Maverick Theory: Preserving Competition in the Digital Economy

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"*[I]t is better to buy than compete*." – Mark Zuckerberg[1]

I. INTRODUCTION

On February 27, 2012, Facebook CEO Mark Zuckerberg emailed Facebook CFO David Ebersman to propose that their company buy Instagram.[2] Zuckerberg explained his motivations, writing, "[T]he brands are already meaningful, and if they grow to a large scale they could be very disruptive to us . . . . These entrepreneurs don't want to sell . . . but at a high enough price — like $500m or $1b — they'd have to consider it."[3] Ebersman told Zuckerberg that "neutraliz[ing] a potential competitor" was a poor justification for the acquisition because another company would simply take Instagram's place in the market.[4] Zuckerberg countered, "what we are really buying is time . . . . [B]uying 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."[5] Forty-five minutes later, Zuckerberg walked back his earlier emails, writing, "I didn't mean to imply that we'd be buying them to

1. Katie Canales, *'It's Better to Buy than Compete': The FTC Is Using Mark Zuckerberg's Own Words Against Him*, INSIDER (Dec. 10, 2020), https://www.businessinsider.in/tech/news/its-better-to-buy-than-compete-the-ftc-is-using-mark-zuckerbergs-own-words-against-him-read-the-facebook-ceos-crucial-emails-here-/articleshow/79666677.cms.

2. Casey Newton & Nilay Patel, *'Instagram Can Hurt Us': Mark Zuckerberg Emails Outline Plan to Neutralize Competitors*, THE VERGE (July 29, 2020), https://www.theverge.com/2020/7/29/21345723/facebook-instagram-documents-emails-mark-zuckerberg-kevin-systrom-hearing.

3. Miguel Carruego, *Learnings from the GAFA Hearings to Product People*, MEDIUM (Aug. 24, 2020), https://mikecarruego.medium.com/learnings-from-the-gafa-hearings-to-product-people-344007dddd14.

4. Timothy B. Lee, *Zuckerberg Wrote "Instagram Can Hurt Us" Days Before Acquisition*, ARS TECHNICA (July 29, 2020), https://arstechnica.com/tech-policy/2020/07/zuck-email-instagram-deal-could-neutralize-a-potential-competitor.

5. Newton & Patel, *supra* note 2.

prevent them from competing with us in any way."[6] But it was too late. Zuckerberg had just exposed his company to legal scrutiny by openly admitting in writing that his motivation for buying Instagram was to eliminate Facebook's competition. Federal antitrust laws are designed to prevent the exact type of anticompetitive acquisition that Zuckerberg described, and his emails would be sure to draw scrutiny from either the Federal Trade Commission (FTC) or the Antitrust Division of the U.S. Department of Justice (DOJ) when either agency reviewed the deal.[7]

In April 2012, Instagram co-founder Kevin Systrom agreed to sell the company to Facebook for $1 billion.[8] Four months later, the FTC ended its merger investigation and cleared the deal to Facebook's great fortune.[9] The FTC completed its review without holding any open hearings or issuing a public report.[10] While no one knows for sure, it is generally assumed that the FTC declined to challenge the acquisition because they felt that they did not have enough evidence to prove that Instagram would become a substantial competitor with Facebook.[11] At the time of the deal, Instagram had thirty million users

6. *Id.*

7. Canales, *supra* note 1. Federal antitrust enforcement agencies are supposed to block any merger whose effect "may be substantially to lessen competition, or to tend to create a monopoly." The Clayton Act, 15 U.S.C. § 18. Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, the FTC and DOJ share jurisdiction on merger reviews. *See infra* note 50.

8. Newton & Patel, *supra* note 2.

9. *Facebook's Instagram Acquisition: The Billion-Dollar Story*, THE VERGE (Dec. 16, 2012), https://www.theverge.com/2012/4/13/2946785/facebook-instagram-acquisition.

10. Newton & Patel, *supra* note 2.

11. *Id.* Traditional merger analysis is centered around prediction of the future. Antitrust enforcement agencies use analytical economic methods and other evidence to predict whether a merger may substantially lessen competition. *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §1 (2010), https://www.justice.gov/atr/horizontal-merger-guidelines-08192010. This prediction gets harder when nascent competitors are involved because there often isn't a long history of revenue and other business data to input into the economic models. *See* Tracy J. Penfield & Molly Pallman, *Looking Ahead: Nascent Competitor Acquisition Challenges in the "TechLash" Era*, ANTITRUST SOURCE (June 2020) at 4, https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/2020/june-2020/jun20_penfield_6_17f.pdf ("When a nascent competitor is involved . . . [it] injects considerable uncertainty into the Agencies' evaluation, which

but only had thirteen employees and reported zero revenue.[12] When the acquisition was final, a Facebook employee emailed Zuckerberg to congratulate him on the move.[13] Zuckerberg wrote back, "One reason people underestimate the importance of watching Google is that we can likely just always buy any competitive startups . . . . But it'll be a while before we can buy Google."[14] Since the acquisition, Instagram has become the most popular photo-sharing app, with over a billion users worldwide. The company generated an estimated $24 billion in revenue in 2020, which was 36.9% of Facebook's total revenue.[15]

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will necessarily plague any assessment of a nascent competitor's future viability and competitive significance.").

12. Kurt Wagner, *Here's Why Facebook's $1 billion Instagram Acquisition Was Such a Great Deal*, VOX (Apr. 9, 2017), https://www.vox.com/2017/4/9/15235940/facebook-instagram-acquisition-anniversary; Newton & Patel, *supra* note 2.

13. Newton & Patel, *supra* note 2.

14. *Id.* Zuckerberg's internal emails concerning the Instagram and WhatsApp merger were made public in December 2020 when the FTC sued Facebook for illegal monopolization. The complaint centered around the company's acquisitions of WhatsApp and Instagram. Canales, *supra* note 1. Unsurprisingly, Zuckerberg's emails were quoted on page 2 of the complaint. FTC v. Facebook, 560 F. Supp. 3d 1, 8 (D.D.C. 2021). Zuckerberg is not the first tech CEO to have his own emails used against him in a federal antitrust lawsuit. As CEO of Apple, Steve Jobs wrote an email to James Murdoch, then owner of publisher HarperCollins, offering to form a price fixing agreement. James B. Stewart, *Steve Jobs Defied Convention, and Perhaps the Law*, N.Y. TIMES (May 2, 2014), https://www.nytimes.com/2014/05/03/business/steve-jobs-a-genius-at-pushing-boundaries-too.html. Jobs wrote, "Our proposal does set the upper limit for e-book retail pricing based on the hardcover price of each book," urging HarperCollins to "throw in with Apple." *Id.* Unsurprisingly, in 2013, the Federal District Court for the Southern District of New York ruled that Apple was liable for facilitating a conspiracy to raise the price of e-books in violation of the Sherman Act. *Id.* Herbert Hovenkamp, a prominent antitrust scholar, described Jobs as "a walking antitrust violation." *Id.*

15. Mansoor Iqbal, *Instagram Revenue and Usage Statistics (2021)*, BUS. OF APPS (Sept. 6, 2022), https://www.businessofapps.com/data/instagram-statistics. Big Tech companies have thrived in the COVID-19 pandemic. The pandemic created the perfect ecosystem for tech companies. Millions of Americans working or having school from home created unprecedented consumer demand for tech products. Americans shopped more on Amazon, bought more Macs and iPads, and bought more software from Microsoft. By April 2021, Apple had so much extra cash on hand that it spent $90 billion on stock buy backs. Shira Ovide, *How Big Tech Won the Pandemic*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/04/30/technology/big-tech-pandemic.html.

Zuckerberg and Facebook's strategy of buying up smaller competitors is not unique. Over the past two decades, the most powerful tech companies have successfully bought out startups as a strategy to eliminate their competition and maintain their market power.[16] In particular, the "Big Five" (Google, Amazon, Apple, Facebook, and Microsoft) have an insatiable appetite for buying out smaller competitors, and they are doing so at a tremendous pace.[17] Collectively, these five companies have made thirty-two $1 billion plus acquisitions since 2000.[18] Some of the most significant acquisitions to date include LinkedIn, acquired by Microsoft for $26.2 billion; WhatsApp, acquired by Facebook for $19 billion; and Beats, acquired by Apple for $3 billion. [19]

Big Tech's buying spree has transformed the makeup of the tech sector. Once a diverse group of smaller startups, the tech economy has coalesced around the Big Five, and each member now dominates their respective market.[20] Meta, the newly named parent company of Facebook and its affiliates, has three and half billion users across its networks.[21] Meta and Alphabet, Google's parent company, control more

16. *Visualizing Tech Giants' Billion-Dollar Acquisitions*, CBINSIGHTS (Feb. 24, 2021), https://www.cbinsights.com/research/tech-giants-billion-dollar-acquisitions-infographic. The Supreme Court has defined market power as the ability to raise prices "above the levels that would be charged in a competitive market." Jefferson Parish Hosp. v. Hyde, 466 U.S. 2, 27 n.46 (1984) ("As an economic matter, market power exists whenever prices can be raised above levels that would be charged in a competitive market.").

17. CBINSIGHTS, *supra* note 16.

18. *Id.*

19. *Id.* The $19 billion price tag for WhatsApp was an enormous figure at the time. Gordon Kelly, *5 Key Reasons WhatsApp Is Worth $19 Billion—to Facebook*, FORBES (Feb. 20, 2014), https://www.forbes.com/sites/gordonkelly/2014/02/20/5-key-reasons-whatsapp-is-worth-19bn-to-facebook. However, Facebook's user base was dwindling while WhatsApp's was exploding. *Id.* At the time, WhatsApp was the leading messaging service in Europe and India. *Id.* Thus, Facebook's ultimate motive for the acquisition was to provide a boost to its user count, thus increasing monetization. *Id.* Also, Facebook wanted to buy WhatsApp before any of its rivals did. *Id.*

20. Chris Alcantara et al., *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions.

21. Alison Beard, *Can Big Tech Be Disrupted?*, HARV. BUS. REV. (Jan.–Feb. 2020), https://hbr.org/2022/01/can-big-tech-be-disrupted.

than half of global online ad spending.[22] Amazon Web Services operates almost one-third of the internet, and Amazon itself accounts for 40% of online spending in the United States.[23] Apple, the world's most valuable company, recently reached a stock market value of $3 trillion, which is greater than the GDP of the U.K.[24] Meanwhile, Microsoft recently reported its most profitable quarter ever with a record $51.7 billion in sales.[25] Overall, the Big Five are worth more "than the next 27 most valuable U.S. companies put together, including corporate giants like Tesla, Walmart, and JPMorgan Chase."[26]

Congress is currently considering a group of bills that would rein in the power of Big Tech; however, each of these bills proposes overbroad solutions like size-based presumptions.[27] Economic analysts estimate that the proposed bills will have significant financial repercussions not only for the Big Five but also for a host of other U.S. companies in competitive markets that have not been the focus of recent antitrust criticism.[28] "Big is bad" takes a chainsaw to a problem that requires a scalpel, and the idea is contrary to the Consumer Welfare Standard, which has been the guiding principle of antitrust law since

22. *Id.*

23. *Id.*

24. Julia Horowitz, *Apple's Warp-Speed Journey to $3 Trillion*, CNN (Jan. 4, 2022), https://www.cnn.com/2022/01/04/investing/premarket-stocks-trading; Zackary Smith, *Apple Becomes 1st Company Worth $3 Trillion—Greater Than the GDP of the UK*, FORBES (Jan. 3, 2022), https://www.forbes.com/sites/zacharysmith/2022/01/03/apple-becomes-1st-company-worth-3-trillion-greater-than-the-gdp-of-the-uk.

25. Karen Weise, *Microsoft's Profit Continues to Climb*, N.Y. TIMES (Jan. 25, 2022), https://www.nytimes.com/2022/01/25/technology/microsoft-earnings-q2-2022.html. In January 2022, Microsoft reported that it had $125 billion in cash. Earlier in the month, the company announced plans to buy the video game powerhouse Activision for nearly $70 billion. *Id.*

26. Shira Ovide, *Big Tech Has Outgrown this Planet*, N.Y. TIMES (Oct. 12, 2021), https://www.nytimes.com/2021/07/29/technology/big-tech-profits.html.

27. John Ceccio & Christopher Mufarrige, *Digital Platform Competition, Merger Control, and the Incentive to Innovate: Don't Kill the Goose that Lays the Golden Egg*, 30 Competition: J. Anti., UCL & Privacy Sec. Cal. L. Assoc. 52 (2020).

28. CHRISTIAN DIPPON & MATTHEW HOELLE, THE ECONOMIC COSTS OF STRUCTURAL SEPARATION, LINE OF BUSINESS RESTRICTIONS, AND COMMON CARRIER REGULATION OF ONLINE PLATFORMS AND MARKETPLACES (NERA Economic Consulting, 2021).

the 1970s.[29] A critical mass of commentators and politicians agree that it is time for a major change, but if Congress is not careful, they could destroy the innovative ecosystem that created the Big Five and gave consumers the superior products and services that they want.[30] It is a fine line to walk. Congress must amend antitrust laws so that they are strict enough to restore real competition to the tech economy but not so strict that they ruin the innovative ecosystem that created the world's most valuable companies.

Instead of completely overhauling antitrust law as we know it, Congress should reinforce the current merger framework using existing precedent. Implementing "maverick theory" into the Clayton Act can end Big Tech's buying spree and prevent the Big Five from becoming unstoppable monopolies. Maverick theory states that certain smaller, disruptive competitors ("mavericks") are deserving of special protection from mergers due to their unique role in the marketplace.[31] Using means such as innovative products or unique pricing plans, maverick firms prevent coordination among rivals to the benefit of consumers.[32] Federal courts have endorsed maverick theory, and Section 2.1.5 of the FTC/DOJ Horizontal Merger Guidelines (Guidelines) already outlines maverick theory and how it operates.[33] Codifying maverick theory will

29. Since the 1970s, antitrust regulation has been based on evaluating consumer harm, which is measured largely through price increases. The theory is now known as the Consumer Welfare Standard. *See* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (interpreting antitrust laws to protect consumers and describing the Sherman Act as a "consumer welfare prescription."); *see also* Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (establishing that the rule of reason standard must be based upon demonstrable economic effect). Put simply, the Consumer Welfare Standard states that a merger, or other business conduct, is not anticompetitive unless it leads to lower output or increased price for consumers. *See* ROBERT H. BORK, THE ANTITRUST PARADOX 66 (1978). Since the Sylvania decision, the Supreme Court has relied on the Consumer Welfare Standard and modern economic theory to inform its interpretation of federal antitrust laws. *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

30. Ceccio & Mufarrige, *supra* note 27.

31. Taylor M. Owings, *Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*, 66 VAND. L. REV. 323, 325 (2013), https://scholarship.law.vanderbilt.edu/vlr/vol66/iss1/5.

32. *See infra* Section II.E. (description of maverick theory).

33. United States v. H & R Block, Inc., 833 F.Supp.2d 36 (D.D.C. 2011); *See* U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES, §

prevent the Big Five from eating their most important competitors without completely upending antitrust law as we know it, and it will not impede the innovative ecosystem that makes tech the most valuable industry in the world. The result will be that consumers will have more options, industry leaders will have more incentive to improve their products, and smaller, innovative companies will have the chance to thrive. This Note proposes that maverick theory and Section 2.1.5 of the Guidelines be incorporated in the Clayton Act in order to promote innovation and competition.

Part II of this Note will provide a brief history of federal antitrust law, explain what the Horizontal Merger Guidelines are, and describe how maverick theory works. Part III will describe why Big Tech's buying spree is such a problem and offer an application of maverick theory to the Instagram-Facebook merger. Part IV will explain how Congress can amend the Clayton Act to include maverick theory as a solution to Big Tech's buying spree. Part V will briefly conclude.

II. HISTORY OF ANTITRUST: SHERMAN ACT TO MAVERICK THEORY

Federal antitrust law has three main players: Congress, the enforcers, and the courts. Congress laid the foundation of federal antitrust law over a hundred years ago with the Sherman Act in 1890 and the Clayton Act in 1914.[34] Section 7 of the Clayton Act "prohibits mergers and acquisitions where the effect may be substantially to lessen competition, or to tend to create a monopoly."[35] The FTC and DOJ Antitrust Division are the enforcers of federal antitrust law, and one of their primary missions is to use Section 7 of the Clayton Act to challenge and block any anticompetitive mergers in court.[36] The dance among these three antitrust players produces new methods of merger evaluation, such as maverick theory. Without adaptation and evolution,

2.1.5 (2010), available at https://www.justice.gov/atr/horizontal-merger-guidelines-08192010 (outlining the four main characteristics of a maverick firm).

34. Sherman Act, 15 U.S.C. §§ 1–38; Clayton Act, 15 U.S.C. §§ 12–27. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

35. *Id.*

36. *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers.

federal antitrust law would fail to preserve competition as technology advances and new ways of doing business emerge.

A. The Sherman Act

In the 1800s, large corporations developed within many industries, particularly in railroads, oil, steel, and sugar.[37] To become even more powerful, these large corporations formed agreements with their competitors in which a board of trustees would govern the actions of the whole group.[38] These entities were called "trusts."[39] Trusts utilized the collective power of their holding companies to control production and set monopoly prices.[40] The result was near total elimination of competition, and trusts, like the Standard Oil Trust, ruled as monopolies for years.[41] Smaller businesses and consumers had no choice about whom to buy from, prices skyrocketed, and product quality diminished due to lack of competition.[42]

In response to the enormous power of trusts, Congress passed the Sherman Act in 1890 as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."[43] The FTC website succinctly explains the Sherman Act:

> The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy

37. Andrew Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA (Oct. 7, 2021), https://www.investopedia.com/insights/history-of-us-monopolies.

38. FED. TRADE COMM'N, *Competition Counts*, https://www.ftc.gov/system/files/attachments/competition-counts/pdf-0116_competition-counts.pdf.

39. *Id.* at 3.

40. *Id.* at 6.

41. *Id.* The Standard Oil Trust was one of the most powerful corporations in US history, and at its peak, the company reached a 90% market share in the oil refining market. Schutlzy, *Standard Oil – A Company So Effective, Only the U.S. Government Could Compete with It*, HARV. BUS. SCH. (Dec. 2, 2015), https://digital.hbs.edu/platform-rctom/submission/standard-oil-a-company-so-effective-only-the-u-s-government-could-compete-with-it. In 1911, in a monumental antitrust lawsuit, the Supreme Court held that Standard Oil was in violation of the Sherman Act and ordered that it be broken up. Standard Oil Co. v. of New Jersey v. United States, 211 U.S. 1 (1911).

42. FED. TRADE COMM'N, *supra* note 34.

43. *Id.*

> or combination to monopolize." Long ago, the Supreme Court decided that the Sherman Act does not prohibit every restraint of trade, only those that are unreasonable. For instance, in some sense, an agreement between two individuals to form a partnership restrains trade, but may not do so unreasonably, and thus may be lawful under the antitrust laws. On the other hand, certain acts are considered so harmful to competition that they are almost always illegal. These include plain arrangements among competing individuals or businesses to fix prices, divide markets, or rig bids. These acts are "per se" violations of the Sherman Act; in other words, no defense or justification is allowed.[44]

Overall, the Sherman Act is the foundation of the U.S. federal antitrust law, and since its passage, the Supreme Court has described antitrust laws as "the Magna Carta of free enterprise."[45]

B. The Clayton Act

Congress passed the Clayton Act in 1914 to strengthen and clarify the Sherman Act.[46] The Sherman Act targeted common forms of coordinated anticompetitive conduct, such as price-fixing, bid rigging, and market division, but it had loopholes.[47] Companies learned that they could circumvent the Sherman Act by merging into a single corporation; there would be no "agreement" because the new corporation could act unilaterally to control price and production.[48] Thus, Section 7 of the Clayton Act protects American consumers by prohibiting mergers or acquisitions that are likely to "substantially lessen competition

44. *Id.*; Sherman Act, 15 U.S.C. §§ 1–38.

45. United States v. Topco Assoc., Inc., 405 U.S. 596, 610 (1972).

46. *The Clayton Antitrust Act*, U.S. HOUSE OF REPRESENTATIVES OFF. OF ARTS & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/15032424979; The Clayton Act, 15 U.S.C. § 18.

47. FED. TRADE COMM'N, *supra* note 34. Price fixing is an agreement among competitors that raises, lowers, or stabilizes prices or competitive terms. *See Price Fixing*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing.

48. FED. TRADE COMM'N, *supra* note 34.

or tend to create a monopoly."[49] The goal of the Clayton Act is to protect overall market competition rather than individual competitors; thus, mergers may injure certain market participants but not violate antitrust laws.[50]

The Clayton Act has had three major amendments: the Robinson-Patman Act of 1936, the Celler-Kefauver Anti-Merger Act of 1950, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.[51] The Robinson-Patman Act reinforced the Clayton Act's ban on price discrimination which protected small businesses from being squeezed by high prices from larger retailers.[52] The Celler-Kefauver Anti-Merger Act broadened the Clayton Act's ban on anticompetitive acquisitions by restricting mergers of companies at different levels of the same supply chain (i.e. vertical mergers, such as Honda buying a car parts manufacturer).[53] Initially, the Clayton Act only targeted mergers between companies at the same level of the supply chain that produced the same type of goods (i.e. horizontal mergers, such as Coke buying Pepsi)[54] Lastly, the Hart-Scott-Rodino Act required companies to notify the FTC and the DOJ Antitrust Division in advance of any major mergers or acquisitions and provides timeframes for either agency to review the transaction to determine whether to challenge it under the Clayton Act.[55] Ultimately, the Clayton Act prevents monopoly by targeting the anticompetitive mergers and acquisitions that the Sherman Act failed to address.

49. Clayton Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18).

50. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (noting that nothing in the Clayton Act or its legislative history evidences an intent to prohibit the merger of two small companies to better compete with a larger firm); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11 ("The [FTC and DOJ] seek to identify and challenge competitively harmful mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral.").

51. Aly J. Yale*, The Clayton Antitrust Act: One of Many Laws that Protects Consumers from Unfair Business Practices*, BUS. INSIDER (July 14, 2022), https://www.businessinsider.com/clayton-antitrust-act.

52. *Id.* Price discrimination is the practice of charging different customers different prices for the same product or service. *Id.*

53. *Clayton Antitrust Act*, BRITANNICA, https://www.britannica.com/event/Clayton-Antitrust-Act (last visited Dec. 21, 2021).

54. *Id.*

55. *Id.*

C. Traditional Merger Analysis

By prohibiting anticompetitive mergers and acquisitions, Section 7 of the Clayton Act preserves competition rather than enhancing it.[56] Under Section 7, courts must look to the likelihood of future harm to decide whether an acquisition should be prohibited.[57] Thus, courts face the uncertain task of weighing the parties' competing predictions of the future of the relevant market and the challenged merger's effect within that market.[58] Because this is a predictive exercise, the Clayton Act only requires that the transaction be *likely* to lessen competition.[59]

The government "has the ultimate burden of proving a Section 7 violation by a preponderance of the evidence."[60] Under the traditional merger analysis framework, the Government must first establish its prima facie case by 1) identifying the relevant product and geographic markets and 2) showing that the proposed merger is likely to "substantially lessen competition" in the market.[61] Put simply, in the words of Judge Richard Posner, the ultimate issue in a merger review is "whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in a market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level."[62] If the Government satisfies its prima facie case, the burden

56. *The Clayton Antitrust Act*, U.S. HOUSE OF REPRESENTATIVES OFF. OF ARTS & ARCHIVES, https://history.house.gov/HistoricalHighlight/Detail/15032424979.

57. *See* United States v. Von's Grocery Co., 384 U.S. 270, 278 (1966) (explaining that Section 7 requires "a prediction of [a transaction's] impact upon competitive conditions in the future"); United States v. E.I. du pont de Nemours & Co., 353 U.S. 586, 592–93 (1957) ("For it is the purpose of the Clayton Act to nip monopoly in the bud."); *see also* FTC v. Motion Picture Advert. Serv., 344 U.S. 392, 394–95 (stating that Section 5 aimed "to stop in their incipiency acts and practices which, when full blown, would violate [the antitrust] Acts.").

58. United States v. Baker Hughes Inc., 908 F.2d 981, 991 (D.C. Cir. 1990).

59. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 577 (1967) ("The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future.").

60. United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 49 (D.D.C. 2011) (quoting United States v. SunGard Data Sys., 172 F. Supp. 2d 172, 180 (D.D.C. 2001)).

61. *Baker Hughes, Inc.*, 908 F.2d at 982, 991.

62. Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386–87 (7th Cir. 1986) (upholding FTC injunction against acquisition reducing number of hospitals in Chattanooga market from eleven to seven).

shifts to the defendants "to provide sufficient evidence that the prima facie case inaccurately predicts the relevant transaction's probable effect on future competition."[63] The most common way defendants challenge the Government's prediction is by offering evidence that post-merger efficiencies will outweigh any anticompetitive effects.[64] Lastly, if the court finds that the defendant has successfully rebutted the Government's prima facie case, the burden shifts back to the government to produce additional evidence of anticompetitive effects.[65]

D. DOJ/FTC Horizontal Mergers Guidelines

The DOJ Antitrust Division and FTC are the agencies that enforce federal antitrust laws by reviewing mergers to determine if they are likely to lessen competition.[66] The government's objective is to preserve competition within different industries by challenging and potentially blocking any anticompetitive mergers in court.[67] To guide their actions, the DOJ and FTC publish the Horizontal Merger Guidelines (Guidelines) and Vertical Merger Guidelines.[68] The Guidelines

63. *Baker Hughes, Inc.*, 908 F.2d at 991.

64. FTC v. H.J. Heinz Co., 246 F.3d 708, 721 (D.C. Cir. 2001).

65. United States v. Anthem, Inc., 855 F.3d 345, 350 (D.C. Cir. 2017).

66. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11. Passed in 1914, the Federal Trade Commission Act (FTCA) granted the FTC the broad authority to "prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce." Under the FTCA, the FTC has several powers including, but not limited to, administrative enforcement, rulemaking authority, and the ability to challenge a practice directly in court. The FTCA also gave the FTC the power to make referrals to the Department of Justice. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N (May 2021), https://www.ftc.gov/about-ftc/mission/enforcement-authority.

67. J. Bruce McDonald, Deputy Assistant Att'y Gen., U.S. Dep't of Just., Antitrust for Airlines, Remarks Before the Regional Airline Association President's Council Meeting 2 (Nov. 3, 2005) (transcript available at http://www.justice.gov/atr/public/speeches/217987.pdf).

68. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11; This note will focus on the Horizontal Guidelines, because simply put, horizontal mergers are more likely to significantly reduce competition in the marketplace. Horizontal mergers involve two competitors at the same level of a supply chain, i.e., seller v. seller. Meanwhile, vertical mergers involve companies at different levels of the supply chain, and they are often targeted at improving efficiency. Because they have clearer

are a set of internal rules that outline the enforcement policy of the Department of Justice and the Federal Trade Commission concerning horizontal acquisitions and mergers subject to Section 7 of the Clayton Act.[69] The Guidelines describe the analytical framework and the types of evidence the agencies rely on to predict whether a horizontal merger is likely to substantially lessen competition.[70] Importantly, Section 2.1.5 of the Guidelines outlines the basic framework of maverick theory and describes how antitrust enforcers should use it.[71]

The DOJ and FTC issued the most recent edition of the Guidelines in August 2010 with the purpose of "assist[ing] the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions."[72] Notably, the Guidelines are simply a statement of agency enforcement policy and are not binding on the courts.[73] However, they are persuasive authority, and courts have repeatedly cited and endorsed the Guidelines in adjudicating merger challenges.[74]

E. Maverick Theory

Federal antitrust law gives the FTC and DOJ the power to block a merger if: (1) the proposed merger would likely result in one dominant firm unilaterally setting prices, or (2) the firms remaining post-merger would be likely to coordinate with each other to raise prices.[75]

procompetitive benefits, vertical mergers are much harder for enforcement agencies to successfully challenge. Also, antitrust regulators are much more suspicious of horizontal mergers because they involve a company directly eliminating a competitor. Matthew Lane, *Antitrust in 60 Seconds: Vertical vs. Horizontal Mergers*, DISCO (Nov. 19, 2018), https://www.project-disco.org/competition/111918-antitrust-60-seconds-vertical-vs-horizontal-mergers.

69. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11.

70. *Id.* at §§ 3–4.

71. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11.

72. *Id.*

73. *See* Chicago Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 n.11 (5th Cir. 2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.").

74. *See* Cal. v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1120, 1128–32 (N.D. Cal. 2001) ("Although the Merger Guidelines are not binding, courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues").

75. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at §§ 6–7.

These two concerns are known as "unilateral effects" and "coordinated effects."[76] Maverick theory is a theory of anticompetitive harm that addresses coordinated effects.[77] Section 2.1.5 of the 2010 Guidelines defines maverick as "a firm that plays a disruptive role in the marketplace to the benefit of consumers."[78] An older iteration of the Guidelines, the 1992 version, states that a maverick firm has "a greater economic incentive to deviate from the terms of coordination than do most of [its] rivals."[79] The 2010 Guidelines provide four examples of maverick conduct: if a firm (1) "threatens to disrupt market conditions with a new technology or business model," (2) has an "incentive to take the lead in price cutting," (3) has "the ability and incentive to expand production rapidly using available capacity," or (4) "has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition."[80] No matter what road it takes to get there, a maverick firm has one essential characteristic—it prevents or limits coordination among other competitors in the marketplace to the benefit of consumers.[81] Being a maverick is not just a fancy label for a small competitor; rather, it is a unique and functional position of a disruptive competitor in the market.[82]

1. Maverick Theory Grows Under Obama Administration

Under the Bush Administration, antitrust enforcers did not utilize maverick theory, and antitrust enforcement was nearly non-existent.[83] However, in 2007, then-presidential candidate Barack Obama

76. *Id.*

77. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.12, at 20 (1992), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11250.pdf ("[A]cquisition of a maverick firm is one way in which a merger may make coordinated interaction more likely, more successful, or more complete.").

78. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5.

79. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 77.

80. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5.

81. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11.

82. Owings, *supra* note 31, at 325.

83. Stephen Labaton, *When It Comes to Antitrust, Washington Is Antibust*, N.Y. TIMES (May 5, 2006), https://www.nytimes.com/2006/05/05/business/worldbusiness/05iht-antitrust.html. During the Bush administration, the Wall Street Journal wrote "[t]he federal government has nearly stepped out of the antitrust

promised that his administration would take an aggressive approach to antitrust enforcement.[84] Thus, in the 2010 revision to the Guidelines, the FTC and DOJ included a critical edit—the elimination of a maverick firm was now direct evidence of an anticompetitive merger.[85] Previously, the 1992 Guidelines considered the identification of a maverick firm as one piece of a totality of the circumstances type approach.[86] The impact of the change was immediately apparent. Within a year, the DOWJ Antitrust Division successfully blocked two massive mergers, the Intuit/TaxAct merger and the AT&T/T-Mobile merger.[87] In both cases, the DOJ argued that the target companies were mavericks in their respective industries.[88] In identifying TaxAct as a maverick, the DOJ emphasized the company's innovative pricing model because TaxAct kick-started the trend of offering tax-preparation products for free.[89] In AT&T/T-Mobile, the DOJ emphasized T-Mobile's history of innovation and relied on internal documents to show that T-Mobile executives prided themselves on their "disruptive pricing" plans.[90] The two cases were the first significant merger victories for antitrust enforcement agencies since 2004.[91] These cases are examples of how,

enforcement business, leaving companies to mate as they wish." Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 244 (2008).

84. Stephen Labaton, *Obama Takes Tougher Antitrust Line*, N.Y. TIMES (May 11, 2009), http://www.nytimes.com/2009/05/12/business/economy/12antitrust.html.

85. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11.

86. Owings, *supra* note 31, at 328 ("Prior versions discussed the maverick status of a target firm as one piece of evidence in a totality-of-the-circumstances approach to predicting whether a post-merger group of firms would be able to overcome the difficulties inherent in coordination.").

87. *See* United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 45 (D.D.C. 2011) (judgment for the United States enjoining the merger). AT&T dropped its bid to acquire T-Mobile after the DOJ filed suit to enjoin the merger. *See* Press Release, U.S. Dep't of Just., Just. Dep't Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011), http://www.justice.gov/atr/public/press_releases/2011/278406.pdf.

88. *H&R Block, Inc.*, 833 F. Supp. 2d at 79–81.

89. *Id.*

90. *See* Amended Complaint at 13–14, ¶ 27, United States v. AT&T Inc., No. 11-01560 (D.D.C. Sep. 2011) at 27, http://www.justice.gov/atr/cases/f275100/275128.pdf.

91. Baker & Shapiro, *supra* note 83, at 246.

when properly used, maverick theory is a powerful tool for antitrust enforcers.

2. Maverick Innovation

As stated in the Guidelines, one way a maverick "disrupts" markets is by leading in innovation, such as developing new and improved products.[92] For example, in 2017, the FTC challenged a merger between two producers of microprocessor prosthetic knees: Otto Bock HealthCare North America, Inc. and FIH Group Holdings, LLC ("Freedom Innovations" or "Freedom")[93] As part of their case, the FTC alleged that Freedom was a maverick because the company was so adept at improving its products.[94] In 2014, Freedom introduced the Plié 3, its third-generation microprocessor prosthetic knee.[95] Almost immediately, customers began moving away from Otto Bock's C-Leg to the Plié because not only did the Plié offer better functionality, but it did so at a lower price.[96] In response to the launch of the Plié 3, Otto Bock developed its own next-generation microprocessor prosthetic knee known as the C-Leg 4.[97] When Otto Bock introduced the C-Leg 4 in mid-2015, it had an immediate and significant impact on Freedom's Plié 3 sales. Freedom countered by offering discounts and promotions and making more quality improvements to the Plié 3.[98] After the merger, the FTC alleged that the two companies no longer had an incentive to compete against each other for sales and therefore had less incentive to innovate their products.[99] In November 2019, upholding an administrative law judge's decision, the FTC unanimously found that the

92. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5.

93. Press Release, Fed. Trade Comm'n, Agency Alleges that Otto Bock's Acquisition of Freedom Innovations Has Harmed Competition that Benefits Amputees, (Dec. 20, 2017), https://www.ftc.gov/news-events/press-releases/2017/12/ftc-challenges-consummated-merger-companies-make-microprocessor.

94. Redacted Complaint at 12, *In re* Otto Bock HealthCare N. Am., Inc., No. 9378 (FTC Dec. 20,2017), https://www.ftc.gov/system/files/documents/cases/otto_bock_part_3_complaint_redacted_public_version.pdf.

95. *Id.* at 9.

96. *Id.* at 9–10.

97. *Id.*

98. *Id.*

99. *Id.*

merger was anticompetitive, and it issued a final order requiring Ottobock to divest from Freedom Innovations.[100]

The case of Ottoblock and Freedom Innovations is a story about how maverick theory preserves competition and benefits consumers. The core tenant of modern antitrust law is the Consumer Welfare Standard, which directs courts to focus on the effects that challenged business practices have on consumers.[101] If the Ottoblock/Freedom merger had been allowed to go through, the competition that produced all those innovative new prosthetics would have been lost. The merged company would likely have been more profitable, but the consumers would have lost—consumers that relied on the two companies' innovations and competitive prices to improve their lives as amputees.

3. Apple & the iPhone: From Maverick to Industry Leader

It is important to note that mavericks don't stay mavericks forever; a company's status as a maverick can be short-lived, especially in the tech industry. A startup with an innovative product can soon become a dominant firm, and the change can feel like it happened overnight. For example, in retrospect, it is now clear that Apple was once a maverick firm. Initially, Apple was not in the mobile phone market, but on January 9th, 2007, CEO Steve Jobs took the stage at the company's Macworld conference in his trademark black turtleneck and introduced the iPhone.[102] At that time, Blackberry dominated the smartphone market.[103] But within five years of the release of the iPhone, Blackberry went from controlling roughly half of the world's smartphone market to less than 1%.[104] In January of 2021, Apple passed a significant milestone—more than one billion active

100. Press Release, Fed. Trade Comm'n, FTC Approves Otto Bock HealthCare North America, Inc.'s Application to Divest Assets It Gained through Acquisition of FIH Group Holdings, LLC, (Dec. 1, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-approves-otto-bock-healthcare-north-america-incs-application.

101. *See* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (interpreting antitrust laws to protect consumers and describing the Sherman Act as a "consumer welfare prescription.")

102. Parmy Olsen, *BlackBerry's Famous Last Words At 2007 iPhone Launch: 'We'll Be Fine',* FORBES (May 26, 2015), https://www.forbes.com/sites/parmyolson/2015/05/26/blackberry-iphone-book.

103. *Id.*

104. *Id.*

iPhones.[105] Today, Apple is the most valuable company in the world, and its market cap is approaching three trillion dollars.[106] In just a few years, Apple went from a company with a seemingly harebrained idea about a responsive, touch screen phone to being the industry leader in the market for mobile phones.[107] If Blackberry had acquired Apple during its maverick stage, it is conceivable that the iPhone would have been shelved to prevent it from disrupting Blackberry's dominance. This strategy is colloquially known as a "killer acquisition": an industry leader acquires a smaller innovative competitor and then discontinues the new product to avoid future competition.[108] Thus, the development of Apple demonstrates how crucial it is to prevent industry leaders from buying out maverick firms. Without proper protection for mavericks, the next revolutionary, innovative product could be shelved before it even reaches the hands of consumers.

105. Jacob Kastrenakes, *Apple Says There Are Now Over 1 Billion Active iPhones,* THE VERGE (Jan. 27, 2021), https://www.theverge.com/2021/1/27/22253162/iphone-users-total-number-billion-apple-tim-cook-q1-2021.

106. Julia Horowitz, *supra* note 24. A company's market cap is the total value of all the shares of a company's stock. Jason Fernando, *Market Capitalization; How Is It Calculated and What Does It Tell Investors*, INVESTOPEDIA (Mar. 1, 2022), https://www.investopedia.com/terms/m/marketcapitalization.asp.

107. Kastrenakes, *supra* note 105.

108. *See* Florian Ederer, *Does Big Tech Gobble Up Competitors?*, YALE INSIGHTS (Aug. 4, 2022), https://insights.som.yale.edu/insights/does-big-tech-gobble-up-competitors. It is important to note that discontinuing the acquired product is not the only way for a buyer to get ahead. Often, larger companies integrate the acquired product's innovative features into their own product, which allows them to remain the dominant player. One example is Google's acquisition of Waze in 2013. Renaud Foucart, *Tech Firms Face More Regulation After Moves to Stop 'Killer' Acquisitions—But Innovation Could Also Be Under Threat*, THE CONVERSATION (July 25, 2022), https://theconversation.com/tech-firms-face-more-regulation-after-moves-to-stop-killer-acquisitions-but-innovation-could-also-be-under-threat-187278. Waze was one of Google's primary competitors in the free online maps market. *Id.* Instead of shutting down Waze, as many expected they would do, Google added Waze's most innovative features into Google Maps and let Waze live. *Id.* This undoubtedly provided some benefit to consumers as Google Maps improved as a product; however, both companies now have less incentive to innovate because they are no longer competing.

F. Modern Antitrust Developments

For the past twenty years, antitrust scrutiny of Big Tech acquisitions has been remarkably lenient, but the tide is turning.[109] Recently, Congress and antitrust enforcers harshly criticized Big Tech for their seemingly anticompetitive strategies.[110] Now, a reckoning is coming for Big Tech. President Biden recently appointed Lina Khan and Jonathan Kanter, both outspoken Big Tech critics, as heads of the FTC and the DOJ antitrust division, respectively.[111] The two now lead major federal lawsuits against Google and Facebook for monopolization and are investigating Amazon and Apple for anticompetitive practices.[112] Not to be left out, Congress is also making significant moves. For the first time in seven decades, Congress intends to overhaul federal antitrust laws.[113] Legislators from both parties are now going after leading

109. Ovide, *supra* note 26.

110. Shira Ovide, *What Congress Wants from Big Tech*, N.Y. TIMES (June 24, 2021), https://www.nytimes.com/2021/06/24/technology/congress-big-tech.html.

111. President Biden appointed Lina Khan Chair of the FTC in June 2021. David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html. Chairwoman Khan is the youngest Chair in the history of the FTC. *Id.* As a law student at Yale, Kahn wrote a blockbuster law review note titled "Amazon's Antitrust Paradox" in which she described how modern antitrust law has failed to rein in the monopoly power of Amazon. *See* Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017). Kahn also played a major role in the House Judiciary Committee's investigation into competition among digital platforms. David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair,* N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html. In November 2021, President Biden appointed Jonathan Kanter to lead the Antitrust division of the DOJ. Previously, Kanter represented tech companies in lawsuits accusing Google of anti-competitive behavior, and he is now in charge of several DOJ antitrust cases against big tech, including one accusing Google of holding a monopoly over the digital ads market. Makena Kelly, *Senate Confirms Google Critic to Lead DOJ Antitrust Division*, THE VERGE (Nov. 16, 2021), https://www.theverge.com/2021/11/16/22786079/google-jonathan-kanter-justice-department-antitrust-division-facebook-lina-khan.

112. Nicolás Rivero, *A Cheat Sheet to All of the Antitrust Cases Against Big Tech in 2021*, QUARTZ (July 20, 2022), https://qz.com/2066217/a-cheat-sheet-to-all-the-antitrust-cases-against-big-tech-in-2021.

113. Ovide, *supra* note 110. The Celler-Kefauver Act of 1950 was the last major antitrust bill passed by Congress. It strengthened the Clayton Act's antimerger provisions by closing a loophole that allowed acquisitions that did not involve direct

online platforms for monopolizing the digital economy, and some believe that Big Tech companies should simply be broken up.[114]

The antitrust movement in Washington intensified in October 2020 when the Majority staff of the House Judiciary Subcommittee on Antitrust released a report titled "Investigation of Competition in Digital Markets."[115] The report is the culmination of a sixteen-month-long bipartisan investigation into anticompetitive conduct by the "Big Four" (Amazon, Facebook, Apple, Google).[116] The report concludes that the Big Four are all engaging in anticompetitive practices, including buying up smaller competitors, preferencing their own services and products, and using gatekeeping power to maintain their market share.[117] The report states, "[t]o put it simply, companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."[118] To conclude the report, the Majority Staff of the Antitrust Subcommittee recommended a complete overhaul of U.S. antitrust law.[119] The proposals are so extensive that collectively they would

competitors. Arthur Holst, *Celler-Kefauver Act*, BRITANNICA, https://www.britannica.com/topic/Celler-Kefauver-Act.

114. Paul McLeod, *Democrats and Republicans Alike Are Talking About Breaking Down Big Tech Monopolies*, BUZZFEEDNEWS (Mar. 12, 2021), https://www.buzzfeednews.com/article/paulmcleod/congress-big-tech-monopolies-antitrust; *see also* Shira Ovide, *How Klobuchar and Hawley See Things When It Comes to Technology,* N.Y. TIMES (May 13, 2021), https://www.nytimes.com/2021/05/13/books/amy-klobuchar-antitrust-josh-hawley-tyranny-big-tech.html.

115. STAFF OF S. COMM. ON ANTITRUST, COM. & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Comm. Print 2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

116. *Id.* Some commentators have questioned why Microsoft was left off the list. One reason may be that Microsoft has learned to "play by the rules" since 1998 when the DOJ accused the company of monopolization in a monumental antitrust action. *See* Dina Bass, *Microsoft's Missteps Offer Antitrust Lesson for Tech's Big Four*, YAHOOFINANCE (June 19, 2019), https://finance.yahoo.com/news/microsoft-missteps-offer-antitrust-lessons-080042557.html.

117. STAFF OF S. COMM. ON ANTITRUST, COM. & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., *supra* note 115.

118. *Id.* at 2.

119. *Id.*

overturn almost fifty years of court precedent, including fourteen Supreme Court decisions.[120]

Building off the report's recommendations, Senators Amy Klobuchar (D-MN) and Josh Hawley (R-MO) have introduced a series of bills that would subject dominant digital platforms to a variety of new regulations.[121] These bills differ in important ways, but they all seek to regulate online platforms above a certain size threshold.[122] Under Senator Hawley's proposal, the Trust-Busting for the Twenty-First Century Act, any company with a market cap of more than $100 billion would be banned from making any acquisitions.[123] Senator Klobuchar's proposal, the Competition and Antitrust Law Enforcement Act, would shift the burden of proof, in special circumstances, to the merging parties to prove that the benefits of the merger or acquisition outweigh the anticompetitive risks.[124] The special circumstances include, but aren't limited to, if "[t]he transaction is valued at more than $5 billion" or if "[a] firm with greater than 50% market share . . . acquires a company that has a 'reasonable probability' of becoming a competitor in the relevant market."[125] These proposals are overbroad and will have a significant impact on companies that operate in competitive markets outside the tech economy.[126] Also, the rationale behind these proposals is "big is bad," but that has never been a tenant of antitrust law. Sometimes companies are big because they make the best product or have the best service. Antitrust laws seek to prevent anticompetitive conduct, not to regulate companies based on size or profits alone.

In the late 1800s, U.S. lawmakers formed antitrust law to deal with commodity-based monopolies, like U.S. Steel and U.S. Standard

120. *Id.*; Michael Bopp, *Senator Klobuchar Proposes Major Antitrust Bill*, GIBSON & DUNN (Mar. 22, 2021), https://www.gibsondunn.com/senator-klobuchar-proposes-major-antitrust-bill.

121. McCabe & Kang, *supra* note 111.

122. STAFF OF S. COMM. ON ANTITRUST, COM. & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 116TH CONG., *supra* note 115, at 5.

123. Taylor Hatmaker, *Republican Antitrust Bill Would Block All Big Tech Acquisitions*, TECHCRUNCH (Apr. 13, 2021), https://techcrunch.com/2021/04/13/hawley-antitrust-bill-trust-busting-for-the-twenty-first-century-act.

124. Bopp, *supra* note 120.

125. *Id.*

126. Ceccio & Mufarrige, *supra* note 27.

Oil.[127] Since then, the U.S. economy has completely transformed; the most powerful corporations now deal in digital markets.[128] Antitrust law has had to transform with the economy. Thus, since the passage of the Sherman Act in 1890, Congress has passed multiple antitrust acts in response to new economic developments.[129] However, Congress passed the last major antitrust act over seventy years ago; the time has come for an update.[130] If nothing is done, Big Tech will continue to eat their smaller competitors and will eventually become monopolies that have total control of the tech sector.

III. ANALYSIS

In many ways, the story of the Big Five is one of American exceptionalism. Every member of the Big Five was once a small startup company with a groundbreaking idea, and they all built their products around the consumer experience.[131] Google created a search engine with the single goal of making information on the web accessible to anyone who could type on a computer.[132] Amazon is the largest and most successful retailer in America because it innovated and revolutionized e-commerce.[133] Facebook blew up not because it was first but

127. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

128. Alcantara, et. al, *supra* note 20.

129. Yale*, supra* note 51.

130. *Id.*

131. Beth Burgess, *7 Startups That Started in a Garage*, PAKWIRED (Oct. 30, 2019), https://pakwired.com/7-startups-that-started-in-garage. Google, Amazon, Microsoft, and Apple all started off in garages. *Id.* In 1976, Steve Jobs, Steve Wozniak, and Ronald Wayne hand-built Apple's first computer, the Apple I, in Job's parents' house. Jeremy Korst & Kimberly Whitler, *Why the Big Tech Firms Keep Customers Front-of-Mind*, HARV. BUS. REV. (Jan. 8, 2020), https://hbr.org/2020/01/why-the-best-developers-keep-customers-front-of-mind.

132. Tiffany Eaton, *What Makes Top Tech Companies Successful?*, MEDIUM (June 1, 2017), https://medium.muz.li/what-makes-top-tech-companies-successful-8c48762f6fd0.

133. Annie Palmer, *Amazon Will Overtake Walmart as the Largest U.S. Retailer in 2022, JPMorgan Predicts*, CNBC (June 11, 2021), https://www.cnbc.com/2021/06/11/amazon-to-overtake-walmart-as-largest-us-retailer-in-2022-jpmorgan.html.

because it focused on simple, fun, and easy-to-use features.[134] However, the problem is that the same competitive ecosystem that allowed these companies to thrive no longer exists. The Big Five now cannibalize smaller startups before they have a chance to grow. They often bury or capture rival technologies rather than beat them fairly by offering a superior product.

A. Big Tech's Buying Spree—Why Facebook Bought Instagram

The Big Five are buying startups and competitors at an unprecedented pace, and there is no sign of a slowdown.[135] Each member of the Big Five is an amalgamation of hundreds of different companies.[136] Google has made 270 acquisitions over the past two decades, and in the early 2010s it acquired a company every ten days on average.[137] Amazon has bought into dozens of markets, but up until 2010 it focused on gaining market dominance in e-commerce. The first thirty-one of the company's acquisitions were e-commerce brands, like Zappos.[138] Apple used a similar strategy. The company started by acquiring software companies, and in 2000 the company bought SoundJam MP, which was a music service that eventually led to the creation of iTunes.[139] Of course, Facebook is no different. In 2012 Facebook bought Instagram for $1 billion, and in 2014 it acquired the messaging app WhatsApp for $19 billion.[140]

However, some scholars don't see the trend of mergers and acquisitions by Big Tech as a problem at all.[141] These scholars argue that the current analytical merger framework is sufficient to terminate anticompetitive acquisitions and that a stricter standard could potentially

134. Harrison Hoffman, *Four Reasons Why Facebook Is Succeeding in Social Networking*, CNET (Dec 10, 2008), https://www.cnet.com/news/four-reasons-why-facebook-is-succeeding-in-social-networking.

135. C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879, 1898–903 (2020); *see also* United States v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (developing the idea of nascent competition).

136. Alcantara, et. al, *supra* note 20.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Ceccio & Mufarrige, *supra* note 27.

destroy the innovative ecosystem that Big Tech has created.[142] On the other side, interventionists argue that these acquisitions have harmed competition and innovation.[143] The interventionists argue that Big Tech's buying spree of competitors has eliminated much-needed competitive constraints.[144] Without those acquisitions, the theory is that those small tech startups could have grown into competitive threats to the industry leaders or that the massive digital firms would have innovated organically to develop their own products or services, with the result being more options for consumers.[145] Both sides are correct. Not all big tech mergers and acquisitions are anticompetitive, but problems arise when the Big Five acquire maverick firms—usually companies with developing, innovative products that could one day challenge their status as industry leaders.[146] Just as Facebook did with Instagram, dominant digital platforms look to buy their potential competitors to integrate the new tech within their own products or to kill any innovation outright.[147]

Big Tech's acquisition strategy has been incredibly effective, and the key is network effects. A network effect is when the value of a good or service increases the more people use it.[148] In social networking, users value the social network with the most users because they can communicate and connect with more and more people. For example, a person is more likely to use an app like Instagram if their friends, family, and coworkers all use it; they want to be a part of a large, trendy social network. The advertisers then benefit from greater user numbers in terms of reach and consumer targeting.[149] This creates a feedback loop. A company with a large user base collects a vast amount of data

142. *Id.*

143. Kevin Bryan & Erik Hovenkamp, *Antitrust Limits on Startup Acquisition*, 56 REV. IND. ORGAN. 615, 615–636 (2020).

144. *Id.*

145. *Id.*

146. Salvador Rodriguez, *Facebook Is a Social Network Monopoly that Buys, Copies or Kills Competitors, Antitrust Committee Finds*, CNBC (October 6, 2020), https://www.cnbc.com/2020/10/06/house-antitrust-committee-facebook-monopoly-buys-kills-competitors.html.

147. *Id.*

148. Tim Stobierski, *What Are Network Effects?*, HARV. BUS. SCH. (Nov. 12, 2020), https://online.hbs.edu/blog/post/what-are-network-effects.

149. Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2005 COLUM. BUS. L. REV. 515 (2005).

to improve the service and then uses that data for targeted advertising.[150] The profits go toward reaching even more users, which means more data collection.[151] Thus, network effects and data-driven efficiencies compound in digital markets, reinforcing the power of the industry leaders.[152] The flip side is that network effects can also allow smaller startup competitors with an attractive alternative platform to grow quickly and challenge the dominance of the top companies.[153] These smaller competitors improve the economic performance of the market overall by preventing a dominant firm from raising prices, reducing product quality, or restricting innovation.[154] However, the Big Five usually acquire these smaller, promising startups, eliminating all the benefits they bring to the market.

Big Tech's acquisition strategy of eliminating potential competitors on the road to market dominance is precisely the type of harm that federal antitrust law was intended to prevent. According to the Clayton Act, federal agencies are supposed to block any merger whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[155] Yet, antitrust scrutiny of Big Tech acquisitions has been incredibly lenient. From 2001 to 2019, Google and Facebook completed more than 350 mergers, yet federal agencies found that none threatened a reduction of competition sufficient to block it.[156] In 2012, the FTC investigated the $1 billion Facebook/Instagram merger and did

150. *See* ORG. FOR ECON. COOP. AND DEV., BIG DATA: BRINGING COMPETITION POLICY TO THE DIGITAL ERA, Doc. DAF/COMP(2016)14, at 12 (OECD Oct. 27, 2016), https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf.

151. *Id.* at 12–13.

152. *Id.* at 13.

153. Stobierski, *supra* note 148.

154. JONATHAN B. BAKER, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY 160–61 (2019) ("Future competition may be threatened when a dominant information technology platform (or other large firm) acquires a potential rival. When the potential rival would be expected to innovate were it to enter, possibly leading the dominant incumbent to upgrade its products or services in response, the competitive harms from the merger may involve reduced innovation incentives, not just lessened future price competition.").

155. The Clayton Act, 15 U.S.C. § 18.

156. Tim Wu & Stuart A. Thompson, *The Roots of Big Tech Run Disturbingly Deep*, N.Y. TIMES (June 7, 2019), https://www.nytimes.com/interactive/2019/06/07/opinion/google-facebook-mergers-acquisitions-antitrust.html.

not recommend further action.[157] Just two years later, in 2014, U.S. regulators cleared Facebook's $19 billion acquisition of the messaging app WhatsApp.[158] Without any pushback, Google acquired YouTube in 2006, a competitor to Google Video, and Waze in 2013, a direct competitor with Google Maps.[159] Traditional merger analysis is missing something. By codifying maverick theory, Congress can give antitrust enforcers the tools they need to preserve competition and protect consumers.

Antitrust enforcers made a huge mistake when they decided not to challenge the Facebook/Instagram merger back in 2012. Instagram was a maverick company, worthy of increased protection, and the facts were there to prove it. On April 9, 2012, Facebook announced that it would be acquiring Instagram for $1 billion—the highest price it had ever paid in an acquisition up to that point.[160] The acquisition came at a critical stage in Facebook's development. Investors were pressuring the company to increase its revenue base, and the company was failing to respond as consumers were rapidly moving from computers to mobile phones.[161] Facebook had a serious problem. As other companies focused on developing mobile-first applications, Facebook was still a desktop-centric platform.[162] But applications like Instagram were built specifically for iOS and Android, so they were faster, more stable, and easier to use on mobile phones than Facebook.[163] Facebook was in

157. Letter from April J. Tabor, Acting Secretary, FED. TRADE COMM'N, to Thomas O. Barnett, COVINGTON & BURLINGTON LLP, (Aug. 22, 2012) (on file with the Federal Trade Commission), https://www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822barnettfacebookcltr.pdf.

158. Letter from Jessica L. Rich, Director, FED. TRADE COMM'N to Erin Egan, Chief Privacy Officer, FACEBOOK, & Anne Hoge, General Counsel, WHATSAPP INC., (Apr. 10, 2014) (on file with the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatappltr.pdf.

159. Alcantara, et. al, *supra* note 20.

160. Evelyn M. Rusli, *Facebook Buys Instagram for $1 Billion*, N.Y. TIMES, (Apr. 9, 2012), https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion.

161. *See* Om Malik, *Here Is Why Facebook Bought Instagram*, GIGAOM (Apr. 9, 2012), https://gigaom.com/2012/04/09/here-is-why-did-facebook-bought-instagram.

162. *Id.*

163. *Id.*

huge trouble. Mobile-native apps like Instagram and Foursquare brought in more and more users every day and were siphoning user engagement away from Facebook.[164]

Since its inception, Facebook has relied on photo-sharing to attract users. By 2009, Facebook was the largest photo-sharing service in the world.[165] But soon, dramatic improvements in smartphone cameras made photo sharing a much more mobile-based activity, which was a weak spot for Facebook.[166] In 2010, at this crucial crossroads, Stanford engineering graduates Kevin Systrom and Mike Krieger launched a native iOS photo-sharing social network called Instagram.[167] On Instagram, users could upload, edit, and share pictures from their iPhones and follow, comment, and like pictures posted by others. Also, the app allowed users to post their Instagram pictures across social networks, including Facebook and Twitter. Systrom and Krieger wanted their app to become a legitimate rival to the incumbent social networking giants like Facebook, and their vision was "the next network is people interested in sharing life visually."[168]

On October 6, 2010, Instagram launched on the Apple App Store, and within a week, it had 100,000 user downloads.[169] Just ten weeks later, it had accrued over a million registered users. In February of 2012, Instagram founder Kevin Systrom announced that Instagram

164. Malik, *supra* note 161.

165. Erick Schonfeld, *Facebook Photos Pulls Away from the Pack*, TECHCRUNCH (Feb. 22, 2009), https://techcrunch.com/2009/02/22/facebook-photos-pulls-away-from-the-pack.

166. *See* Drew Olanoff, *Mark Zuckerberg: Our Biggest Mistake Was Betting Too Much on HTML5*, TECHCRUNCH (Sept. 11, 2012), https://techcrunch.com/2012/09/11/mark-zuckerberg-our-biggest-mistake-with-mobile-was-betting-too-much-on-html5.

167. Gaurav Sangwani, *The Story of How Instagram Started and What Entrepreneurs Can Learn from It*, FIN. EXPRESS (Apr. 26, 2018), https://www.financialexpress.com/industry/sme/the-story-of-how-instagram-started-and-what-entrepreneurs-can-learn-from-it.

168. Claire Cain Miller, *A Photo-Sharing App with Bigger Aspirations*, N.Y. TIMES (Oct. 19, 2010), https://bits.blogs.nytimes.com/2010/10/19/a-photo-sharing-app-with-bigger-aspirations. Kevin System described Instagram, "You see the world through your friends' eyes, as it happens." *Id.*

169. MG Siegler, *Instagram Captures a Million Users. Up Next: API, Android, and Funding*, TECHCRUNCH (Dec. 21, 2010), https://techcrunch.com/2010/12/21/instagram-one-million.

had reached 27 million registered users and "Facebook-level engagement."[170] In response, Zuckerberg invited Systrom to his home on Saturday, April 7, 2012, and by Monday, the billion-dollar deal was done.[171]

Even back in 2012, tech observers suspected that the acquisition was an act of "squashing a potential rival."[172] They recognized that the inevitable monetization of Instagram would soon be a real threat to Facebook's business model.[173] The merger triggered a Hart-Scott-Rodino filing, but antitrust enforcement agencies took no action.[174] The FTC investigation was nonpublic, and the agency did not explain the basis for their decision.[175] Since the acquisition, Instagram has become the most popular photo-sharing app with over a billion users worldwide, and it generated an estimated $24 billion in revenue in 2020, which was 36.9% of Facebook's total revenue.[176] This is proof that Instagram likely would have grown into a legitimate competitor with Facebook, especially on mobile devices, where the social network was unable to, by its own admission, generate "meaningful revenue."[177] This

170. Kim-Mai Cutler, *From 0 to $1 Billion in Two Years: Instagram's Rose-Tinted Ride to Glory*, TECHCRUNCH (Apr. 9, 2012), https://techcrunch.com/2012/04/09/instagram-story-facebook-acquisition. Heavy venture capital funding allowed Instagram to pursue growth first without monetization. This way they could attract more users and establish strong network effects that would drive advertising revenue later. *Id.*

171. THE VERGE, *supra* note 9.

172. *See* Somini Sengupta, *Why Would the Feds Investigate the Facebook-Instagram Deal?*, N.Y. TIMES (May 10, 2012), https://bits.blogs.nytimes.com/2012/05/10/why-would-the-feds-be-probing-the-facebook-instagram-deal.

173. *Id.*

174. The Hart-Scott-Rodino Act requires companies to notify the FTC and the DOJ Antitrust Division in advance of any major mergers or acquisitions that cross a certain monetary threshold. In 2012, the basic HSR threshold was $68.2 million. Thus, Facebook was required to notify antitrust enforcers of its $1 billion plan to acquire Instagram. Martin Brinkley et al., *FTC Announces New HSR Reporting Thresholds for 2012*, SMITH ANDERSON (Feb 13, 2012), https://www.smithlaw.com/media/alert/1_Client%20Alert%20-%20HSR%20Filing%20Thresholds%202012.pdf.

175. Alexei Oreskovic, *FTC Clears Facebook's Acquisition of Instagram*, REUTERS (Aug. 22, 2012), https://www.reuters.com/article/us-facebook-instagram/ftc-clears-facebooks-acquisition-of-instagram-idUSBRE87L14W20120823.

176. Iqbal, *supra* note 15.

177. Sengupta, *supra* note 172.

competition could have improved the social media experience for billions of users through innovation and could have driven down costs in digital ad markets.[178] Instead, Facebook was allowed to use its entrenched position as an industry leader to buy out a small startup who was beating the larger company at its own game.

Federal antitrust enforcers missed the mark by not challenging the Facebook/Instagram merger back in 2012, and only recently have they tried to amend that mistake. On December 9th, 2020, the FTC sued Facebook for illegally maintaining a monopoly in the market for Personal Social Networking Services (PSN) services.[179] The FTC alleged that Facebook engaged in a systematic anticompetitive strategy—including its 2012 acquisition of up-and-coming rival Instagram and its 2014 acquisition of the mobile messaging app WhatsApp—to eliminate threats to its monopoly.[180] A federal court initially dismissed the complaint for "failing to properly allege that Facebook has monopoly power in the market."[181] However, the FTC amended the complaint, and on January 11, 2022, the same federal court ruled that the lawsuit could proceed.[182] However, the judge also stated that the agency faces a 'tall task' in proving its case, especially concerning acquisitions it cleared years ago.[183]

Congress needs to act now to amend federal antitrust law. The FTC and DOJ are trying to rein in the monopolistic power of the Big Five, but they simply do not have strong enough tools. Current antitrust laws are too weak to rein in Big Tech's acquisition strategy, and if nothing is done, the Big Five will continue to gobble up their competitors until they have absolute control of the digital economy.

178. *Id.*

179. FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 4 (D.D.C. 2021).

180. *Id.*

181. Salvador Rodriguez, *Judge Dismisses FTC and State Antitrust Complaints Against Facebook*, CNBC (Jun. 28, 2021), https://www.cnbc.com/2021/06/28/judge-dismisses-ftc-antitrust-complaint-against-facebook.html.

182. *Id.*; Bobby Allyn, *Judge Allows Federal Trade Commission's Latest Suit Against Facebook to Move Forward*, NPR (Jan 11, 2022), https://www.npr.org/2022/01/11/1072169787/judge-allows-federal-trade-commissions-latest-suit-against-facebook-to-move-forw.

183. Allyn, *supra* note 182.

B. Applying Maverick Theory to the Facebook/Instagram Merger

In 2012, the FTC should have recognized Instagram as a maverick and prohibited Facebook from acquiring the company. At that time, Instagram had three of the four characteristics that define a maverick company: innovation, the ability to expand rapidly, and price-cutting.[184] First and foremost, Instagram had an innovative, groundbreaking product that was disrupting the social media sphere and siphoning users away from Facebook.[185] Instagram created a social media network built around mobile phones; the founders of the company intentionally built their app around the use of the iPhone camera.[186] In turn, they created a mobile photo-sharing app that was accessible, fun, and made people feel like professional photographers.[187] Perhaps most importantly, Instagram offered a truly unique feature in its filters that could transform ordinary photos to make them look old-fashioned or black-and-white, or adjust light and shadows.[188] These innovative features define a maverick firm. Instagram deviated from its rivals and invented an original product that eventually dominated the mobile photo-sharing market.[189]

Second, Instagram was a maverick because it could expand its capacity rapidly. Instagram had a million users within just ten weeks of its introduction to the App Store in October 2010.[190] In April 2012, at the acquisition, Instagram had thirty million registered users.[191] By June 2018, it had over one billion active monthly users, and in December 2021, the company surpassed two billion monthly users.[192] Mark

184. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5.

185. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5. Maverick behavior includes "threaten[ing] to disrupt market conditions with a new technology or business model." *Id.*; Cutler, *supra* note 170.

186. Claire Cain Miller, *A Photo-Sharing App with Bigger Aspirations*, N.Y. TIMES (Oct. 19, 2010), https://bits.blogs.nytimes.com/2010/10/19/a-photo-sharing-app-with-bigger-aspirations.

187. *Id.*

188. *Id.*

189. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5.

190. Cutler, *supra* note 170.

191. *Id.*

192. Salvador Rodriguez, *Instagram Surpasses 2 Billion Monthly Users While Powering Through a Year of Turmoil*, CNBC (Dec. 14, 2021),

Zuckerberg knew that Instagram's user base would continue to grow exponentially, and he recognized the existential threat that Instagram posed to Facebook.[193] Just days before offering to buy the company, he wrote in an email, "Instagram can hurt us meaningfully without becoming a huge business."[194] Facebook's orientation guide for new employees offered a similar sentiment stating, "If we don't create the thing that kills Facebook, something else will."[195]

Lastly, Instagram was in the perfect position to compete vigorously with Facebook and drive down digital advertising costs.[196] Initially, Instagram had no advertisements, but it was inevitable that the app would be monetized and integrate ads.[197] From the beginning, Instagram planned to grow first and monetize later. By increasing its user base exponentially, it could establish network effects that would drive advertising revenue in the future.[198] At the time of the acquisition, Facebook controlled much of the digital ad market, and it was afraid of the threat that Instagram posed to its status as an industry leader.[199] Instagram was lying in wait—preparing for the right opportunity to bust into the digital ad market and give Facebook a run for its money. Instead, post-merger, the fruits of Instagram's labor of gathering a massive user base went right into the pocket of Facebook. The result for consumers is that Facebook has less incentive to improve their platform. For example, Facebook pays its content creators very little compared to apps like YouTube.[200] Between Instagram and Facebook, Meta's user base is already so large that they simply do not see the need to pay creators the fair value of their labor.[201] If Instagram had remained independent, the increased competition would likely have

https://www.cnbc.com/2021/12/14/instagram-surpasses-2-billion-monthly-users.html.

193. Newton & Patel, *supra* note 2.

194. *Id.*

195. *Id.*

196. Sengupta, *supra* note 172.

197. *Id.*

198. Newton & Patel, *supra* note 2.

199. *Id.*

200. Peter Kafka, *Facebook Wants Creators, but YouTube Is Paying Creators Much, Much More*, VOX (Jul. 15, 2021), https://www.vox.com/recode/22577734/facebook-1-billion-youtube-creators-zuckerberg-mr-beast.

201. *Id.*

forced Facebook to pay creators more for their content and to pay more attention to the wants of consumers.

IV. AMENDING THE CLAYTON ACT TO INCLUDE MAVERICK THEORY

Maverick theory will solve the big tech antitrust crisis by preventing companies like the Big Five from acquiring smaller, upcoming competitors and destroying their competition. The issue is that the DOJ/FTC Guidelines are discretionary; thus, the FTC & DOJ can choose not to use maverick theory when bringing a merger challenge.[202] For example, the FTC chose not to label Instagram as a maverick competitor in 2012, but in 2017 chose to characterize Freedom as a maverick and blocked the acquisition because it would eliminate "the most significant and disruptive competitor" thereby "further entrenching . . . the dominant supplier."[203] Also, maverick theory is currently only persuasive authority for the courts.[204] The solution is to give maverick theory the force of law by implementing Section 2.1.5 of the Guidelines into Section 7 of the Clayton Act. Codifying maverick theory will help return competition to the digital economy without harming companies competing in competitive markets.

To give maverick theory the force of law, Congress would have to amend Section 7 of the Clayton Act. This is not a radical proposal; the Clayton Act has had three major amendments since its passage.[205] Section 7 of the Clayton Act is codified in Title 15, Section 18 of the U.S. Code, and the most vital part is the conclusion of the first paragraph which prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[206] To implement maverick theory, Congress should pass a bill that amends the Clayton Act and adds a new section to the U.S. code, section 18(b). Section 18(b) should begin with the following text: "No entity engaged in commerce shall acquire, directly or indirectly, the stock or assets of a maverick firm." The text would

202. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 1.

203. FTC v. Facebook, No. CV 20-3590, 2021 WL 2643627 (D.D.C. 2021).

204. Cal. v. Sutter Health Sys., 130 F. Supp. 2d 1109, 1120, 1128–32 (N.D. Cal. 2001) ("Although the Merger Guidelines are not binding, courts have often adopted the standards set forth in the Merger Guidelines in analyzing antitrust issues.").

205. *See supra* Part II.

206. The Clayton Act, 15 U.S.C. § 18.

then have to define a maverick firm, and the simplest solution would be to include the exact text of Section 2.1.5 of the Guidelines.[207] Section 2.1.5 of the Guidelines starts by defining a maverick as a "firm that plays a disruptive role in the market to the benefit of customers," and it concludes by providing the four most common examples of maverick behavior: innovation, the ability to expand rapidly, price-cutting, and an aversion to cooperation with rivals.[208] The proposed amendment, section 18(b), would prohibit the acquisition of a maverick in any merger circumstance (horizontal or vertical) but would not create a strict per se standard. Specifically, to challenge a merger under this amendment, the FTC or DOJ still would need to show, by a preponderance of evidence, that the nascent competitor satisfies the definition of a maverick firm, pursuant to the definition and examples noted above. Once that burden is satisfied, the merger can be prohibited.

Passing a federal law in the United States is not a simple task, and amending the Clayton Act would require a bill to pass through the entire legislative process. An amendment to the Clayton Act would have to be voted on and passed by the House of Representatives and the Senate.[209] Any antitrust bill would have to pass through the House Judiciary Subcommittee on Antitrust, Commercial and Administrative Law and the Senate Judiciary Subcommittee before reaching either floor for a vote.[210] If the House passes the bill by a simple majority (218 of 435) in the House, it moves to the Senate.[211] A simple majority (51 of 100) also passes a bill in the Senate, but the filibuster rule means that sixty senators must vote to close debate on the bill before moving to a final vote.[212] So, even if fifty-nine senators support the bill, the other forty-one could filibuster and prevent the bill's passage by

207. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, *supra* note 11, at § 2.1.5.

208. *Id.*

209. *The Legislative Process*, U.S. HOUSE OF REP., https://www.house.gov/the-house-explained/the-legislative-process (last visited Aug. 31, 2022).

210. *Id.*; *Subcommittee on Competition Policy, Antitrust, and Consumer Rights*, COMM. OF THE JUDICIARY, https://www.judiciary.senate.gov/about/subcommittees/subcommittee-on-antitrust-competition-policy-and-consumer-rights (last visited Aug. 31, 2022); *Subcommittee on Antitrust, Commercial and Administrative Law*, U.S. HOUSE COMM. ON THE JUDICIARY, https://judiciary.house.gov/subcommittees/antitrust-commercial-and-administrative-law-116th-congress (last visited Aug. 31, 2022).

211. U.S. HOUSE OF REP., *supra* note 209.

212. *Id.*

making sure that it never gets a final vote.[213] If the Senate passes the bill, it goes to the President, who chooses whether to sign it or not.[214] If the President signs the bill, it becomes law.[215]

A bill adding maverick theory to the Clayton Act is a modest proposal that will address many lawmakers' concerns about tech's growing power. Currently, there is a set of aggressive antitrust bills moving through Congress, but those bills face significant obstacles from coalitions on both sides of the aisle.[216] On the Democrat side, California Senators Dianne Feinstein and Alex Padilla have expressed concerns that the bills target Apple, Alphabet, and Meta, all headquartered in California.[217] On the Republican side, six Republican senators on the Senate Judiciary Committee voted against advancing the proposal out of committee, including Senators Ted Cruz (R-TX) and Lindsey Graham (R-SC).[218] A maverick theory amendment would alleviate many of these lawmakers' concerns because (1) it would give enforcement agencies less power than the other more aggressive proposals, (2) it would apply to all companies equally, and (3) it would reinforce the current antitrust merger enforcement framework. Overall, a bill adding maverick theory to the Clayton Act would have a decent chance at becoming law.

V. CONCLUSION

Since its inception, Big Tech has shown an insatiable appetite for acquisitions of small startups and maverick firms. Congress must give the DOJ and FTC the power to stop Big Tech's buying spree by amending the Clayton Act to prohibit the acquisition of a maverick. If nothing is done, Facebook and the rest of the Big Five will continue to eat and eat until there is no real competition left. It is the consumers

213. Peter Stevenson & Amber Phillips, *The filibuster, Explained*, WASH. POST (Dec. 22, 2021), https://www.washingtonpost.com/politics/2021/04/09/what-is-filibuster.

214. U.S. HOUSE OF REP., *supra* note 209.

215. *Id.*

216. Cristiano Lima, *Senate's Tech Antitrust Push Notches a Win, but Major Hurdles Loom*, WASH. POST (Jan. 21, 2022), https://www.washingtonpost.com/politics/2022/01/21/senates-tech-antitrust-push-notches-win-major-hurdles-loom.

217. *Id.*

218. *Id.*

who will suffer, and all the benefits that maverick companies bring to the market will be destroyed. Innovative products will be shelved before they reach consumers, market consolidation will leave less incentive for companies to improve their products and services, and prices will be set by a handful of players. Maverick theory will bring fair competition back to the tech economy because it will prevent companies like Facebook from squashing their potential rivals. Consumers will benefit from increased innovation and lower costs, and the U.S. will prevent the Big Five from becoming the gatekeepers of the internet.