+Effects on Development)*, G2 (May 21, 2021), https://learn.g2.com/mobile-operating-systems [https://perma.cc/2TLW-WYUF].

93. Malcolm Owen, *How Apple Has Hit 2 Billion iOS Devices Sold, and When It Will Hit 2 Billion iPhones*, APPLEINSIDER (Sept. 13, 2018), https://appleinsider.com/articles/18/09/13/how-apple-has-hit-2-billion-ios-devices-sold-and-when-it-will-hit-2-billion-iphones [https://perma.cc/2LLN-5JTB].

94. Ben Lovejoy, *Apple Sells Its 2-billionth iPhone, with Steve Jobs Legacy Still Evident*, 9TO5MAC (Sept. 22, 2021, 4:40 AM), https://9to5mac.com/2021/09/22/steve-jobs-legacy-iphone-13/ [https://perma.cc/D5MJ-V3XX].

through the App Store that Apple required of third-party app developers, Epic Games, a video game and software developer and publisher, gave users the option to pay for its popular video game, Fortnite, through Epic Games itself, instead of going through the App Store—a violation of Apple's guidelines for the App Store.[95] This option removed the 30% transaction fee that Apple charges for every purchase through the App Store.[96] Unsurprisingly, Apple removed Fortnite from the App Store later on the same day.[97] In response to Apple's actions, Epic Games filed suit against Apple in the U.S. District Court for the Northern District of California.[98] In a motion for preliminary injunction, Epic Games asked the court "to force Apple to reinstate *Fortnite* to the Apple App Store . . . and to stop Apple from terminating its affiliates' access to developer tools for other applications . . . while Epic Games litigates its claims."[99] The district court granted in part and denied in part the motion, stating that Apple is preliminarily enjoined "from taking adverse action against the Epic Affiliates with respect to restricting, suspending or terminating the Epic Affiliates from the Apple's Developer Program" but that Apple would not be required to immediately bring Fortnite back onto the App Store.[100] A trial on the merits concluded in May 2021,[101] and the court issued its final ruling on September 10, 2021, with a split decision for the parties.[102] The court concluded on the one hand that Epic Games failed to carry its burden of demonstrating that Apple is an illegal monopolist but on the other hand Apple engaged in anticompetitive conduct under California's competition laws by forcing people to pay for apps and in-app items through the App Store.[103] As of the date of this Comment, Apple intends to appeal the ruling to the Ninth Circuit Court of Appeals.[104]

C. GOOGLE'S EARTH

Google has become synonymous with its search engine, Google Search. The

95. Hirun Cryer, *Here's Everything We Know About the Epic Vs Apple Lawsuit*, GAMESRADAR+ (Sept. 11, 2021), https://www.gamesradar.com/epic-vs-apple-lawsuit [https://perma.cc/F665-QUBR].

96. *Id.*

97. *Id.*

98. Epic Games, Inc. v. Apple Inc., 493 F. Supp. 3d 817, 826 (N.D. Cal. 2020).

99. *Id.*

100. *Id.* at *853*; *see also* Russell Brandom, Sean Hollister & Jay Peters, *Epic Judge Will Protect Unreal Engine—but Not Fortnite*, VERGE (Aug. 25, 2020, 9:44 AM), https://www.theverge.com/2020/8/25/21400240/epic-apple-ruling-unreal-engine-fortnite-temporary-restraining-order [https://perma.cc/2ETB-GNTR].

101. Dan Patterson, *What We Learned from the* Epic Games v. Apple *Lawsuit*, CBS NEWS, https://www.cbsnews.com/news/epic-apple-lawsuit-what-we-learned [https://perma.cc/SA2G-GM2Z] (May 27, 2021, 10:08 AM).

102. Epic Games, Inc. v. Apple Inc., No. 4:20-CV-05640, 2021 WL 4128925 (N.D. Cal. Sept. 10, 2021), https://s3.documentcloud.org/documents/21060696/epic-v-apple-ruling.pdf [https://perma.cc/DMW3-6J9U].

103. *Id.*

104. Adi Robertson, *Judge Orders Apple to Allow External Payment Options for App Store by December 9th, Denying Stay*, VERGE (Nov 9, 2021, 8:14 PM), https://www.theverge.com/2021/11/9/22773082/epic-apple-fortnite-lawsuit-ruling-injunction-stay-app-store-anti-steering-rules [https://perma.cc/WRU5-UEH8].

company is now also a web browser, a mobile operating system, the largest digital advertising provider, and "a major provider of digital mapping, email, cloud computing, and voice assistant services."[105] Nine of Google's products—Android, Chrome, Gmail, Search, Drive, Maps, Photos, Play Store, and YouTube—each have more than a billion users.[106] These products provide Google with "a trove of user data," which it has used to "reinforc[e] its dominance across markets" and increase its revenues through online ads.[107] In several markets, Google built its stature through acquisitions rather than, for example, research and development of new products or services.[108] In the last twenty years, Google has purchased at least 260 companies.[109]

Both Google's advertising and its search engine methods have recently come under fire. On August 13, 2020, mirroring its lawsuit against Apple, Epic Games filed suit against Google for alleged anticompetitive behavior in the Google Play Store in the U.S. District Court for the Northern District of California.[110] Epic alleges Google violated both the Sherman and California Cartwright Acts.[111] Like Apple, Google collects transaction fees of 30% for all in-app purchases.[112] Epic updated Fortnite so that Android users could submit payments directly to Epic Games rather than going through the Google Play Store—again, as was the case with Apple's guidelines, this was a direct violation of Google's Google Play Store guidelines.[113] And like Apple, Google removed Fortnite from the Google Play Store.[114] For Fortnite customers, this means they can continue playing the current version but will be unable to download any future versions or updates.[115] Epic argues that if direct payments were allowed, then Epic would be able to pass on savings to its customers.[116] Although, on the surface, the cases between both Apple and Google appear similar, Google continues to argue that its case is different from Apple's and does not want the judge to merge the two.[117] As of December 2021, the case is still pending.[118]

105. SUBCOMMITTEE REPORT, *supra* note 13, at 174.

106. *Id.* (citing Harry McCracken, *How Google Photos Joined the Billion-User Club*, FAST CO. (July 24, 2019), https://www.fastcompany.com/90380618/how-google-photos-joined-the-billion-user-club [https://perma.cc/3TJD-MTUK]).

107. *Id.*

108. *Id.*

109. *Id.* (citations omitted).

110. Russell Brandom, *Epic Is Suing Google over Fortnite's Removal from the Google Play Store*, VERGE (Aug. 13, 2020, 9:51 PM), https://www.theverge.com/2020/8/13/21368363/epic-google-fortnite-lawsuit-antitrust-app-play-store-apple-removal [https://perma.cc/5S84-CAJ7].

111. *Id.*

112. Samit Sarkar, *Epic Games' Fortnite Legal Battle with Apple and Google, Explained*, POLYGON, https://www.polygon.com/2020/8/17/21372119/fortnite-apple-google-sued-epic-games-lawsuit [https://perma.cc/K9N2-T6EU] (Aug. 25, 2020, 5:54 PM).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. Chantal Allam, *Google Is Pushing to Get Epic's Fortnite Antitrust Case Dismissed*, WRAL TECHWIRE (Sept. 4, 2020), https://www.wraltechwire.com/2020/09/04/google-is-pushing-to-get-epics-fortnite-antitrust-case-dismissed [https://perma.cc/LE49-TN8M].

118. Jennifer Elias, *Analysts Explain How the Apple-Epic Court Ruling Could Affect Google*, CNBC (Sept. 13, 2021, 8:57 PM), https://www.cnbc.com/2021/09/13/how-the-apple-epic-court-

As for government enforcement, the DOJ, along with eleven state attorneys general, filed an antitrust lawsuit against Google on October 20, 2020, in the U.S. District Court for the District of Columbia "to stop Google from unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms."[119] In a press release, the DOJ stated that the government is "enforcing the Sherman Act to restore the role of competition and open the door to the next wave of innovation—this time in vital digital markets."[120] The DOJ alleges, "By suppressing competition in advertising, Google has the power to charge advertisers more than it could in a competitive market and to reduce the quality of the services it provides them."[121] Google responded to the lawsuit with a blog post stating that the lawsuit "suggests we shouldn't have worked to make Search better and that we should, in fact, be less useful to you."[122] Since this case was filed, two more antitrust cases have been brought against Google—one by attorneys general in thirty-five states and another filed by Texas's Attorney General, Ken Paxton, along with nine other state attorneys general.[123]

D. FACEBOOK'S MARKETPLACE

Facebook is one of the largest personal social networking platforms and has immense power in personal social networking services. Facebook's business operates around five primary product offerings: "(1) Facebook, a social network platform; (2) Instagram, a social network app for photos and videos; (3) Messenger, a cross-platform messaging app for Facebook users; (4) WhatsApp, a cross-platform messaging app; and (5) Oculus, a virtual reality gaming system."[124] Over 3 billion people regularly use Facebook itself,[125] with over 1.79 billion daily active users, 2.91 billion monthly active users, and an average revenue of $10.00 per user in Q3 2021.[126] As of September 2021, Facebook's family of products engaged 2.81 billion people daily, engaged 3.58 billion

ruling-could-affect-google-analysts.html [https://perma.cc/8GJF-PGHJ].

119. Press Release, Dep't of Just., Off. of Pub. Affs., Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws [https://perma.cc/2C3M-KWK7].

120. *Id.*

121. *Id.*

122. Adam Cohen, *Redesigning Search Would Harm American Consumers and Businesses*, GOOGLE: THE KEYWORD (Dec. 17, 2020), https://blog.google/outreach-initiatives/public-policy/redesigning-search-would-harm-consumers-and-american-businesses [https://perma.cc/EBG5-YNJ9].

123. Rani Molla & Adam Clark Estes, *Google's Three Antitrust Cases, Briefly Explained*, VOX, https://www.vox.com/recode/2020/12/16/22179085/google-antitrust-monopoly-state-lawsuit-ad-tech-search-facebook [https://perma.cc/TF9M-QP83] (Dec 17, 2020, 2:42 PM).

124. SUBCOMMITTEE REPORT, *supra* note 13, at 132.

125. Complaint for Injunctive & Other Equitable Relief at 1, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021) [hereinafter FTC Complaint]; *see also Our Mission*, FACEBOOK, https://about.fb.com/company-info [https://perma.cc/Y4F3-8LU6] ("Our products empower more than 3 billion people around the world to share ideas, offer support and make a difference.").

126. Facebook, Inc., Quarterly Report (Form 10-Q) 28, 33 (Oct. 26, 2021), https://www.sec.gov/Archives/edgar/data/1326801/000132680121000065/fb-20210930.htm [https://perma.cc/4KCT-CXXA].

people monthly, and generated an average revenue of $8.18 per user of one or more of their products.[127]

As measured by monthly active users, Facebook owns three of the seven most popular mobile apps in the United States.[128] No other personal social network of comparable scale exists anywhere in the world.[129] Because of its market power, several international antitrust enforcement agencies have scrutinized Facebook in recent years. For example, in July 2020, the United Kingdom's Competition and Markets Authority found that Facebook's market power "derives in large part from strong network effects stemming from its large network of connected users and the limited interoperability it allows to other social media platforms."[130]

"Facebook monetizes its personal social networking monopoly principally by selling advertising, which exploits a rich set of data about users' activities, interests, and affiliations to target advertisements to users."[131] Facebook, in combination with Google, comprised almost 61% of the total digital advertising spending in 2019.[132] That same year, Facebook generated more than $70 billion in revenue and $18.5 billion in profits.[133]

Facebook has maintained its dominant position (both in terms of numbers of users and revenue) by buying up companies that could present competitive threats, like Instagram and WhatsApp.[134] According to the FTC,

> Facebook has engaged in a systematic strategy—including its 2012 acquisition of up-and-coming rival Instagram, its 2014 acquisition of the mobile messaging app WhatsApp, and the imposition of anticompetitive conditions on software developers—to eliminate threats to its monopoly. This course of conduct harms competition, leaves consumers with few choices for personal social networking, and deprives advertisers of the

127. *See id*. at 27, 35.

128. SUBCOMMITTEE REPORT, *supra* note 13, at 136 (citations omitted).

129. Press Release, FTC, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization [https://perma.cc/FRV6-5WTA].

130. COMPETITION & MKTS. AUTH., ONLINE PLATFORMS AND DIGITAL ADVERTISING: MARKET STUDY FINAL REPORT 26 (2020), https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020_.pdf [https://perma.cc/YA8B-F6TK].

131. FTC Complaint, *supra* note 125, at 2.

132. Nicole Perrin, *Facebook-Google Duopoly Won't Crack This Year*, EMARKETER (Nov. 4, 2019), https://www.emarketer.com/content/facebook-google-duopoly-won-t-crack-this-year [https://perma.cc/7PYL-VG8A]. For yet another reflection of the monopolistic market power of the Big Tech companies, see Daisuke Wakabayashi & Tiffany Hsu, *Behind a Secret Deal Between Google and Facebook*, N.Y. TIMES, https://www.nytimes.com/2021/01/17/technology/google-facebook-ad-deal-antitrust.html [https://perma.cc/V94K-UEUF] (Apr. 6, 2021) ("In 2017, Facebook said it was testing a new way of selling online advertising that would threaten Google's control of the digital ad market. But . . . [by 2019, it had] join[ed] an alliance of companies backing a similar effort by Google. Facebook never said why it pulled back from its project, but evidence presented in an antitrust lawsuit filed by 10 state attorneys general [in December 2020] indicates that Google had extended to Facebook, its closest rival for digital advertising dollars, a sweetheart deal to be a partner.").

133. FTC Complaint, *supra* note 125, at 2.

134. *Id.* at 1–2.

benefits of competition.[135]

This strategy echoes CEO Mark Zuckerberg's view articulated in a June 2008 internal email provided to the FTC during its investigation into Facebook that "it is better to buy than compete."[136] This mode of thinking has pervaded Big Tech and will inevitably harm consumers and dampen innovation.

IV. FACEBOOK AS A CASE STUDY

Market share is usually measured by sales, but this concept presents difficulties when applied to Big Tech companies because they often do not directly charge consumers.[137] However, even though Facebook is "free" in the dollars-and-cents understanding of the word, consumers "pay" to use Facebook with data and attention.[138] "In digital markets where consumers do not pay a price, antitrust enforcement must become comfortable with a paradigm that focuses on quality."[139]

A. FACEBOOK V. MYSPACE

Launched in 2003, MySpace was one of the early personal social networks.

> MySpace did not restrict membership in its network, allowed users to customize their pages and to make them public, and continuously added features based on user demand. By the time The Facebook launched at Harvard University in February 2004, MySpace had more than a million users and was becoming America's dominant social network.[140]

In 2006, MySpace reached 100 million users and surpassed Google as the most visited website in the United States.[141] But it also started to run into serious problems. For instance, MySpace was known for having an open platform and a lack of privacy that garnered negative attention.[142]

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135. FTC, *supra* note 129.

136. FTC Complaint, *supra* note 125, at 2, 4, 21.

137. Pedro Aranguez-Diaz, Comment, *A New Opportunity for Digital Competition: Facebook, Libra, and Antitrust*, 50 STETSON L. REV. 199, 210 (2020).

138. *Id.* at 211 (citing Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 771 (2019)).

139. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 46 (2019).

140. Gil Press, *Why Facebook Triumphed Over All Other Social Networks*, FORBES (Apr. 8, 2018, 4:11 PM), https://www.forbes.com/sites/gilpress/2018/04/08/why-facebook-triumphed-over-all-other-social-networks/?sh=49b0dad66e91 [https://perma.cc/GHS2-H6LD].

141. Srinivasan, *supra* note 139, at 46 (citing *Hanging with the In-Crowd*, ECONOMIST (Sept. 14, 2006), https://www.economist.com/node/7918729 [https://perma.cc/EF3P-94PC]).

142. *See, e.g.*, Sue Downes, *Teens Who Tell Too Much*, N.Y. TIMES (Jan. 15, 2006), http://www.nytimes.com/2006/01/15/opinion/nyregionopinions/teens-who-tell-too-much.html [https://perma.cc/42QL-3CGW]; John Kreiser, *MySpace: Your Kids' Danger?*, CBS NEWS (Feb. 6, 2006, 6:17 PM), https://www.cbsnews.com/news/myspace-your-kids-danger [https://perma.cc/MN5E-YR4C]; Jane Gordon, *MySpace Draws a Questionable Crowd*, N.Y. TIMES (Feb. 26, 2006), https://www.nytimes.com/2006/02/26/nyregion/nyregionspecial2/myspace-draws-a-questionable-

Enter Facebook. MySpace was already a free platform, so Facebook needed to provide something different to entice users to move from MySpace to Facebook. Among other things, Facebook marketed itself as a privacy-focused alternative to MySpace.[143]

When Facebook entered the market, it stood apart because of its privacy protection. Facebook's privacy policy stated that "[w]e do not and will not use cookies to collect private information from any user."[144] Facebook initially allowed users to opt out of sharing information with third parties such as advertisers.[145] However, the concerns over protecting users' privacy did not last. On November 6, 2007, Facebook released "Beacon," an advertising product, which allowed Facebook to record and monitor its users' activity outside of Facebook.[146] Facebook eventually discontinued Beacon, but its premise remained.[147] Facebook surveillance today is a mandatory requirement for a third-party's use of other Facebook products.[148] In April 2008, Facebook surpassed MySpace in the number of unique worldwide visitors, and in May 2009, in the number of unique U.S. visitors.[149]

B. ACQUIRING INSTAGRAM AND WHATSAPP

The FTC recently brought an antitrust lawsuit against Facebook, alleging that Facebook "illegally maintain[ed] its personal social networking monopoly through a years-long course of anticompetitive conduct" and that Facebook's "course of conduct harms competition, leaves consumers with few choices for personal social networking, and deprives advertisers of the benefits of competition."[150] Two key aspects of Facebook's growth that the FTC's complaint focused on were its acquisitions of both Instagram and WhatsApp.

1. Instagram

According to the FTC's complaint filed against Facebook, Instagram "emerged at a critical time of technological and social transition, when users of personal social networking were migrating from desktop computers to

crowd.html [https://perma.cc/E3LN-ZX52]; Anna Bahney, *Don't Talk to Invisible Strangers*, N.Y. TIMES (Mar. 9, 2006), https://www.nytimes.com/2006/03/09/fashion/thursdaystyles/dont-talk-to-invisible-strangers.html [https://perma.cc/D5CU-YAA7]; Tom Rawstorne, *How Paedophiles Prey on MySpace Children*, DAILYMAIL.COM, http://www.dailymail.co.uk/femail/article-397026/How-paedophiles-prey-MySpace-children.html [https://perma.cc/3VEJ-D9UZ] (July 21, 2006, 10:40 PM); Wired Staff, *Myspace Murder: An Epilogue*, WIRED (Nov. 17, 2006, 12:00 PM), https://www.wired.com/2006/11/myspace-murder-an-epilogue [https://perma.cc/MD9L-V4G6].

143. Srinivasan, *supra* note 139, at 48.

144. *Facebook Privacy Policy*, FACEBOOK (2004), https://web.archive.org/web/20050107221705/http:/www.thefacebook.com/policy.php [https://perma.cc/54LR-XA2M].

145. Srinivasan, *supra* note 139, at 51.

146. *Id.* at 56.

147. *See id*. at 60–62.

148. *Id.* at 62.

149. Press, *supra* note 140.

150. FTC, *supra* note 129.

smartphones and toward a greater use of photo-based sharing."[151] During its investigation into Facebook, the FTC revealed documents indicating that Facebook knew it was "acquir[ing] Instagram to neutralize an emerging rival."[152] Because Instagram met the demand for social networking on smartphones, it became a clear threat to Facebook's long-established social media monopoly,[153] and Facebook had a "buy or bury" strategy whenever there was a competitive threat.[154] Instagram appeared to be a step ahead of Facebook in moving from desktop computers to smartphones. The biggest risk to Facebook was, and still is, that some other "new thing" will come along and take attention away from Facebook—Instagram was threatening to become that new thing before Facebook acquired it.[155]

Internal Facebook emails predating the Instagram deal discussed how cameras were the next new thing.[156] When Apple released the iPhone 4 with a front-facing camera in the early 2010s, it was a sign that social media was going to involve far more smartphones than desktops.[157] Facebook was "not well-positioned for mobile" adaptability at the time,[158] so it "identified a market . . . [and] a need."[159] Facebook knew that it would have had a hard time competing in the mobile space if it did not acquire or work with Instagram.[160]

Emails between Mark Zuckerberg and the head of Instagram illustrate how Facebook threatened Instagram.[161] Zuckerberg stated that Instagram needed to figure out how it would manage the relationship between the two platforms to help decide whether the two companies would be partners or competitors.[162] Regulators rightly read those emails as a threat.[163] As Zuckerberg explained in an email to Facebook's CFO David Ebersman, "controlling Instagram would secure Facebook's enduring dominance" by significantly hindering another firm from using photo-sharing on mobile phones as a way to gain popularity as a provider of personal social networking:

> Even if some new competitors spring[] up, buying Instagram, Path, Foursquare, etc. now will give us a year or more to integrate their dynamics before anyone can get close to their scale again. Within that time, if we incorporate the social mechanics they were using, those new products

151. FTC Complaint, *supra* note 125, at 4.
152. *See* SUBCOMMITTEE REPORT, *supra* note 13, at 392.
153. *See id*. at 151–52.
154. The Weeds, *The Next Four Years: Fighting Tech Monopolies*, VOX, at 35:54 (Jan. 15, 2021), https://open.spotify.com/episode/0oyxOAdjI1SF9BkVnnsNb7?si [https://perma.cc/E7G7-H77X] (downloaded using Spotify).
155. *Id*. at 36:57.
156. What Next: TBD, *Everybody Sues Facebook*, SLATE, at 6:50 (Dec. 11, 2020, 5:00 AM), https://slate.com/podcasts/what-next-tbd/2020/12/the-battle-to-break-up-facebook [https://perma.cc/Y9AM-N5SW].
157. *Id*. at 7:45.
158. *Id*. at 8:18.
159. *Id*. at 9:53.
160. *See id*. at 10:03.
161. *Id*. at 10:29.
162. *Id*. at 10:44.
163. *See id*.

> won't get much traction since we'll already have their mechanics deployed at scale.[164]

Read in conjunction with Facebook's internal emails, which also included suggestions to "pay[] a lot of money" for Instagram and concerns that Facebook would be "very behind in both functionality and brand on how one of the core use cases of Facebook will evolve in the mobile world,"[165] it is plain to see that Facebook's only goal in acquiring Instagram was to neutralize a competitor and protect its dominant market power. Facebook's Instagram acquisition gave it control over its biggest and most important competitor, securing Facebook's position as the largest personal social media company in the world with no signs of losing that status anywhere in sight.[166] If the current U.S. antitrust regime is not sufficient to stop such an acquisition, then it is clearly not up to the task of protecting consumers and businesses from monopolies.

2. WhatsApp

The other market that Facebook was unprepared to compete in was mobile messaging. Messaging was the next frontier in social networking in the early 2010s, and it was not something Facebook was good at.[167] By 2012, the threat of a mobile messaging app with social network capabilities running on multiple operating systems became "a strategic focus for [Facebook's] leadership."[168] In an April 2012 email produced to the FTC during its investigation, "Zuckerberg identified a troubling global trend of 'messaging apps . . . using messages as a springboard to build more general mobile social networks.' And by October 2012, the threat was [apparently] widely recognized within Facebook, with a Facebook business growth director predicting internally that '[t]his might be the biggest threat we've ever faced as a company.'"[169] Facebook considered an app offering mobile messaging services entering the personal social networking market to be "the next biggest consumer risk" for Facebook.[170] It identified WhatsApp, a popular mobile messaging app, to be the most significant such threat.[171] In an August 2013 email produced to the FTC during its investigation, "the head of Facebook's internal mergers and acquisitions . . . group warned that WhatsApp's 'kind of mobile messaging is a wedge into broader social activity/sharing on mobile we have historically led in web.'"[172] So, as it did with Instagram, Facebook acquired WhatsApp instead of trying to outcompete it.[173] And just as was the case with Facebook's acquisition of Instagram, our current antitrust regime proved to be not up to the task of stopping another monopolistic

164. FTC Complaint, *supra* note 125, at 5.
165. *Id.* at 4–5.
166. *See id*. at 4–6.
167. What Next: TBD, *supra* note 156, at 7:12.
168. FTC Complaint, *supra* note 125, at 6.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 7.
173. *Id.*

acquisition by a Big Tech giant of a growing competitive threat.

C. BEHAVIOR AS ANTICOMPETITIVE

In U.S. antitrust laws, "intent matters."[174] The courts have to look at *why* Facebook acquired Instagram and WhatsApp in order to determine if there was anticompetitive conduct or intent to obtain a monopoly in the market.[175] Facebook bought Instagram and WhatsApp because it was afraid of those two companies taking business from and outcompeting Facebook.[176] As such, Facebook's acquisitions should have been blocked as illegal, anticompetitive conduct under U.S. antitrust laws.[177] Current U.S. antitrust laws are supposed to protect choice and consumer welfare, yet these acquisitions reduced consumer choice.[178] However, because of the importance of the consumer welfare standard in current U.S. antitrust laws and because of the way consumer welfare is measured, current U.S. antitrust laws fail to adequately restrain anticompetitive conduct by Big Tech. It begs the question that if U.S. authorities had not allowed Facebook to acquire Instagram and WhatsApp in the first place, "would there be more benefits to consumers?"[179]

V. THE CONSUMER WELFARE STANDARD AND ITS FAILURE TO APPLY TO BIG TECH

The Sherman Act provides courts and agencies with little guidance in deciding when a company acts as a monopoly for antitrust purposes.[180] Nonetheless, defining the relevant market and evaluating a company's power within the relevant market are critical steps in cases involving the Sherman Act and challenges to mergers often brought under § 7 of the Clayton Act.[181]

There are three different approaches "used to measure market power: performance, rivalry, and structure."[182] However, most of the time, these three tests are inapplicable to Big Tech because of how the tests work. Each test measures sales, output, and price difference among competitors, none of which adequately capture the effects of the anticompetitive conduct we've seen from Big Tech.[183] Measuring market power is an inexact process.[184] When coupled

174. Planet Money, *The Case Against Facebook*, NPR, at 5:46 (Dec. 16, 2020, 8:21 PM), https://www.npr.org/2020/12/16/947160910/the-case-against-facebook [https://perma.cc/SS2J-3Z2R].

175. *Id.* at 5:51.

176. *See id*. at 10:10.

177. *See id*. at 6:43.

178. *Id.* at 6:52.

179. The Ezra Klein Show, *Antitrust, Censorship, Misinformation, and the 2020 Election*, VOX CONVERSATIONS, at 42:55 (Nov. 16, 2020), https://www.radio.com/podcasts/the-ezra-klein-show-20555/antitrust-censorship-misinformation-and-the-2020-election-350185251 [https://perma.cc/B5LZ-FPC3].

180. GELLHORN ET AL., *supra* note 16, at 113.

181. *Id.*

182. *Id.* at 114.

183. *See id*. at 114–15.

184. *Id.* at 116.

with the inexact costs to consumers of anticompetitive behavior by Big Tech, it is practically impossible to measure the market power required to trigger antitrust enforcement and evaluation.

According to FTC Commissioner Christine S. Wilson, "Under the consumer welfare standard, business conduct and mergers are evaluated to determine whether [the conduct or merger] harm[s] consumers in any relevant market."[185] Numerous cases have followed the view espoused by Judge Bork that Congress wrote the Sherman Act as a "consumer welfare prescription."[186]

However, per Lina Khan, the Chair of the FTC, "Focusing antitrust exclusively on consumer welfare is a mistake."[187] Congress created the FTC to prohibit "unfair methods of competition"[188] and serve as an "administrative tribunal" that carefully studies ongoing business practices and economic conditions.[189] To enable the agency to carry out these functions, Congress assigned the FTC powers to "make rules and regulations for the purpose of carrying out the [FTC Act's] provisions," as well as broad investigative authority to compel business information and conduct market studies.[190] Notably, Congress established the provision prohibiting "unfair methods of competition" to reach beyond the other antitrust statutes, "to fill in the gaps in the other antitrust laws, and to round them out and make their coverage complete."[191]

In 2015, the FTC adopted a set of "Enforcement Principles," stating that the FTC's targeting of "unfair methods of competition" would be guided by the "promotion of consumer welfare."[192] A narrow construction of consumer

185. Christine S. Wilson, Comm'r, FTC, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 1 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/EG93-MJJH].

186. GELLHORN ET AL., *supra* note 16, at 47; BORK, *supra* note 58, at 64.

187. Khan, *supra* note 60, at 743 (citations omitted).

188. S. Rep. No. 63-597, at 13 (1914) ("The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid [them] . . . or whether it would, by a general declaration condemning unfair practices, leave it to the commission to determine what practices were unfair. It concluded that the latter course would be better, for the reason . . . that there were too many unfair practices to define, and after writing 20 of them into the law it would be quite possible to invent others.").

189. *See* Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 233 (1980); *see also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 78 (2003).

190. 15 U.S.C. § 46.

191. Averitt, *supra* note 189, at 251 ("Section 5 is not confined to conduct that actually violates, or that threatens to violate, one of the other antitrust statutes. If it were limited to this extent it would be a largely duplicative provision. The legislative purpose instead assigned to Section 5 a broader role. It was to be an interstitial statute; it was to fill in the gaps in the other antitrust laws, to round them out and make their coverage complete. In addition to overt violations, therefore, Section 5 would reach closely similar conduct that violates the policy or 'spirit' of the antitrust laws, even though it may not come technically within its terms.").

192. FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf [https://perma.cc/PV7D-DFC7].

welfare as the guiding principle behind U.S. antitrust laws limits the scope of competitive harms the analysis considers by narrowing the focus to price and output rather than the competitive process and the inherent downsides of excessive market concentration.[193] Doing so is contrary to Congress's intent in passing the antitrust laws "to safeguard against excessive concentrations of economic power."[194] The antitrust laws' original intent and broad goals were "to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[195] The consumer welfare standard's narrow focus on price "to the exclusion of other factors that benefit consumers"[196] overlooks the many "other ways that excessive concentration can harm [consumers and other businesses]—enabling firms to squeeze suppliers and producers," mine personal data, and harm innovation.[197] Furthermore, consumer welfare only focuses on the difference between what consumers "actually pay[]" and what they "would be willing to pay."[198] In the realm of Big Tech, where the commodities are "free," the consumer welfare standard cannot be usefully applied to enforce U.S. antitrust laws.

Facebook removed two privacy-protected personal social networking options and, as Part VII of this Comment explains, degraded the user experience when it acquired Instagram and WhatsApp. Facebook did not start charging users money when it acquired two emerging rivals and started to chip away at its users' privacy protections. However, this loss of control over personal data and loss of alternative options for consumers—*that* is the cost. *That* is where the consumer is harmed and where the welfare *should be* measured.[199]

VI. CONSEQUENCES OF BIG TECH ON CONSUMERS

A. THE DECLINE IN BUSINESS FORMATION AND EARLY STARTUPS

Facebook's acquisition of Instagram both neutralized a threat while also making it harder for another personal social networking business to reach scale.[200] Given the size of Facebook and its network, new social networks confront considerable obstacles in attracting enough users to compete with Facebook.[201] Investors avoid investing in startup companies that compete with

193. *See* Jonathan Sallet, *Competitive Edge: Protecting the "Competitive Process"—The Evolution of Antitrust Enforcement in the United States*, WASH. CTR. FOR EQUITABLE GROWTH: COMPETITIVE EDGE (Oct. 31, 2018), https://equitablegrowth.org/competitive-edge-protecting-the-competitive-process-the-evolution-of-antitrust-enforcement-in-the-united-states [https://perma.cc/NXX7-H8J8].
194. Khan, *supra* note 60, at 743.
195. SUBCOMMITTEE REPORT, *supra* note 13, at 392 (citations omitted).
196. Wilson, *supra* note 185, at 5.
197. Khan, *supra* note 60, at 743.
198. Wilson, *supra* note 185, at 4.
199. What Next: TBD, *supra* note 156, at 16:06.
200. FTC, *supra* note 129.
201. *See* FTC Complaint, *supra* note 125, at 1–3; *see also* Press, *supra* note 140.

giants like Facebook because of the likelihood of failure.[202] It is thought to be "nearly impossible to overcome the monopoly" of the Big Tech companies.[203] In other words, these companies are "innovation kill zone[s]."[204]

In recent decades, there has been a sharp decline in new business formation and early-stage startup funding.[205] Job creation in the high-technology sector has likewise slowed considerably.[206] In 2000, the job creation rate in the high-technology sector was approaching 20% year-over-year.[207] Within a decade, the rate had halved to about 10%.[208] Even accounting for job losses during the Great Recession of 2007 to 2009, the dominance of online platforms was at least one factor that "materially weakened innovation and entrepreneurship in the U.S. economy."[209] Some venture capitalists, for example, report that they avoid funding entrepreneurs and other companies that compete directly with dominant firms in the digital economy.[210] In the wake of an acquisition by a Big Tech giant like Facebook, investments in startups in the same space drop by over 40%, and deal numbers fall by over 20% in the three years following an acquisition.[211]

The decline in business formation and early startups has followed hand-in-glove with the explosive growth of Facebook and the other Big Tech companies. Dominant platforms, such as Facebook, enjoy superior bargaining power over the third parties that depend on their platforms to access users and markets.[212] Their bargaining leverage is a form of market power,[213] which the dominant platforms routinely use to protect and expand their dominance. The FTC uncovered that on April 9, 2012—the day that Facebook publicized its acquisition of Instagram—Zuckerberg wrote privately to a colleague to celebrate the acquisition and revealed this monopolistic way of thinking: "I remember your internal post about how Instagram was our threat and not Google+. You were basically right. One thing about startups though is you can often acquire

202. SUBCOMMITTEE REPORT, *supra* note 13, at 48 (citation omitted).

203. *Id.*

204. *Id.*

205. *See, e.g.*, Ufuk Akcigit & Sina T. Ates, *Knowledge in the Hands of the Best, Not the Rest: The Decline of US Business Dynamism*, VOXEU (July 4, 2019), https://voxeu.org/article/decline-us-business-dynamism [https://perma.cc/BYQ9-6E24].

206. JOHN HALTIWANGER, IAN HATHAWAY & JAVIER MIRANDA, DECLINING BUSINESS DYNAMISM IN THE U.S. HIGH-TECHNOLOGY SECTOR 4 (2014), https://www.kauffman.org/wp-content/uploads/2019/12/declining_business_dynamism_in_us_high_tech_sector.pdf [https://perma.cc/3Y5R-C29T].

207. *Id.*

208. *Id.*

209. SUBCOMMITTEE REPORT, *supra* note 13, at 47 (citations omitted).

210. *Id.* at 48; *see also* Sai Krishna Kamepalli, Raghuram Rajan & Luigi Zingales, *Kill Zone 2* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27146, 2021), https://www.nber.org/papers/w27146 [https://perma.cc/NW2N-AC4V].

211. Kamepalli, *supra* note 210, at 2, 39.

212. SUBCOMMITTEE REPORT, *supra* note 13, at 390.

213. Aviv Nevo, Deputy Assistant Att'y Gen. for Econ., U.S. Dep't of Just., Antitrust Div., Mergers that Increase Bargaining Leverage, Remarks at the Stanford Institute for Economic Policy Research 7 (Jan. 22, 2014), https://www.justice.gov/atr/file/517781/download [https://perma.cc/UJA8-2ZV2] ("[A]s a matter of economic theory and case law bargaining leverage is a source of market power . . . .").

them."[214] Had Facebook not been allowed to dominate the market through acquisitions and mergers, thereby killing innovation and entrepreneurship, consumers would have more choices for personal social media platforms.

B. THE NOT-SO-FREE COST OF PAYING WITH DATA AND LOSS OF PRIVACY

Traditionally, market power has been defined as the ability to raise prices without a loss of demand, such as fewer sales or customers.[215] However, because online platforms rarely charge consumers a monetary price, traditional assessments of market power are more difficult to apply to digital markets.[216] Because of the pricing dynamics in the digital economy, the best evidence of digital platform market power is not prices charged but the degree to which these platforms erode consumer privacy without prompting a market response.[217]

A lack of competition can lead to reduced quality in many markets, but "the loss of quality due to monopolization—and in turn, privacy and data protection—is even more pronounced in digital markets because product quality is often the 'relevant locus of competition.'"[218] In the absence of adequate transparency or real consumer options, "dominant firms may impose terms of service with weak privacy protections that are designed to restrict consumer choice, creating a race to the bottom."[219] This can also create a cycle in which new firms do not offer products with strong privacy protections or do not even enter into the market.[220]

> [D]ominant platforms have been able to extort an ever-increasing amount of data from their customers and users, ranging from a user's personal data to a business's trade secrets and proprietary content. In the absence of an alternative platform, users effectively have no choice but to accede to the platform's demands for payment whether in the form of dollars or data.[221]

214. FTC Complaint, *supra* note 125, at 5.

215. W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 62 (4th ed. 2005).

216. *See* Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. Pa. L. Rev. 1663, 1687 (2013) ("While increased competition, at least on its own, will not always cause firms to better use or protect customer information, any competitive effects analysis that misses these two nonprice dimensions of platform market performance will be incomplete and could be biased toward underenforcement.").

217. *See, e.g.*, Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks for the Antitrust New Frontiers Conference (June 11, 2019), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers [https://perma.cc/AEZ8-Y5HE] ("It is well-settled, however, that competition has price and non-price dimensions."); Maurice E. Stucke & Ariel Ezrachi, *When Competition Fails to Optimize Quality: A Look at Search Engines*, 18 YALE J.L. & TECH. 70, 103 (2016).

218. SUBCOMMITTEE REPORT, *supra* note 13, at 54.

219. *Id.* (citations omitted); Shelanski, *supra* note 216, at 1691 ("Competition, however, may drive platforms to adopt and adhere to stronger privacy policies, making it worthwhile for a platform to advertise such policies to consumers in order to differentiate itself from its competitors.").

220. SUBCOMMITTEE REPORT, *supra* note 13, at 55.

221. *Id.* at 390.

To make matters worse, Facebook uses this collection of consumer data as a weapon. "Internal communications by Facebook's senior executives and interviews with former employees . . . indicate that Facebook selectively enforced its platform policies based on whether it perceived other companies as competitive threats.'"[222] "Facebook developed the Facebook Platform to connect other applications to Facebook's social graph," which is the network of friends and connections you have on Facebook.[223] In an interview in 2007, Zuckerberg described the Facebook Platform's goals as making "Facebook into something of an operating system so you can run full applications."[224] Over the last few years, Facebook has "recognized that access to its social graph provided other applications with a tool for significant growth."[225] In documents produced to the U.S. House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law (House Subcommittee), Facebook's senior executives realized by 2012 that "apps could use the Facebook Platform to build products that were competitive with Facebook and 'siphon [their] users.'"[226] "Facebook's senior employees agreed that competitive apps used the Facebook Platform to 'steal [their] engagement' and 'could be viewed as replacing Facebook functionality,' adding that they planned to raise this concern with Mr. Zuckerberg."[227] "Recognizing that some social apps had grown too popular and could compete with Facebook's family of products, Facebook cut off their access to Facebook's social graph."[228] The social graph, along with Facebook's integration feature and notification of Facebook friends on Instagram, is how Instagram became so popular.[229] The primary way that Instagram and many other companies grow is through Facebook data.[230] So, if these companies do not do exactly what Facebook says, they are cut off.[231] Once you become "an essential monopoly," one that can pick and choose who you will deal with and discriminate against those who are considered competitors and threats, then

222. *Id.* at 166.

223. *Id.*; *see also* Josh Constine, *Facebook Is Done Giving Its Precious Social Graph to Competitors*, TECHCRUNCH (Jan. 24, 2013, 9:51 PM), https://techcrunch.com/2013/01/24/my-precious-social-graph [https://perma.cc/FW9H-MD4C].

224. David Kirkpatrick, *Facebook's Plan to Hook Up the World*, CNNMONEY (May 29, 2007, 5:29 PM), https://money.cnn.com/2007/05/24/technology/facebook.fortune/ [https://perma.cc/CR4U-4P7R].

225. SUBCOMMITTEE REPORT, *supra* note 13, at 166.

226. *Id.*

227. *Id.* at 167.

228. *Id.* (citing Olivia Solon & Cyrus Farivar, *Mark Zuckerberg Leveraged Facebook User Data to Fight Rivals and Help Friends, Leaked Documents Show*, NBC NEWS, https://www.nbcnews.com/tech/social-media/mark-zuckerbergleveraged-facebook-user-data-fight-rivals-help-friends-n994706 [https://perma.cc/UL8Z-WE24] (Apr. 18, 2019, 6:51 PM)); Constine, *supra* note 223; Rachel Kraus, *Mark Zuckerberg Gave the Order to Kneecap Vine, Emails Show*, MASHABLE (Dec. 5, 2018), https://mashable.com/article/mark-zuckerberg-helped-thwart-vine [https://perma.cc/KM4L-H25W]; *see also* Casey Newton, *Why Vine Died*, VERGE (Oct. 28, 2016, 12:15 PM), https://www.theverge.com/2016/10/28/13456208/why-vinedied-twitter-shutdown [https://perma.cc/QA2X-KZEC].

229. What Next: TBD, *supra* note 156, at 11:03.

230. *Id.*

231. *Id.* at 10:52.

there is a problem.[232]

VII. CHANGING ANTITRUST

Courts that have adopted the consumer welfare standard have not indicated that other goals are excluded. This opens the door to changes in how we approach antitrust and measure anticompetitive and monopolistic activities among companies. The Supreme Court "has yet to issue a decision that precludes judges from relying upon non-efficiency arguments"—like data, privacy, and competition—over efficiency concerns.[233]

As Lina Khan explains in *Amazon's Antitrust Paradox*, "Internet platforms mediate a large and growing share of our commerce and communications. Yet evidence shows that competition in platform markets is flagging, with sectors coalescing around one or two giants."[234] By giving the power back to the consumer, the capitalist market will function as designed. However, giving this control back to consumers requires courts and Congress to change the current trajectory of U.S. antitrust laws in the technological arena. Killing your competitors is not and cannot continue to be a viable business model—outperforming competitors must be.

A. CURRENT CHANGES IN U.S. ANTITRUST LAWS DIRECTED AT BIG TECH

In response to Big Tech's continuing growth, President Biden signed an Executive Order on Promoting Competition in the American Economy on July 9, 2021, that includes seventy-two initiatives.[235] The Executive Order "seeks to ensure small businesses and consumers have access to fair markets."[236] In a speech on the Order, President Biden stated, "Capitalism without competition isn't capitalism; it's exploitation."[237] President Biden "warned that without healthy competition, the biggest players can 'change and charge what they want and treat you however they want.'"[238] President Biden "noted that the past few decades have threatened . . . competition" and stated that "[f]orty years ago, we chose the wrong path . . . following the misguided philosophy of people like Robert Bork and pullback on enforcing laws to promote competition."[239]

Additionally, in February 2021, Senator Amy Klobuchar of Minnesota

232. Political Gabfest, *The "Breaking Up Facebook" Edition*, SLATE, at 29:30 (Dec. 10, 2020, 5:15 PM), https://slate.com/podcasts/political-gabfest/2020/12/facebook-presidential-norms-attempted-coup [https://perma.cc/MQU4-KJ4C].

233. GELLHORN ET AL., *supra* note 16, at 48.

234. Khan, *supra* note 60, at 802.

235. Stewart, *supra* note 3; Exec. Order No. 14,036, 86 Fed. Reg. 36,987 (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ [https://perma.cc/226D-YCJ7].

236. Leah Nylen, *Biden Launches Assault on Monopolies*, POLITICO, https://www.politico.com/news/2021/07/08/biden-assault-monopolies-498876 [https://perma.cc/CRB6-JD4G] (July 9, 2021, 5:45 PM).

237. Stewart, *supra* note 3.

238. *Id.*

239. Nylen, *supra* note 236.

introduced a bill to promote and improve antitrust enforcement.[240] The Competition and Antitrust Law Enforcement Reform Act would place the burden on prospective merging companies to prove that the merger does not create a risk of lessening competition or creating a monopoly.[241] If such a revolutionary bill were signed into law, antitrust litigation would increase. However, such an increase is just what antitrust needs. Courts "have become lenient on antitrust cases in recent decades," and more aggressive challenges in the courts are what we need to push back against the monopolies of Big Tech.[242] By placing the burden on the merging parties to prove the merger *does not* create anticompetitive results rather than on the government to prove *it does*, we can vastly change the landscape of U.S. antitrust laws. This bill would also create a better opportunity for variety in the marketplace. Senator Klobuchar believes that judges who understand the original antitrust laws and how the laws were meant to be enforced need to be placed in the judiciary.[243] By placing individuals in the judiciary who understand the legislative intent behind the original U.S. antitrust bills, we can better safeguard against excessive concentrations of economic power and protect consumers, "workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[244]

Finally, the U.S. Senate passed a bill on June 2, 2021, to increase fees that larger merging companies must pay.[245] The extra money will go to the FTC and DOJ so that those agencies are better able to hire more lawyers.[246] In a recent interview, Senator Klobuchar stated that "we cannot take on the biggest companies the world has ever known with duct tape and band-aids."[247] Thus, this money will give government agencies bigger budgets to hire more staff to better combat Big Tech.[248] With more funds, the FTC and DOJ can more effectively live up to their purposes. For instance, the FTC, with a greater arsenal of qualified attorneys, can better prohibit unfair methods of competition and serve as an administrative tribunal that carefully studies ongoing business practices and conditions.[249] This bill must next be approved by the House of Representatives before it can be sent to the White House for President Biden to sign into law.[250]

These kinds of sweeping changes are precisely what U.S. antitrust laws need

240. Matthew F. Tilley & David B. Hamilton, *Competition and Antitrust Law Enforcement Act Proposes Wholesale Changes to U.S. Antitrust Law*, NAT'L L. REV. (Feb. 15, 2021), https://www.natlawreview.com/article/competition-and-antirust-law-enforcement-act-proposes-wholesale-changes-to-us [https://perma.cc/J2L5-8GF5].

241. *Id.*

242. Stewart, *supra* note 3.

243. Lovett or Leave It, *Rich Boys and Their Space Toys*, CROOKED MEDIA, at 58:41 (July 17, 2021), https://www.youtube.com/watch?v=P_i1PkE37IE [https://perma.cc/VX2F-YQBQ].

244. SUBCOMMITTEE REPORT, *supra* note 13, at 392 (citations omitted).

245. Lovett or Leave It, *supra* note 243, at 51:47.

246. *Id.* at 52:08.

247. *Id.* at 52:15.

248. *See* Diane Bartz, *U.S. Senate Passes Bill to Raise Fees on Biggest Mergers*, REUTERS, https://www.reuters.com/business/us-senate-passes-bill-raise-fees-biggest-mergers-2021-06-09 [https://perma.cc/Y688-5AGE] (June 8, 2021, 8:35 PM).

249. *See supra* notes 188–189 and accompanying text.

250. Bartz, *supra* note 248.

to adequately protect consumers and companies alike. Upon passage of the bill through the Senate, Senator Chuck Grassley of Iowa, the senior Republican on the Senate Judiciary Committee, said that the current system to stop anticompetitive practices and mergers is "outdated" and "not getting the job done."[251] Through changes in legislation and the judiciary—changes that appear to have at least some bipartisan support—we can better prepare ourselves to tackle Big Tech and its monopolistic and anticompetitive behavior.

B. Suggested Changes to U.S. Antitrust Laws to Protect Against Big Tech

While the current changes in motion will help protect consumers against Big Tech, there is still much that needs to be revised in U.S. antitrust laws. Our political leaders must push for antitrust reform. Agencies must deny mergers that stifle competition and have long-term negative consequences to innovation, creativity, choice, and data. Companies should no longer be able to own and sell in the same marketplace. Additionally, citizens should be able to challenge antitrust violations more easily, and those found in violation of U.S. antitrust laws should face civil penalties.

Congress and the courts must focus on the market structure in dealing with Big Tech in U.S. antitrust laws. By changing how we look at anticompetitive behavior, monopolies, and the consumer welfare standard, we can protect emerging businesses and change the quality of technology and goods available to consumers. The market only works as designed when companies respond to consumer demands. But when the market goes unchecked by the agencies that are meant to keep it operating within this framework, companies have no incentive to listen to consumers. After all, it's not like consumers have the option to use another platform—all viable alternatives have already been acquired.

We must require that Big Tech share data between platforms to allow up-and-coming businesses to work off existing frameworks, much like Instagram did with Facebook before Facebook neutered Instagram as a growing competitive threat through acquisition. Thus, rather than forcing startups to bend at every one of Facebook's demands, an interoperability requirement would force Facebook to share information across platforms. This kind of change would allow new companies to compete with Big Tech rather than just be competitive enough to be acquired by a Big Tech monopolist.

Additionally, we must require more privacy protection for user data or give startups the ability, through an interoperability platform, to work off the existing infrastructure to build a competitive and enticing, privacy-protected alternative to the existing Big Tech giants. Consumers should have more control over their privacy and data. To have more control, consumers need more options. To have more options, U.S. antitrust laws and courts need to adjust how they measure consumer welfare. To change how they measure consumer welfare, they must look outside of fiscal cost alone and move toward considering data, privacy, creativity, and innovation costs. By creating and interpreting U.S. antitrust laws

251. *Id.*

with an eye toward opportunity, we can create a platform for small businesses to grow while also giving Big Tech an incentive to stay innovative and competitive rather than simply buying up emerging rivals. Such a change will further promote and encourage investment in startup companies. In digital markets where consumers do not pay an upfront monetary price, U.S. antitrust enforcement must shift its focus. By laying down new laws and regulations that protect consumers, we can stop Big Tech from acquiring more companies and pave a path for new companies to compete with Big Tech, thereby providing more options for consumers.

VIII. CONCLUSION

The continuing domination of the Chicago School of thought and its focus on the consumer welfare standard has resulted in higher prices and markups, monopolies going unchecked, and data being freely collected and distributed.[252] Consumers hand over data and attention in exchange for the "free" services offered by Big Tech. The consumer welfare standard's narrow focus on price "to the exclusion of other factors that benefit consumers"[253] overlooks the many "ways that excessive concentration can harm" consumers and businesses alike.[254]

As this Comment has illustrated, current U.S. antitrust laws do not adequately regulate Big Tech or anticompetitive and monopolistic behavior in the technological arena. It is time for U.S. antitrust laws to be revised and interpreted to better incorporate technological advances and businesses of the twenty-first century. The antitrust statutes were created to invite refinement applicable for the time.[255] Technology is here to stay, and if we want to see what it is capable of, we have to promote and protect innovation by refining U.S. antitrust laws already on the books and creating new laws that better protect against Big Tech. As the D.C. Circuit Court of Appeals stated in *United States v. Microsoft Corp.*, "The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it."[256] Competitive acts increase social welfare. As this Comment has explained, Big Tech, specifically Facebook, is not increasing social welfare but is instead reducing it. The pending lawsuits discussed in Part III of this Comment have the power to set the tone and precedent for how the United States will manage anticompetitive and monopolistic behavior in the coming years. President Biden's Executive Order and the Competition and Antitrust Law Enforcement Reform Act have the potential to boost the government's ability to combat Big Tech adequately. Along with additional changes, such movements set the stage for promoting competitive acts and thereby increasing rather than reducing social welfare.

252. Khan, *supra* note 1, at 132.
253. Wilson, *supra* note 185, at 5.
254. Khan, *supra* note 60, at 743.
255. GELLHORN ET AL., *supra* note 16, at 39.
256. 253 F.3d 34, 58 (D.C. Cir. 2001).

Much like *Microsoft* set the stage for Big Tech's explosive growth, legislative, judicial, administrative, and enforcement changes in the next few years can set the stage for future technological innovations.