In Antitrust We Trust?: Big Tech Is Not the Problem—It's Weak Data Privacy Protections

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I. INTRODUCTION

The Big Tech companies—Amazon, Apple, Facebook, and Google[1]—which many once admired as the trailblazers that brought the technology frontier to America's front door, have fallen out of favor with a public that no longer trusts how important these firms are to American life.[2] The idea to break up Big Tech has been around for over a decade,[3] but the movement did not become mainstream until 2019 when Democratic presidential candidates were asked to debate the topic for the first time on a national stage, exposing the shift in public opinion.[4]

That same year, some of Big Tech's most notable pioneers turned their backs on the companies they helped to start. Apple co-founder Steve Wozniak said in an interview he "wish[es] Apple on its own had split up a long time ago," and thought that Big Tech has "taken our choices away."[5] Facebook co-founder Chris Hughes echoed these sentiments in a *New York Times* opinion column where he mused about his own use of Facebook, saying, "The choice is mine, but it doesn't feel like a choice."[6] Hughes joined the call to break up Facebook, attributing the platform's privacy missteps to its quest for "domination."[7]

The shift in attitude toward Big Tech runs parallel to a movement fervently working to chip away at the edifice of antitrust doctrines that have dominated jurisprudence since the 1970s.[8] This group, referred to as the New Brandeis School,[9] is not only motivated by the power of Big Tech but also

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1. Microsoft is often included in this grouping.

2. Theodore Schleifer, *Why Does Washington Suddenly Seem Ready to Regulate Big Tech? Look at the Polls*, VOX MEDIA (June 4, 2019), https://www.vox.com/2019/6/4/18652469/washington-antitrust-regulate-amazon-google-facebook-look-at-polls [https://perma.cc/QB3J-CXVG] (citing a 2019 Harris Poll that showed the reputations of Google and Facebook dropped 13 and 43 slots respectively among how Americans view them).

3. *See* Tim Wu, *In the Grip of the New Monopolists*, WALL ST. J. (Nov. 13, 2010, 12:01 AM), https://www.wsj.com/articles/SB10001424052748704635704575604993311538482 [https://perma.cc/8PUW-YZTC].

4. Emily Birnbaum, *Democrats Wrangle Over Whether to Break Up Big Tech in Debate First*, THE HILL (Oct. 15, 2019), https://thehill.com/policy/technology/466008-democrats-wrangle-over-whether-to-break-up-big-tech-in-debate-first [https://perma.cc/VYC4-QZR4] (comparing candidates' views to those of Republicans and Democrats during the 2016 election wherein both parties "sought to court companies like Facebook and Google").

5. Mikey Campbell, *Steve Wozniak Says Apple Should Have Split Up Long Ago, Talks Push into Services and More*, APPLE INSIDER (Aug. 27, 2019), https://appleinsider.com/articles/19/08/27/steve-wozniak-says-apple-should-have-split-up-long-ago-talks-push-into-services-and-more [https://perma.cc/28FL-DEBB].

6. Chris Hughes, Opinion, *It's Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html [https://perma.cc/9QX2-8LGJ].

7. *Id.*

8. *See infra* Section III.B.

9. The group has also been referred to as the Hipster Antitrust Movement. *See* Andrea O'Sullivan, *What Is 'Hipster Antitrust?'*, MERCATUS CTR.: THE BRIDGE (Oct. 18, 2018), https://www.mercatus.org/bridge/commentary/what-hipster-antitrust [https://perma.cc/9GTV-URCB].

sees consolidation across a number of industries as a sign that antitrust law is failing to curb excessive accumulations of power.[10] The New Brandeis School is pushing to activate antitrust law against a number of social, economic, and political ills associated with the power of Big Tech and consolidation of power generally.[11] This Note focuses on particular ills that some have identified as symptomatic of Big Tech—namely, consumer exploitation, manipulation, and data privacy violations.[12]

The New Brandeisians have identified the size of Big Tech as the source of consumer harm online. However, these harms are symptoms of one of the basic principles that created the Internet ecosystem as we know it today, that is, the unregulated collection of consumer data for commercial purposes. This principle enables practices that exploit, manipulate, and violate the privacy of consumers to grow and persist. Therefore, breaking up Big Tech will not stop these harms from continuing to occur. Instead of focusing on Big Tech, this Note proposes that Congress and regulators prioritize the true cause of consumer exploitation, manipulation, and privacy violations—weak data privacy protections.

Section II of this Note explains the evolution of the Internet ecosystem and identifies the characteristics of Big Tech firms. In addition, it refutes arguments claiming that Big Tech's dominance is the cause of consumer exploitation, manipulation, and privacy violations in the digital marketplace with examples of consumer harm persisting throughout the Internet ecosystem. Section III discusses the inadequacies of the New Brandeisian approach to the power of Big Tech. Section IV shows that a strategy to curb consumer harm online that focuses on the power of Big Tech will fail to make a sufficient impact. Section V proposes a solution to consumer harm online that rests in a modification to the FTC's Section 5 authority, which will enable the agency to enforce data privacy protections that a reasonable consumer will expect.

II. BACKGROUND

A. The Internet's Move to a Centralized Ecosystem

The Internet ecosystem is defined as an "internet-dependent . . . business-enabling system within the broader economy, defined by activities that rely on the internet to promote exchanges of products, services, and information."[13] Since its humble beginning in the early 1990s, the modern

10. *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

11. *Id.*

12. *See e.g.*, Hughes, *supra* note 6; *see* Matt Stoller, Opinion, *Tech Companies Are Destroying Democracy and the Free Press*, N.Y. TIMES (Oct. 17, 2019), https://www.nytimes.com/2019/10/17/opinion/tech-monopoly-democracy-journalism.html [https://perma.cc/HB8V-MZPY]. These harms are not an exhaustive list of harms associated with the power of Big Tech.

13. JOHN DEIGHTON ET AL., INTERACTIVE ADVERTISING BUREAU, ECONOMIC VALUE OF THE ADVERTISING-SUPPORTED INTERNET ECOSYSTEM 115 (2017).

Internet has grown exponentially from 3,000 websites in 1994 to 1.72 billion websites today.[14]

Contrary to the increase in the number of websites, actual page views have decreased over time. "While in 2001, the top 10 websites accounted for 31 percent of all page views in America, by 2010 the top 10 accounted for 75 percent."[15] This paradox defies initial projections about the decentralized nature of the Internet.[16]

Tim Wu, a leading New Brandeisian, when asked in an interview in 2010 whether he thought the technology monopolies of that time looked different than those of the past, he replied, "I know the Internet . . . was designed to resist centralized control . . . [b]ut firms today, like Apple, make it unclear if the Internet is something lasting. . . ."[17] At that time, companies like Apple and Google began to dominate their respective markets.[18] Even then, many believed that the Internet would withstand centralization. Some gravitated toward factors like switching costs, which early on appeared to outweigh evidence that any firm had durable market power.[19] For example, in 2012 Robert Bork notably argued the proposition that "Google is the 'gateway' to the Internet . . . contradicts real world experiences [because] [c]onsumers can switch to other search engines at zero cost."[20] Those who see

14. Marin Armstrong, *How Many Websites Are There?*, STATISTA (Oct. 28, 2019), https://www.statista.com/chart/19058/how-many-websites-are-there/ [https://perma.cc/2SZ3-LEN2].

15. Robert B. Reich, Opinion, *Big Tech Has Become Way Too Powerful*, N.Y. TIMES (Sep. 18, 2015), https://www.nytimes.com/2015/09/20/opinion/is-big-tech-too-powerful-ask-google.html [https://perma.cc/9YPK-X9CX].

16. *See, e.g.*, David G. Post, *Governing Cyberspace*, 3 WAYNE L. REV. 155, 167 (1996) (describing the decentralized network of the Internet as allowing a "law of the Internet" to emerge "not from the decision of some higher authority, but as the aggregate of choices made by individual system operators about what rules to impose, and by individual users about which online communities to join."); John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND., (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/U5ZN-VM8K] (manifesto written in defiance of government regulation of the Internet, particularly the Telecommunications Act of 1996).

17. Nick Bilton, *One on One: Tim Wu, Author of 'The Master Switch'*, N.Y. TIMES: BITS (Nov. 4, 2010), https://bits.blogs.nytimes.com/2010/11/14/one-on-one-tim-wu-author-of-the-master-switch/ [https://perma.cc/BY8R-JPHR] (responding to interviewer in reference to the monopolies ABC, NBC, and AT&T).

18. *See* Katherine Griwert, *Google Dominates Search Engine Market*, BRAFTON (Apr. 8, 2010), https://www.brafton.com/news/google-dominates-search-engine-market-1260386 [https://perma.cc/W25A-L68T]; Erick Schonfeld, *U.S. Mobile Web Usage Grew 110 Percent Last Year*; *Apple Dominates, Android No. 2*, TECHCRUNCH (Jan. 5, 2010), https://techcrunch.com/2010/01/05/quantcast-mobile-web-apple-android/ [https://perma.cc/Q4RP-JBEC].

19. *See* Erick Schonfeld, *How Durable Are Information Monopolies on the Internet?*, TECHCRUNCH (Nov. 14, 2010), https://techcrunch.com/2010/11/13/information-monopolies-internet/ [https://perma.cc/67FB-8EZ8]. Switching costs in this context refer to the ease with which users can move from one website to the next.

20. Robert H. Bork & J. Gregory Sidak, *What Does the Chicago School Teach About Internet Search and the Antitrust Treatment of Google?*, 8 J. COMP. L. & ECON. 663, 667 (2012).

switching costs as enabling Big Tech's market power, rather than undermining it, have since criticized Bork's remarks.[21]

Today, many believe the Internet is concentrated because Big Tech consists of digital platforms,[22] while others argue that technology sectors, including the Internet, are too dynamic to remain beholden to monopoly power for too long.[23] The former opinion challenges the long-standing theory of "creative destruction," which characterizes industrial change as "incessantly revolutioniz[ing] the economic structure *from within*, incessantly destroying the old one, incessantly creating a new one."[24] Neither position has been definitively refuted and ultimately leave questions about competition in the digital marketplace unresolved.

As the digital world has shifted "from the wide-open web to semi-closed platforms," researchers and scholars have set out to understand the structural models that facilitated the move and enabled certain firms to capture market power and preserve it over time.[25] The following sections (II.B and II.C) provide an overview of the structural characteristics of digital platforms and how those characteristics enhance the market power of Big Tech.

B. The Characteristics of Big Tech

Big Tech companies are distinguished from other Internet-based companies because they are digital platforms. A digital platform is a two-sided market in which an intermediary (the platform) enables two interested

21. *See, e.g.*, Maurice Stucke, *Here Are All the Reasons It's a Bad Idea to Let a Few Tech Companies Monopolize Our Data*, HARV. BUS. REV. (Mar. 27, 2018), https://hbr.org/2018/03/here-are-all-the-reasons-its-a-bad-idea-to-let-a-few-tech-companies-monopolize-our-data [https://perma.cc/8Y2Q-GZPX].

22. *See, e.g.*, COMMITTEE FOR THE STUDY OF DIGITAL PLATFORMS MARKET STRUCTURE AND ANTITRUST SUBCOMMITTEE, GEORGE J. STIGLER CENTER FOR THE STUDY OF THE ECONOMY AND THE STATE, REPORT 7–8 (July 1, 2019) https://www.judiciary.senate.gov/imo/media/doc/market-structure-report%20-15-may-2019.pdf [https://perma.cc/S366-F5ZJ] [hereinafter Stigler Report].

23. *See, e.g.*, David S. Evans & Richard Schmalensee, *Debunking the Network Effects Bogeyman*, 40 REGUL. 36 (2017).

24. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 83 (1976). By comparison, while breakthroughs in technology that make farming more efficient can affect agriculture, the basis of it does not change; it will always be a matter of extracting matter from the earth.

25. Chris Anderson & Michael Wolff, *The Web Is Dead. Long Live the Internet*, WIRED (Aug. 17, 2010), https://www.wired.com/2010/08/ff-webrip/ [https://perma.cc/GJ4B-PWXF] (offering opposing views as to why the internet has shifted from a decentralized "wide-open web" to a network of more centralized "semi-closed" platforms).

parties, usually buyers and sellers, to interact.[26] Two-sided markets existed before the digital age,[27] but digital platforms are singled out for their strong network effects, economies of scale, and use of data.[28] Digital platforms are generally prone to tipping. Tipping means that once a firm gains enough users in a given market, it establishes itself as a powerful incumbent—one that is difficult to displace.[29] The popularity of digital platforms can be attributed to these characteristics which enable greater connectivity within Internet ecosystem.

1. Network Effects

Network effects occur when the value of a product is dependent upon the number of its users.[30] This occurrence is especially important for digital platforms because success hinges on the platform's ability to incentivize parties on either side (usually buyers and sellers) of the platform to interact. Once the number of users reaches a certain threshold, network effects take over and the service increases in value as more users join.[31] This phenomenon captures the trajectory of Facebook's growth: individuals' desire to be on the platform increases as more people they know join the network, linking the value of the social network to its size.

2. Economies of Scale

Economies of scale occur in industries when efficiencies in production reach a point at which production costs decrease with every added customer.[32] For example, when a manufacturer creates an assembly line that maximizes

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26. *See* JEAN TIROLE, ECONOMICS FOR THE COMMON GOOD 379 (2017). Others define digital platforms as services that are "accessed via the internet [and operate as] two-sided or multi-sided platform[s], at least one side of which is open to the public and allows members of the public to produce content, buy and sell goods or services, or otherwise interact in ways that enable them to be more than simply passive consumers of goods and services." Harold Feld, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms*, ROOSEVELT INST. 30 (May 2019), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Case-for-the-Digital-Platform-Act-201905.pdf [https://perma.cc/6B9B-PZGM].

27. For example, credit cards are a two-sided market that allow consumers and merchants to transact such that merchants get instant payment while consumers get to defer payment to a later time. *See e.g.*, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2277–78 (2017) (requiring consideration of cardholders and merchants in defining the relevant market of the two-sided credit-card market).

28. *See* Feld, *supra* note 26, at 31 (distinguishing Netflix from YouTube, both of which are two-sided platforms, because Netflix is simply "creating or licensing content and then making it available to consumers," whereas YouTube allows users to participate in content creation); Stigler Report, *supra* note 22, at 11–12.

29. Stigler Report, *supra* note 22, at 11–12.

30. *See* United States v. Microsoft, 253 F.3d 34, 49 (D.C. Cir. 2001) ("In markets characterized by network effects, one product or standard tends towards dominance, because 'the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.'").

31. *See id.*

32. Stigler Report, *supra* note 22, at 36.

labor and materials efficiently and thus minimizes the cost of each product unit, the manufacturer reaches "scale." However, in typical markets, efficiencies have a ceiling that, once reached, will result in increased costs for every additional unit of production.[33] In digital markets, products and services are delivered as digital information and can be replicated at little to no cost.[34] An example of this is the digital distribution of music. Platforms like Spotify and Apple Music distribute millions of music albums with virtually zero increased cost to production because the music has no physical form—the costs do not increase in proportion to usership. "The same holds for information services that are subject to fixed design and development costs and fixed maintenance and updating costs."[35] For example, every time Facebook updates its services, it does so for all of its users in a jurisdiction, but the cost only incurs once.

Generally speaking, digital platforms enjoy "[i]ncreasing returns to scale."[36] After initial investment in fixed costs to create a service, a digital platform can generate profit as customers join the platform.[37] Once the platform has a large enough customer base, it enjoys lower average costs per customer, giving it a significant advantage over competitors that have not yet invested in the development of a new platform.[38] Network effects compound this occurrence because once a platform gains a significant number of users, those users are less likely to switch to another platform that has a smaller network of participants.[39] With platforms like Facebook and Google, which have strong network effects and economies of scale, competitors have less incentive to enter the market because the obstacles to reach a comparable size and profitability are difficult.[40]

3. The Role of Data

Data is an extremely valuable asset within the Internet ecosystem.[41] The analysis of data through machine learning and artificial intelligence creates value for companies "as it can guide the development of new products and services, predict the preferences of individuals, help tailor services and opportunities, and guide individualized marketing."[42] At the same time, advocates, academics, and others have raised concerns over how digital

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *See id.*
38. Stigler Report, *supra* note 22, at 36.
39. *See id.*
40. *Id.*
41. Joris Toonders, *Data is the New Oil of the Digital Economy*, WIRED, https://www.wired.com/insights/2014/07/data-new-oil-digital-economy/ [https://perma.cc/X7LG-8NRL] (referring to data as "the new oil").
42. FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION i (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf [https://perma.cc/EQ2D-AXPH].

platforms' control over user data may further cement market power.[43] Some summarize this phenomenon as a "virtuous loop":

> As a platform expands and diversifies, it obtains greater ability to compile different types of data from an increasing number of users. The benefits of these additional data will provide the platform with the opportunity to develop even more services and make enhancements to existing ones. Efficiency improvements further grow the user base and extent of collectible data. In this way, the platform may very well find itself in a sustained virtuous loop where success in one type of service leads to large scale data collection, which leads to more positive enhancements in services, then to further expansion and so-on.[44]

The role of data in the Internet ecosystem further complicates the dominance of digital platforms by amplifying the impact of network effects and scale. The mix of large data sets and the advantages of scale enable large firms to reap the benefits of artificial intelligence and machine learning at a faster and more dynamic rate than smaller companies.[45]

C. Concentration

The characteristics described above can create difficult conditions for competition, especially once a dominant firm establishes itself in a market.[46] When competitive markets function properly, "new enterprises [are] able to enter the market if they are more efficient or more innovative than the established monopoly," but in digital markets, research suggests that entrants cannot do so because the combination of qualities creates durable market power.[47] Once entry barriers exist, they can be difficult to overcome, and when such conditions exist for an extended period, there is potential that they will lead to poorer quality products and services and less innovation.[48]

Not only do the characteristics of Big Tech stifle competition, but many commentators, including the New Brandeisians, attribute consumer

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43. *See* Eliana Garces & Daniel Fanaras, *Antitrust, Privacy, and Digital Platforms' Use of Big Data: A Brief Overview*, 28 J. OF THE ANTITRUST, UNFAIR COMPETITION, AND PRIV. L. SEC. OF THE CAL. LAW'S ASS'N, 23, 23 (2018).

44. *Id.* at 24–25 (noting that some literature assimilates the "virtuous loop" to network effects, but the phenomenon this literature refers to is the result of increasing returns to scale and scope in data, making the loop operative "for as long as additional data serves to make a service more efficient to every user.").

45. *See* Stigler Report, *supra* note 22, at 37.

46. *See id.* at 57 (explaining that absent entry barriers, "the tremendous amount of profit available . . . would stimulate entry").

47. *See* TIROLE, *supra* note 26, at 398.

48. Stigler Report, *supra* note 22, at 57.

exploitation, manipulation, and privacy violations to Big Tech's power.[49] However, the following section shows this is hardly the case.

D. Is Big Bad or Is Bad Bad?

Most of the Internet's magic happens behind the shroud of Big Tech. Seamless surfing between webpages that offer tailor-made recommendations are conveniences powered by what some refer to as the one-way mirror of corporate surveillance.[50] Big Tech has been accused of having a stranglehold on data, but it is not the only group collecting it. From shopping centers to concert venues and car dealerships, many unsuspecting industries participate in corporate surveillance.[51] However, most data tracking goes undetected by consumers and many of the companies involved do not interact directly with them.[52]

1. Data Collection Practices Across the Internet and Beyond

There are two categories of information that travel over the Internet. "First-party data" is information collected by companies when people interact directly with their services.[53] "Third-party data" is information collected by a company from any place other than through direct interactions with users.[54] A good illustration of this is Facebook, which learns about users through first-party data because of what they like, click on, and post on its platform. But Facebook also collects third-party data about people across the Internet using Facebook Pixel, which is a tracking device installed on thousands of different websites that allows Facebook to collect data about individuals' activities online.[55] Like Facebook Pixel, third-party data is collected all the time and in every corner of the Internet.[56] The more time people spend online, the more valuable data becomes. But Big Tech firms are not the only ones cashing in.[57]

Data brokers are "companies whose primary business is collecting personal information about consumers from a variety of sources and

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49. *See id.* ("when platforms do not face competition, they will be able to reduce quality, for example, by decreasing privacy protections, without losing customers or revenue.").

50. BENNET CYPHERS & GENNIE GEBHART, ELECTRONIC FRONTIER FOUNDATION, BEHIND THE ONE-WAY MIRROR: A DEEP DIVE INTO THE TECHNOLOGY OF CORPORATE SURVEILLANCE (Dec. 2, 2019), https://www.eff.org/document/behind-one-way-mirror-deep-dive-technology-corporate-surveillance [https://perma.cc/Z6XR-BVYF]; *see also* Shoshana Zuboff, *Big Brother: Surveillance Capitalism and the Prospects of an Information Civilization*, 30 J. INFO. TECH. 75 (2015).

51. *See* CYPHERS, *supra* note 50, at 4.

52. *See id.*

53. *Id.* at 4–5.

54. *Id.*

55. *See* Allen St. John, *How Facebook Tracks You, Even When You're Not on Facebook*, CONSUMER REPS., (Apr. 11, 2018), https://www.consumerreports.org/privacy/how-facebook-tracks-you-even-when-youre-not-on-facebook/ [https://perma.cc/8U6K-NR2P].

56. *See Id.*

57. *See id.*

aggregating, analyzing, and sharing that information, or information derived from it" for a wide range of purposes including, but not limited to, "marketing products, verifying an individual's identity, or detecting fraud."[58] Some laws regulate data broker activity in specific industries. For example, the Fair Credit Reporting Act ("FCRA") governs companies providing consumer data to credit reporting agencies or for credit related purposes like employment, insurance, and housing.[59] However, there is no federal law covering the use of consumer data for marketing purposes, which includes e-commerce and any online ad-supported goods and services, which comprise the majority of the Internet ecosystem.

Data brokering is believed to be a $200 billion industry,[60] and even firms like Facebook and Google are customers "because of the wealth and granularity of offline and cross-device data [brokers] have accumulate[d]."[61] One company, PeekYou, uses technology to analyze content from different social sites, news sources, homepages, and blog platforms to build profiles of the individuals it identifies.[62] Acxiom, another data broker, collects data from over 60 countries, and has 2.5 billion addressable consumers with over 10,000 attributes compiled for those consumers.[63]

The main difference between data brokers and Big Tech is that many brokers do not collect data directly from consumers. Instead, data brokers collect data from public government sources, other publicly available sources, and commercial sources online and offline.[64] This allows them to build a "detailed composite of a consumer's life" from seemingly disparate data points gathered from a wide range of a consumer's online and offline activities.[65] Many people are likely unaware that this practice is legal, however in 2019, the U.S. Court of Appeals for the Ninth Circuit held that hiQ, a data analytics company, could scrape publicly available data from LinkedIn without reprisal.[66]

58. FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY i, 3 (May 2014) [hereinafter FTC Data Broker Report].

59. *Id.* at i.

60. David Lazarus, *Column: Shadowy Data Brokers Make the Most of Their Invisibility Cloak*, L.A. TIMES (Nov. 5, 2019), https://www.latimes.com/business/story/2019-11-05/column-data-brokers [https://perma.cc/57BY-RPF8].

61. Aliya Ram & Madhumita Murgia, *Data Brokers: Regulators Try to Reign in the 'Privacy Deathstars'*, FIN. TIMES (Jan. 7, 2019), https://www.ft.com/content/f1590694-fe68-11e8-aebf-99e208d3e521 [https://perma.cc/9D3A-Q3SD].

62. *About Us*, PEEKYOU, https://www.peekyou.com/about/ (last visited Apr. 4, 2020) [https://perma.cc/6PGE-DBHG].

63. *What We Do*, AXCIOM, https://www.acxiom.com/what-we-do/data/ (last visited Apr. 4, 2020) [https://perma.cc/A8B9-NM8L].

64. FTC Data Broker Report, *supra* note 58, at 11.

65. *Id.*

66. hiQ Labs, Inc. v. LinkedIn Corp., 938 F.3d 985 (9th Cir. 2019).

2. Commercial Data Collection Leaves Consumers Exposed

Data is fundamental to the basic functions of the Internet.[67] It allows companies to provide Internet services for free and plays an important role in the advancement of existing technology infrastructures.

There is also the potential for data to be used for nefarious purposes. There are many allegations that digital platforms employ data collected in the commercial context in a "deeply intentional and highly consequential" regime aimed "to predict and modify human behavior as a means to produce revenue and market control."[68]

Up until now, the business of collecting consumer data has operated under a shroud of secrecy. Big Tech has been a target for blame for because it is big and has considerable influence over much of the Internet. But a policy agenda focused on market share and power risks making size the disease such that it becomes the proxy for consumer harm online.

The New Brandeis School and others calling for antitrust intervention mistakenly focus on the structure of Big Tech as the means to cure the harms associated with it. However, the issue is behavioral, not structural, and as shown above, the behavior is common throughout the Internet ecosystem.

The historical perspective provided in the next section shows that focusing antitrust doctrine on the structure of markets rather than welfare outcomes,[69] as is its traditional function, will fail to address consumer exploitation, manipulation, and privacy violations online.

III. THE MOVEMENT TO TAKE DOWN BIG TECH

In the last year, criticism that Big Tech is too big and too powerful has intensified[70] with calls to action gaining bipartisan support.[71] Perhaps the most progressive advocates are the antitrust experts and scholars organized under the New Brandeis School. While opinions differ on what to do about Big Tech, the consensus is *something* should be done. Among the most radical and often quoted solution is "break them up." Some advocate for the traditional approach: a structural splitting of these firms into their component businesses, such as, for example, breaking up Amazon into Amazon

67. *See* Zachary Karabell, *Don't Break Up Big Tech*, WIRED (Jan. 23, 2020), https://www.wired.com/story/dont-break-up-big-tech/ [https://perma.cc/45M6-2UHA] (suggesting that in order for businesses to thrive under a different model, they would have to charge customers more for services than customers have so far been willing to pay).

68. Zuboff, *supra* note 50, at 75.

69. *See infra* III.B.

70. *See, e.g.*, STAFF OF H. SUBCOMM. ON ANTITRUST, COMMERCIAL AND ADMIN. LAW OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIG. MKTS., 116th Cong. (2020).

71. *See* Christopher Mims, *Republicans and Democrats Find a Point of Agreement: Big Tech Is Too Powerful*, WALL ST. J. (July 30, 2020), https://www.wsj.com/articles/republicans-and-democrats-find-a-point-of-agreement-big-tech-is-too-powerful-11596118625 [https://perma.cc/64E5-5X3U].

Marketplace, Amazon Web Services, and AmazonBasics.[72] Others have argued that Big Tech's vertically integrated parts should be unbound so none of the firms can own a platform that allows merchants and consumers to buy and sell while also selling its own products on the platform.[73] Others want to see enforcement officials unwind mergers viewed as anticompetitive.[74]

A. Shifts within Congress and Federal Agencies

Frustrations about the power of Big Tech have been percolating for years among policy groups, academic scholars, and antitrust experts, finally boiling over in 2019. Senator Elizabeth Warren (D-MA), was one of the first in Congress to formulate a plan to take on Big Tech. Her two-part proposal creates "Platform Utilities" of firms with over $25 billion (capturing all of Big Tech) in global revenue and prohibits those firms from operating and participating on the same platform.[75] Her plan also designates regulators to reverse anticompetitive mergers.[76]

The intrigue of antitrust action is the blunt force of the Sherman Act, which is one of the government's main tools capable of stopping corporations from amassing too much power. However, monopolization cases are complex, require considerable resources, and could take years to conclude. However, Senator Warren's allegations that Big Tech has "bulldozed competition, used our private information for profit, and tilted the playing field against everyone else,"[77] and Republican Senator Josh Hawley's (R-MO) remarks that "they've given us some of the worst of America,"[78] display considerable motivation from lawmakers to crack down on Big Tech.

A similar consensus was on display at a 2020 congressional hearing by the House of Representative's Subcommittee on Antitrust, Commercial, and Administrative Law, where top executives from smaller technology companies testified about the different tactics tech giants—particularly Google, Apple, and Amazon—employ to crush their competitors.[79] Led by

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72. *See* Steve Lohr, *How Should Big Tech Be Reined In? Here Are 4 Prominent Ideas*, N.Y. TIMES (Aug. 20, 2019), https://www.nytimes.com/2019/08/20/technology/big-tech-reined-in.html [https://perma.cc/XU76-6JTP].

73. *Id.*

74. *Id.*

75. *See* Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c [https://perma.cc/4EF4-E3AH].

76. *See id.*

77. *Id.*

78. Matt Laslo, *Josh Hawley Says Tech Enables 'Some of the Worst of America'*, WIRED (Aug. 16, 2019), https://www.wired.com/story/josh-hawley-tech-enables-worst-of-america/ [https://perma.cc/8AAT-4KP2].

79. One example of bullying tactics came from testimony by Tile, Inc. representatives, who testified about Tile's experience with Apple's anti-competitive practices. According to Tile, Apple abruptly informed Tile that Apple would no longer carry Tile products in its stores because it created its own Tile-like products. *See Online Market Platforms and Market Power, Part 5: Competitors in the Digital Economy, Hearing Before Subcomm. on Antitrust, Com. and Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. (2020) (testimony of Kirsten Daru, Chief Privacy Officer and General Counsel, Tile Inc.).

Chairman David Cicilline (D-RI), the subcommittee began investigating Big Tech in 2019, looking for answers to how these companies amassed so much wealth and whether it accumulated through anticompetitive or illegal means. The Subcommittee released its report in October 2020 with recommendations on how to correct digital platform market dominance including antitrust reform, structural separation of dominant firms, and the implementation of rules to prevent firms from discriminating and self-preferencing.[80]

In response to pressure from Congress and the public, the FTC and DOJ opened probes into Big Tech and have since brought suit against Facebook and Google respectively.[81] The FTC also issued a broad Section 6(b) order to social media and video streaming platforms in December 2020 that could serve as the basis for future lawsuits.[82] Both agencies have recently been scrutinized for having lax enforcement agendas over the last two decades,[83] although it appears the tides are changing given the recent lawsuits. Still, the dissatisfaction with these institutions is deeper than simply years of bad leadership and management. Couched within the debate on what to do about Big Tech is a meta-debate over whether the doctrine to take down monopolies is itself up to the job.

B. The Evolution of Antitrust and the Rise of the New Brandeis School

Within the debate on what to do about Big Tech is a deeper divide over antitrust doctrine. On the one side is the Chicago School, which has dominated antitrust jurisprudence in the courts and agencies since the 1970s, and on the other is the New Brandeis School—a populist movement that looks to replace the Chicago School's consumer welfare standard with a broader set

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80. *See* STAFF OF SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 375–402 (2020). Congressman Ken Buck (R-CO) released a report in response to the majority staff's report that details alternative solutions to Big Tech dominance. *See* STAFF OF SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, THE THIRD WAY: ANTITRUST ENFORCEMENT IN BIG TECH (2020).

81. *See* FTC v. Facebook, Inc. (D.D.C filed Dec. 9, 2020); United States v. Google LLC, No. 1:20-cv-3010, 3 (D.D.C. filed Oct. 20, 2020). The FTC is still working on an antitrust probe into Amazon and the DOJ is still working on a probe into Apple. *See* Laslo, *supra* note 78.

82. *FTC Issues 6(b) Orders to Social Media and Video Streaming Services*, FTC, https://www.ftc.gov/news-events/blogs/business-blog/2020/12/ftc-issues-6b-orders-social-media-video-streaming-services (last visited 1/1/2021) [https://perma.cc/WP4E-DBMQ] (the order covers social media and video streaming services by Amazon, Discord, Facebook, Reddit, Snapchat, TikTok, Twitter, WhatsApp, and YouTube).

83. *See* Kadhim Shubber, *U.S. Antitrust Enforcement Falls to Slowest Rate Since 1970s*, FIN. TIMES (Nov. 28, 2018), https://www.ft.com/content/27a0a34e-f2a0-11e8-9623-d7f9881e729f []; Jason Del Rey, *Why Congress's Antitrust Investigation Should Make Big Tech Nervous*, VOX (Feb. 6, 2020), https://www.vox.com/recode/2020/2/6/21125026/big-tech-congress-antitrust-investigation-amazon-apple-google-facebook [https://perma.cc/24VU-MQ3S]. ("The last major antitrust battle between the US government and a tech giant ended in 2013 when the FTC cleared Google of violating antitrust law in relation to how it ranks and displays search results from competing websites like Yelp and TripAdvisor.")

of measures to fight against what Supreme Court Justice Louis Brandeis coined "the curse of bigness."[84]

"There [is] a long tradition of fear of monopoly in the United States."[85] Between 1850 and 1900, the U.S. saw the climax of laissez-faire policy.[86] It was a period of tremendous social and economic upheaval—improvements in transportation and communications revolutionized the economy and society—and business growth outpaced the development of the law.[87] The notorious trusts formed in the wake of the development, harnessing economic power to dominate industries and politics.[88] People turned against monopolies because they led to higher prices, suppression of wages, decreased innovation, and less productivity.[89]

The Progressive Era (1880-1920) arose in reaction to the rise of monopoly power.[90] Legal thinkers at the time began to question the philosophy of laissez-faire,[91] pointing out that although industrialization showed promise as an economic model, "[the] premise that unregulated self-interest would yield optimal economic development had never been proven," and in certain industries, such as the railroads, "laissez-faire seemed not to work."[92] Combined with renewed concerns for public welfare and social reform, the Progressive Era ushered in ideas about wealth and corporate power that American society still grapples with today, and are center stage in the Big Tech debate.

Progressive economists at the turn of the 20th century were greatly concerned with unequal distributions of wealth.[93] "The major legal innovations arising from that period—antitrust, corporate governance, and public utility—were . . . parallel strategies for addressing different forms of private power . . . [and] share[d] a common moral purpose: not just to facilitate market mechanisms or promote efficiency, but to ensure the accountability of private power and to promote public values such as access, equity, and innovation."[94] The Supreme Court has noted:

84. *See* Lina Khan, Editorial, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. OF EUR. COMPETITION L. & PRAC. 131, 131–32 (2018).

85. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 463 (2d. ed., 1985).

86. *Id.* at 440.

87. *See id.*

88. *See id.* at 463–64.

89. *See generally id.*

90. *See* Jean-Paul Simon, *The Origins of US Public Utilities Regulation: Elements for a Social History of Networks*, 1993 FLUX 33.

91. *See* Herbert Hovenkamp, *The First Great Law and Economics Movement*, 42 STAN. L. REV. 993, 998 (1990).

92. *Id.*

93. *See* K. Sabeel Rahmen, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 CARDOZO L. REV. 1621, 1621 (2018).

94. *Id.* at 1634.

> The Sherman Act was designed to be a comprehensive charter of economic liberty. . . . It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[95]

The Sherman Act of 1890 is notoriously vague. Section 2 states in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize . . . shall be deemed guilty of a felony. . . ."[96] Due to its open-endedness, antitrust jurisprudence has vacillated throughout its 130 years of development while at the same time maintaining the principle that the statutes themselves are a charter of economic liberty.[97]

Modern Section 2 jurisprudence is nearly synonymous with the Chicago School's consumer welfare standard. The Chicago school of thought gained popularity in the 1970s for its streamlined economic approach to the application of antitrust law at a time when critics questioned the government's interventionist policies.[98] Robert Bork, the Chicago School pioneer who originated the consumer welfare standard, was at the forefront of the effort to expose the failures he and others[99] observed in the judicial process—namely the inconsistent and confusing precedent set by the Court's embrace of broad and diverging social, political, and ethical values.[100] He argued that "antitrust was unworkable" when it was used to promote a diverse set of goals, which

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95. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

96. 15 U.S.C. § 2.

97. *See generally* William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74, IOWA L. REV. 1105 (1989) (identifying over time a cyclical pattern in policy agendas that mark the periods of American government efforts to use the Sherman Act to deconcentrate markets).

98. William F. Adkinson, Jr. et al, FED. TRADE COMM'N, ENFORCEMENT OF SECTION 2 OF THE SHERMAN ACT: THEORY AND PRACTICE, WORKING PAPER 10 (Nov. 3, 2008) (enforcement agencies acted aggressively during the 1960s and 70s but lost many cases, which raised doubts about the economic theories underlying those cases); *see also,* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 UNIV. PA L. REV. 925, 928–29 (1979) ("in the 1950's and early 1960's . . . [c]asual observation of business behavior, colorful characterizations (such as the term 'barrier to entry'), eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of careful definitions and parsimonious logical structure of economic theory.").

99. *See, e.g.*, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 926 (1979) (arguing that the Chicago and Harvard schools of thought did not "emerge from a full-blown philosophy of antitrust. Rather, they were the product of pondering specific questions raised by antitrust cases, and only in retrospect did it become clear that they constituted the basis of a general theory of the proper scope of antitrust policy."). Posner agreed with the Chicago School posture.

100. *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 8 (1966) (referring to a Second Circuit opinion that held a company violated Section 2 of the Sherman Act on the basis of "belief that great industrial consolidations are inherently undesirable, regardless of their economic results." Bork noted the opinion failed "to explain what the noneconomic helplessness of the individual might consist of, what category of individuals was involved, or how the concept applied to the facts of the case. . . .").

was why he promoted a single-minded focus on consumer welfare.[101] The theoretical premise is that "a practice restrains trade, monopolizes, is unfair, or tends to lessen competition if it harms consumers by reducing the value or welfare they would have obtained from the marketplace absent the practice."[102]

Robert Bork and his contemporaries shifted antitrust doctrine towards policies that embrace vertical integration[103] and business expansion across markets[104] because they serve economic efficiencies and development that ultimately benefit consumers.[105] Today, when courts analyze challenged conduct, they tend to focus on whether the behavior affects economic efficiencies and will resist a ruling that may discourage dominant firms from advancing business strategies that improve consumer welfare at the expense of competitors.[106] As noted by the Supreme Court, "the antitrust laws . . . were enacted for 'the protection of competition, not competitors."[107]

Practically speaking, maintaining the "competitive process" is an abstraction. It is attractive in theory but less so as a real-world application because it results in winners and losers, where the losers' livelihoods suffer. With this in mind, the question becomes what is the most important group to protect in carrying out this end? "If antitrust law is required to maximize

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101. *See* Gregory J. Werden, *Back to School: What the Chicago School and New Brandeis School Get Right*, SYMP.ON RE-ASSESSING THE CHI. SCH. OF ANTITRUST L. 5 (2018). Bork argued that "[n]ot only was consumer welfare the predominant goal expressed in Congress, but the evidence strongly indicates that, in case of conflict, other values give way before it. This means that such other values are superfluous to the decision of cases since none of them would in any way alter the result that would be reached by considering consumer welfare alone." Bork, *supra* note 100, at 10–11.

102. Thomas G. Krattenmaker et al, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO L.J. 241, 244 (1987).

103. Vertical integration refers to the combination of a firm's assets along a single supply chain. It may lead to anticompetitive conduct in certain contexts where it enables a dominant firm to foreclose a rival's access to parts of the supply chain or raise a rival's costs by increasing the price of a certain product. *See* U.S DEP'T OF JUSTICE & FED. TRADE COMM., VERTICAL MERGER GUIDELINES 1, 4 (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf [https://perma.cc/DR2J-5DXD].

104. Examples of this are tie-ins, which is when a company offers products together as part of a package. This "can benefit consumers who like the convenience of buying several items at the same time . . . [it] can also reduce manufacturer's costs for packaging, shipping, and promoting the products" among other efficiencies. *See Tying the Sale of Two Products*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products (last visited, Apr. 10, 2020) [https://perma.cc/4WHX-CYAG]. Tie-ins can also be used anticompetitively. For example, "a monopolist may use forced buying, or 'tie-in' sales, to gain sales in other markets where it is not dominant and to make it more difficult for rivals in those markets to obtain sales." *Id.*

105. *See* Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 809 (1987).

106. William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COL. BUS. L. REV. 2, 19–20 (2007).

107. Brunswick Corp. v. Pueblo-Bowl-O-Mat*,* 429 U.S. 477, 488 (1977) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)); *see also S*pectrum Sports v. McQuillan, 506 U.S. 447, 458 (1993).

simultaneously the welfare of small communities, the number of Mom-and-Pop stores, the absolute freedom of entry . . . workers' leisure time, and the ability of firms to avoid competing with each other, then antitrust law is paralyzed."[108] Therefore, the Chicago School places the consumer at the center of antitrust analysis. Over the years, the courts and enforcement agencies have, for the most part, faithfully adhered to the consumer welfare standard. Today, the debate about its viability in addressing concentration in the digital marketplace is enmeshed in the debate about the power of Big Tech.

New Brandeisians reject the consumer welfare standard, which they believe has led antitrust jurisprudence astray and resulted in damage to the American economy.[109] Lina Khan, a prominent New Brandeisian, argues that the Chicago School's consumer welfare theory is "antithetical to the goal of competition" because its focus on efficiency emphasizes economic outcomes rather than maintenance of the competitive process.[110] Using the philosophical and social foundations of Progressive Era ideals, New Brandeisians argue for a new (or rather old, depending on the scholarship) framework for antitrust doctrine[111]—one recognizing "that concentrated private power [is] a menace, a barrier to widespread prosperity, and an indefensible division of the spoils of progress and economic security that yields human flourishing."[112] The New Brandeis School, like Brandeis, believes "that the *structure* of our markets and of our economy can determine how much real liberty individuals experience in their daily lives."[113]

Some critics push back on the notion that antitrust doctrine is inadequate to handle Big Tech's anticompetitive conduct.[114] At a conference in June 2019, Assistant Attorney General of the DOJ Antitrust Division, Makan Delrahim, reviewed the many successful antitrust cases against

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108. Krattenmaker, *supra* note 102, at 244.

109. *See, e.g.*, Lina Khan, *Ideological Roots of America's Market Power Problem*, 127 YALE L.J. 960, 964 (2018) ("The sweeping market power problem we confront today is a result of the current antitrust framework. The enfeebled state of antitrust enforcement traces directly to an intellectual movement that fundamentally rewrote antitrust law—redefining its purpose, its orientation, and the values that underlie it.").

110. *Id.* at 968.

111. One of the movement's leading thinkers, Tim Wu, has advocated extensively for reviving the anti-monopoly tradition in the U.S. which he believes has been obliterated by the economic policies of the last 40 years. *See* Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, MEDIUM ONEZERO (Nov. 18, 2019), https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7. [https://perma.cc/C67H-NR6N].

112. *Id.*; *but see* Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293 (2019) (arguing that "[o]ver the last fifty years, antitrust has developed into a coherent, principled, and workable body of law that contributes positively not only to American competitiveness and societal well-being, but also helps to export the culture of market competition around the world.").

113. Khan, *supra* note 84, at 131 (arguing that the Chicago School's focus on consumer welfare has distorted the doctrine to prioritize outcomes—welfare of the consumer—instead of ensuring the market structure supports the competitive process) (emphasis added).

114. *See, e.g.*, Joe Kennedy, *Why the Consumer Welfare Standard Should Remain the Bedrock of Antitrust Policy*, INFO. TECH. & INNOVATION FOUND., http://www2.itif.org/2018-consumer-welfare-standard.pdf [https://perma.cc/G495-6D3V].

legitimate monopolization and warned against dispatching antitrust laws to address issues unrelated to competition.[115] His remarks highlight the struggle over defining the purpose and aim of antitrust. This dispute traces directly to the vague language of the Sherman Act. As explained above, the Act was passed with tremendous public support. Ultimately, it is a law shaped by public policy and will continue to be shaped by public policy.

IV. BREAKING UP BIG TECH WILL NOT CURE CONSUMER HARMS

The intellectual divide in antitrust policy breaks at the fine line that defines the difference between procompetitive and anticompetitive conduct.[116] The Sherman Act itself causes this issue in part because it does not define what it means "to monopolize" or "attempt to monopolize."[117] Legislative history[118] and the courts affirm that monopolies are not illegal per se.[119] Likewise, courts acknowledge that "monopoly may be obtained by superior skill and unmatched effort."[120] Herbert Hovenkamp, a notable antitrust scholar, helped elucidate the distinction between illegal and legal monopolization. He points out that "in most circumstances involving monopoly, the 'intent' to create a monopoly anticompetitively cannot be distinguished from the intent to do so competitively."[121] Here, he simply refers to how normal business conduct works in competitive markets; a firm "intends" to increase its profits which, if successful, invariably leads to excluding profits from other firms.[122] If the market is competitive, and many firms are vying for market share, it is harder to conclude that competitive conduct is intended to harm any particular rival.[123] In a concentrated market, this scenario looks different. When a dominant firm has few competitors and it "intends" to increase its profits, it likely does so with the awareness that its actions will harm rivals. However, this scenario does not necessarily lead to the conclusion of intentional harm either.[124] The goal of business is well

115. Makan Delrahim, U.S. Assistant Att'y Gen., Remarks at the Antitrust New Frontiers Conference (Jun. 11, 2019) (transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers [https://perma.cc/X7UG-L8W9]).

116. *See* Herbert Hovenkamp, *The Monopolization Offense*, 61 OHIO STATE L.J. 1035, 1036 (2000).

117. *Id.* at 1035 (adding that "the legislative history of the antitrust laws provides no enlightenment about what it means 'to monopolize' a part of commerce").

118. *Id.* at 1035–36 (At the time the statute passed, some "objected that the plain language of the statute would condemn one 'who happens by his skill and energy to command an innocent and legitimate monopoly of a business.'").

119. Adkinson, *supra* note 98, at 1.

120. *Id.* at 1. Conduct that can be characterized as a violation includes that which is done in order to acquire a monopoly position or maintain a monopoly position, and which exposes consumers to the harmful effects of monopoly, such as increased prices or decreased output.

121. Hovenkamp, *supra* note 116, at 1039.

122. *See id.*

123. *See id.*

124. *See id.* at 1039–40.

understood. Companies big and small are formed to make money. Therefore, in monopolization cases adjudicators are pressed to determine when a dominant firm's profit-seeking conduct and market share exceed the benefits associated with it.[125]

New Brandeisians claim that the competitive process is best protected by "structural conditions (competition) as a way of promoting a set of outcomes and principles" such as "preventing unfair wealth transfers from consumers, producers and workers to monopolistic firms; preserving open markets in order to ensure opportunity for entrepreneurs; and halting excessive concentrations of private power."[126] However, this structural framework ignores the fine line between procompetitive and anticompetitive acts and, under certain circumstances, could be employed to prevent behavior that enhances competition.

New Brandeisians not only overemphasize the role of structure in maintaining healthy and competitive markets, they also mistakenly entangle the goal of protecting the competitive process with remedying consumer exploitation, manipulation, and privacy violations associated with the concentration of Big Tech.[127]

Digital platforms have deep insight into their respective markets because they are uniquely positioned to gather data on both sides of the transactions they administer. More often than not, consumers are unaware how much of their online activity is being tracked and used to sell them products and services.[128] However, data is essential for operating in the Internet ecosystem today and it allows companies to offer a variety of high-quality services.[129]

Despite the importance of data to online business operations, some allege that Big Tech may use data to exploit consumers. Data mining, machine learning, and algorithmic pricing practices are claimed to disrupt the natural functioning of the market by inhibiting consumers from making informed purchasing decisions and allowing firms to unfairly maximize profit from each transaction.[130] The presumption is that the amount of data Big Tech controls, combined with its "ability to control the environment and the timing

125. *Id.* at 1040.

126. Khan, *supra* note 109, at 971–72, n.52.

127. Nathan Newman, *The Costs of Lost Privacy: Consumer Harm and the Rising Economic Inequality in the Age of Google*, 40 WM. MITCHELL L. REV. 849, 889 (2014).

128. *Id.* at 849, 861–62, n.44.

129. *See generally* Christiane Lehrer et al., *How Big Data Analytics Enables Service Innovation: Materiality, Affordance, and the Individualization of Service*, 35 J. OF MGMT. INFO. SYS. 424 (2018).

130. *Id.* at 854, 859 (explaining that the technology employed does not allow for a "single equilibrium price" making it impossible for antitrust enforcers to determine how price discrimination is being deployed and whether it actually benefits consumer welfare).

of choices and offers," creates a system in which consumers are essentially powerless.[131]

In *Amazon's Antitrust Paradox*, Khan notes that Amazon's control over vast amounts of data "enables it both to extend its tug over customers through highly tailored personal shopping experiences, and, potentially, to institute forms of price discrimination,"[132] in which customers will see different prices for the same products based on information gathered about them.[133] Journalists note the confusion that arises when Amazon and other online services constantly shift prices day-to-day and sometimes even hour-to-hour.[134] Behavioral economists also raise issue with Big Tech's ability to exploit and manipulate inherent consumer biases.[135] Commentators note that the value Google delivers to users in the form of information is "delivered by [its] access to other people's labor and knowledge, most of which Google accesses for free itself."[136] When Google turns the information into behavioral profiles for advertisers, it has the potential to cause "the kind of predatory marketing we saw in the subprime housing bubble globally and in a range of other sectors" where "seedier companies . . . target the most naïve and vulnerable potential consumers and facilitate new forms of price discrimination."[137] Even with the potential for abuse, research shows that price discrimination is common in many markets and is actually an efficient practice that, in many instances, enhances market competition.[138]

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131. *See* Stigler Report, *supra* note 23, at 59; *but see* Diane Coyle, *Practical Competition Policy Implications of Digital Platforms*, 82 ANTITRUST L.J. 835, 842 (2019) (recognizing the validity of concerns about how pricing algorithms work "given their black box character" but affirming that there is no evidence to conclude that price discrimination is currently causing harm to consumers).

132. Lina Kahn, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 788 (2017) ("Not only has Amazon inaugurated an entire generation into online shopping through its platform, but it has expanded into a suite of additional businesses and amassed significant droves of data on users . . . and control over data equip an incumbent platform to recoup losses in ways less obviously connected to the initial form of below-cost pricing."). Khan claims, "Amazon's conduct suggests predatory pricing and integration across related business lines are emerging as key paths to establishing dominance—aided by the control over data that dominant platforms enjoy." *Id.* at 789.

133. *See* ORGANISATION FOR ECON. CO-OPERATION AND DEVELOPMENT, DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, PERSONALIZED PRICING IN THE DIGITAL ERA—NOTE BY THE UNITED STATES 3 (Nov. 21, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)140/en/pdf [https://perma.cc/2LT9-2KNV] [hereinafter OECD Report].

134. *See* Jerry Useem, *How Online Shopping Makes Suckers of Us All*, THE ATL. (May 2017), https://www.theatlantic.com/magazine/archive/2017/05/how-online-shopping-makes-suckers-of-us-all/521448/ [https://perma.cc/9RLN-HFQF].

135. Stigler Report, *supra* note 22, at 58–60 (explaining that "[f]raming, nudges, and defaults can direct a consumer to the choice that is most profitable for the platform" which exemplifies their ability "to understand and manipulate individual preferences at a scale that goes far beyond what is possible in traditional markets").

136. Newman, *supra* note 127, at 857.

137. *Id.*

138. *See* OECD Report, *supra* note 133, at 2, (noting that "[i]n certain limited circumstances, price discrimination might feature as an aspect of an exclusionary strategy meant to enhance or protect market power. Intervention should be limited to preventing these exclusionary abuses.").

The dangers associated with these data collection practices are well documented. However, much of the analysis fails to make the case that consumer manipulation and exploitation are problems related to the *bigness* of Big Tech. As stated in Section II.D, the allegedly exploitative practices actually pervade the entire online ecosystem with companies of all sizes.

Those who view alleged exploitation as a distinctly Big Tech issue attempt to show that large-scale collection of data entrenches the strength of Big Tech, thereby effectuating harm. For example, Google products like Gmail, Google Search, YouTube, and even Google Chrome effectively gather data about individuals "across almost every imaginable space where users operate online" and "[g]iven how valuable such profiling is to advertisers, Google's entrenched knowledge of consumers' personal information makes it nearly impossible for any rival or potential rival to woo online advertisers away and creates an anticompetitive barrier to entry."[139] In this case, Google's dominance is elemental to the harm. However, the amount of data the company possesses is not the impetus of the abuse. It may be true that Google has an extensive control over consumer data that disrupts competition in the advertising market, but dismantling Google's conglomerate will not change the potential for consumer manipulation and exploitation online because the components of a hypothetically broken-up Google would still collect the same data on their own. The same is true for Amazon's business; whenever there exists a buyer-seller relationship online, asymmetries of information will exist, and depending on how often a consumer uses a particular online service, that company may have more or less potential to use the information it gathers to advantage itself in a transaction.

Privacy is another category of harm associated with Big Tech's dominance. Privacy, like quality, is recognized as a non-price dimension of competition, but measuring how prominently privacy factors into consumer decision-making is hard to calculate.[140] Privacy could be a factor to consider in a merger review or a monopolization case where a transaction or conduct "generate[s] market power [that] . . . may harm consumers when it results in diminished quality, selection, or service."[141] Privacy concerns were a focus in the FTC's review of Google's 2007 acquisition of the advertising technology firm DoubleClick.[142] Critics of the transaction raised questions about the boundaries of privacy and consumer expectations because the combination of

139. Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 Y.J. REG. 401, 407 (2014).

140. Maurice Stucke & Allen P. Grunes, *No Mistake About It: The Important Role of Antitrust in the Era of Big Tech*, THE ANTITRUST SOURCE 4 (April 2015).

141. Fed. Trade Comm'n, File No. 071-0170, Statement of Federal Trade Comm'n Concerning Google/DoubleClick 1–2 (2007) [hereinafter FTC Statement on Google/DoubleClick].

142. *See id.* at 2.

"deep" and "broad"[143] tracking that would result from the merger would likely reduce the quality of the search engine product for consumers with "high privacy preferences."[144] The FTC ultimately approved Google's merger with DoubleClick, and responding to the privacy concerns noted: "[T]he consumer privacy issues presented . . . are not unique to Google and DoubleClick. To the contrary, these issues extend to the entire online advertising marketplace."[145] Despite the FTC's statement, some commentators such as Senator Warren, among others, argue that when fewer companies compete in the digital marketplace, companies have less incentive to compete in key areas like protecting privacy.[146] The problem with this characterization is that it suggests concentration causes weak privacy protections. But, like the FTC pointed out back in 2007, all firms operating within the Internet ecosystem benefit from weak privacy protections.

Since then, the landscape has not changed—commercial use of consumer data remains unregulated. The FTC acknowledged this at the time saying, "we take these consumer privacy issues very seriously," and recognizing that while "such issues may present important policy questions for the Nation, the sole purpose of federal antitrust review . . . is to identify and remedy . . . harm to competition."[147] Another example clarifies this point: If Facebook divested itself of prior acquisitions WhatsApp and Instagram, it would still be advantageous for Facebook to operate under the same business model that led to the Cambridge Analytica scandal of 2018.[148]

IV. AMEND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

So far, this Note has demonstrated that antitrust enforcement is not a viable method for addressing many of the consumer harms associated with the power of Big Tech, particularly consumer exploitation and manipulation and privacy violations. It has also demonstrated that concerns about data practices online and offline are not baseless. However, ultimately, harms occurring in the Internet ecosystem are due to a lack of regulation covering the collection and use of consumer data in the commercial context. Harms are further aggravated by two factors: (1) the complexity of relationships between consumers, digital platforms, and third-party agents participating in the

143. *See* Peter P. Swire, *Submitted Testimony to the Federal Trade Commission Behavioral Advertising Town Hall*, EUR. PARLIMENT 5 (Oct. 18, 2007), https://www.europarl.europa.eu/meetdocs/2004_2009/documents/dv/testimony_peterswire_/Testimony_peterswire_en.pdf [https://perma.cc/UX3S-2HVC] (commenting that Google has deep knowledge about the users of its products and DoubleClick would add information about consumers across a broad swath of the Internet).

144. *See id.* Swire ultimately sees the privacy issue as a *quality* issue.

145. FTC Statement on Google/DoubleClick, *supra* note 141, at 2.

146. *See* Warren, *supra* note 75.

147. FTC Statement on Google/DoubleClick, *supra* note 141, at 2.

148. *See* Len Sherman, *Why Facebook Will Never Change Its Business Model*, FORBES (Apr. 16, 2018), https://www.forbes.com/sites/lensherman/2018/04/16/why-facebook-will-never-change-its-business-model/#7e97049064a7. [https://perma.cc/E2KY-3Q9E].

collection and use of consumer data and (2) the dynamism of technological innovation. The nature of the Internet ecosystem requires more than simple legislation, which would be ill-suited to keep pace with industries that are constantly changing. Accordingly, this Note proposes Congress amend the FTC Act to expand FTC authority to enforce against practices that are unfair and deceptive to the reasonable expectations of an ordinary consumer and thereby pressuring firms to abide by those reasonable expectations.

A. The FTC's Expertise

The FTC has a broad mandate to protect consumers from unfair and deceptive practices in the marketplace, pursue law enforcement orders to stop illegal activity, and "educat[e] consumers and businesses about their rights and responsibilities."[149] It is also the nation's leader in protecting consumer privacy through this mandate and through its rulemaking authority in some narrow areas such as children's privacy, financial data security, and credit reporting.[150] As of today, it lacks rulemaking authority for consumer privacy and data security in general, but it has knowledge and expertise in these areas.[151] No other agency is as invested in bridging the divide between consumer and business interests, nor does another agency have comparable capacity to study and understand consumer and business relations as they exist today and in such diverse sectors of the economy.[152]

B. Expand FTC Authority to Enforce Against Section 5 Violations

Section 5 of the FTC Act empowers the FTC "to prevent persons, partnerships, or corporations . . . from using unfair and deceptive acts or practices in or affecting commerce."[153] Congress should amend the existing statute and empower the FTC "to prevent persons, partnerships, or corporations . . . from using unfair and deceptive acts or practices in or affecting commerce *and, with respect to consumer privacy, as understood by the reasonable expectations of an ordinary consumer*." The FTC should then shape its policy to further define the "reasonable expectations of an ordinary consumer" through the analysis of data collected by its Consumer Sentinel complaint database. The changes to Section 5 will have a number of important effects on the kinds of behaviors the FTC can enforce against and its success in suing to mitigate consumer harms while continuing to allow the digital marketplace to self-regulate and evolve over time.

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149. *Oversight of the Federal Trade Commission: Hearing Before the S. Subcomm. on Consumer Prot., Prod. Safety, Ins., and Data Sec. of the Comm. On Commerce, Science, and Transportation*, 115th Cong., 2nd Sess., 3 (2018) (testimony of Fed. Trade Comm'n).

150. *Id.* at n.20.

151. *Id.* at 7.

152. *See About the FTC*, https://www.ftc.gov/about-ftc (last visited Nov. 17, 2020) [https://perma.cc/D3F2-N7PG].

153. 15 U.S.C. § 45(a)(1)–(2).

By allowing the FTC to bring actions according to actual consumer expectations, the law would fill a gap that currently exists in the absence of federal privacy legislation. The FTC can stop unfair and deceptive practices in the handling of consumer data, but the scope of its enforcement is severely restricted by its mandate, which limits its enforcement power in circumstances where a business does not have a privacy policy or where the business's acts did not violate its privacy policy.[154]

Amending the FTC Act to protect consumer expectations of privacy fits within the FTC's evolving privacy role, which has already been expanded through the Gramm-Leach-Bliley Act[155] (GLBA) and the Children's Online Privacy Act (COPPA).[156] Even still, the power of the FTC to enforce consumer privacy protections follows the self-regulatory approach thus far embraced in the U.S., where "businesses essentially determine for themselves the basic rules they will adhere to regarding data collection, use, and disclosure."[157]

The amendment will follow in this spirit and allow the relationship between the FTC, businesses, and consumers to continue to evolve in the same fashion. The only change will be that consumers' consensus understanding of reasonable privacy expectations will be the baseline for determining an unfair and deceptive practice regarding data collection and use. Ultimately, this change will work to reign in the general attitude embraced by the Internet's business community, which is generally, *collect data at all costs and in whatever ways possible and worry about the consequences later*. The new law will slow companies down. It will force them to find ways to effectively communicate and educate their consumers on their data collection practices. Ultimately, it will force companies to put customer interests at the forefront of their decision-making process.

This law does not automatically swing the enforcement pendulum in the consumers' favor. Because it is based on the "reasonable expectations of an ordinary consumer," it is flexible enough to distinguish the contours of what people actually know, what people are expected to know, and what would be a genuine surprise to an ordinary consumer. Additionally, the law is flexible enough to adapt to changes in the marketplace. As business

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154. Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COL. L. REV. 583, 599 (2014) ("Because the FTC could only enforce FTC Act violations or infringements of other laws that granted it regulatory authority and because the FTC lacked the ability to enact substantive privacy rules of its own, if a company not regulated by such a jurisdiction-granting statute lacked a privacy policy, then the FTC would have nothing to enforce. Thus, the FTC appeared to be limited to enforcing whatever a company promised, and most companies were under no obligation to make any promises to restrict their collection and use of personal data.").

155. The GLBA covers consumer financial data.

156. *See* Solove & Hartzog, *supra* note 154, at 599–604 ("[B]etween 1995 and 2000, the FTC jumped into the privacy regulatory space in a dramatic way, acquiring new power with each passing year. As the FTC began to enforce COPPA and GLBA, it largely followed the same model as the notice-and-choice regime it relied upon to enforce its general Section 5 powers.").

157. *Id.* at 604 (noting that "FTC enforcement added some teeth to the promises in privacy policies, most of which lacked any penalty or consequence if a company failed to live up to its promises.").

practices evolve to meet consumer expectations and businesses become more adept at communicating practices, the law will adapt along with them.

Under the proposed amendment, the FTC will inform itself of the reasonable expectations of an ordinary consumer and base decisions on information found in its Consumer Sentinel, which contains rich data about the problems consumers face in the digital marketplace.[158] The FTC already uses the database to "spot trends, identify questionable business practices and targets, and enforce the law."[159] In 2019, "Sentinel received over 3.2 million consumer reports" through the FTC call center and from complaints filed online.[160] Every year, the FTC aggregates the information collected through Sentinel into an interactive report and compiles it alongside reports filed from "other federal, state, local, and international law enforcement agencies, as well as other organizations like the Better Business Bureau and Publishers Clearing House."[161] Through Sentinel, the FTC has data analytics expertise that will enable it to correctly identify the pain points between consumer expectations and business practices while also avoiding abuses such as false or misleading complaints. Sentinel will serve as a reference supplement for determining whether enforcement action is needed under the amended law.

C. Expand FTC Authority to Order Conduct

In bringing enforcement actions against unfair and deceptive practices, the FTC issues orders to stop entities from further engaging in a practice.[162] Accordingly, the FTC opens a proceeding that allows the accused to offer a defense.[163] If the FTC finds the defense inadequate, it can proceed to "issue . . . an order requiring such [entity] to cease and desist from using . . . such act or practice" appealable in the U.S. Courts of Appeals.[164] To ensure the FTC is fully empowered to enforce orders in the interest of the reasonable expectations of ordinary consumers, Congress must amend Section 5 of the FTC Act to read, "if upon such hearing the [FTC] shall be of the opinion that . . . the act or practice in question is prohibited . . . [it] shall issue . . . an order requiring such [entity] to cease and desist from using . . . such act or practice *and, with regard to consumer privacy, in accordance with the reasonable expectation of an ordinary consumer*."

In issuing orders, the FTC provides wrongdoers with remedial steps to comply with an order but cannot order measures that are too vague for a

158. *See* FED. TRADE COMM'N, CONSUMER SENTINEL NETWORK, DATA BOOK 2019 2 (Jan. 2020), https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2019/consumer_sentinel_network_data_book_2019.pdf [https://perma.cc/W28H-CT34].

159. *Id.*

160. *Id.*

161. *Id.*

162. 15 U.S.C. § 45(b).

163. *See id.*

164. *Id.*

company to determine acts required for compliance.[165] By adding the above language to the statute, the FTC will be able to offer companies and courts sufficient clarity on the standards for what is required under an order. While it is important that orders are not too vague, most orders are issued according to settlements.[166] In those situations, the FTC and parties have the opportunity to negotiate the contours of how a company must proceed.[167] Therefore, this amendment will function to inform relevant actors of the contents of settlements and the acts necessary to comply.

Section 5 also authorizes the FTC to "reopen and alter, modify, or set aside, in whole or in part any report or order . . . whenever in the opinion of the [FTC] conditions of fact or of law have so changed as to require such action or if in the public interest shall so require. . . ."[168] The FTC may initiate these actions or do so at the request of parties subject to an order.[169] This provision of the statute provides flexibility in the reevaluation of orders in light of the Internet ecosystem's dynamism. Altogether, the process accommodates the diversity of interests that come together under Section 5 enforcement. It is strong enough to stop obvious bad actors and supple enough to offer solutions that maximize the interests of different parties. Overall, amending the FTC Act is the best path forward to guard against consumer exploitation, manipulation, and privacy violations occurring in the Internet ecosystem.

For over 100 years, the FTC has cultivated expertise in the area of consumer protection. This talent and skill set should not go to waste. The infrastructure needed to rebuild trust between consumers and business in the digital marketplace is, for the most part, in place. It is simply a matter of slightly retooling the capacity of the FTC, which this proposal does, in order to move the marketplace in the right direction.

VI. CONCLUSION

In 1997, the time of early commercial Internet, some of the Internet's original architects warned "[t]he most pressing question for the future of the Internet is not how the technology will change, but how the process of change

165. *See* LabMD, Inc v. Fed. Trade Comm'n*,* 894 F.3d 1221, 1237 (11th Cir. 2018) (striking down an FTC order which gave a company standards to follow to craft a reasonable security program because the approach was too broad and would make it difficult for a reviewing court to determine if the company had complied with the order).

166. Deborah L. Feinstein, Director, FTC Bureau of Competition, Remarks at GCR Live on The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts (September 17, 2013) 2 (transcript available at https://www.ftc.gov/sites/default/files/documents/public_statements/significance-consent-orders-federal-trade-commission%E2%80%99s-competition-enforcement-efforts-gcr-live/130917gcrspeech.pdf [https://perma.cc/5RD4-ZQKG]).

167. *See id.* at 5.

168. 15. U.S.C. § 45(b).

169. *Id.*

and evolution itself will be managed."[170] More than two decades later, America still grapples with this question. The Internet ecosystem is a complex network of relationships, and however concentrated it may appear to be, Congress and regulators must take a closer look. Big Tech's spectacular size is not the root of consumer harm online. If regulators break up Big Tech, dysfunction will still persist.

Unlike breaking up Big Tech, this Note's proposed amendments to Section 5 of the FTC Act would help rectify harms online. It would quell imbalances caused by self-regulation of data collection and data use practices. Seeking to fix these harms through the flexibility of Section 5 of the FTC Act would preserve fast, dynamic evolution of the commercial Internet while also offering protection to consumers. This change would accommodate the interest of consumers and businesses alike while also providing needed legislative relief in an area ignored for too long.

170. Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOC'Y 17 (1997), https://www.internetsociety.org/wp-content/uploads/2017/09/ISOC-History-of-the-Internet_1997.pdf [https://perma.cc/UQ2N-SG25].