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Articles

Big Tech's Buying Spree and the Failed Ideology of Competition Law

MARK GLICK,[†] CATHERINE RUETSCHLIN,[†] & DARREN BUSH[†]

Big Tech is on a buying spree. Companies like Apple, Google, Facebook, and Amazon are gobbling up smaller companies at an unprecedented pace. But the law of competition isn't ready for Big Tech's endless appetite. Today's antitrust law is controlled by the Chicago School of Law and Economics. The Chicago School's ideological frame is toothless when a dominant firm purchases a startup that could be a future competitor. Under the "potential competition" doctrine, the Chicago School is impotent to face the anti-competitive thread of Big Tech.

This Article shows how the Chicago School of law and economics hobbles antitrust law and policy on potential competition mergers. It illustrates this problem with a close study of public information regarding Facebook. The Article assembles a database of Facebook's completed acquisitions—ninety in all—and shows how the "potential competition" doctrine renders competition law entirely impotent to protect the consumer interest in this space. What is true for Facebook applies to the market generally. While we offer no opinion on any particular merger, protecting the consumer against the ravenous appetite of Big Tech requires rejecting the potential competition test and adopting the empirically tractable structural approach to potential competition mergers.

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INTRODUCTION

Big Tech dominates the technology sector in the American economy. Five technology firms—Google, Amazon, Apple, Facebook, and Microsoft—claim the top five spots on the NASDAQ by market capitalization.¹ And Big Tech is hungry for more. All five companies are buying smaller companies at an unprecedented pace. Google has acquired 270 companies since 2001, including Android, YouTube, and Waze.² Microsoft has made over 100 acquisitions in the last ten years, including acquisitions of Skype, Nokia Devices, LinkedIn and GitHub.³ Amazon has made a similar number of acquisitions, including its purchase of Whole Foods.⁴ Facebook has acquired ninety companies, mainly startups.⁵

A growing chorus of commentators have argued that Big Tech's appetite for expanding through purchasing other companies provide a potential means for these dominant firms to solidify and protect their dominance.⁶ While we do not determine whether any particular merger was anticompetitive, this Article, relying exclusively on public information, joins that chorus but adds a new twist. It argues that existing law of mergers is ill-equipped to address the tech firms' acquisition of startups because of a rule called the "potential competition" doctrine. The potential competition doctrine addresses the effects of an acquisition where one firm is in the market and the other is "waiting in the wings" or on the periphery of the market.

The problem with the potential competition doctrine, we argue, is its extraordinarily high burden of proof. That burden can be traced back to Justice Powell's opinion in *United States v. Marine Bancorporation*.⁷ The *Marine Bancorporation* case imposed an extravagant evidentiary burden for a violation of § 7 of the Clayton Act based on elimination of potential competition.⁸ Decades later, that standard has gutted the proper role of competition law and rendered it effectively inapplicable to today's mergers in digital markets. A dramatic rethinking of the doctrine is needed to enable federal antitrust enforcement agencies to protect consumers.

In this Article, we explore how the proper use of potential competition doctrine might have halted the transactions that have led to massive Big Tech. We begin by examining the history of Facebook's acquisition strategy and how

1. *Stock Screener*, NASDAQ, <https://www.nasdaq.com/screening/companies-by-industry.aspx?exchange=NASDAQ&sortname=marketcap&sorttype=1> (last visited Feb. 4, 2021).

2. 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>.

3. *Calls to Rein in the Tech Titans Are Getting Louder*, ECONOMIST (July 16, 2019), <https://www.economist.com/graphic-detail/2019/07/16/calls-to-rein-in-the-tech-titans-are-getting-louder>.

4. *Id.*

5. See *infra* Appendix (listing Facebook's acquisitions by year).

6. See Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 792–97 (2017); Wu & Thompson, *supra* note 2; 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/>.

7. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 604 (1974).

8. *Id.* at 623–26.

it could have contributed to Facebook's rise to dominance and the maintenance of its dominance.

Facebook and other Big Tech companies maintain their market dominance by harnessing the network effects that reinforce user value in the consumer-facing market and advertiser benefits in digital advertising markets. Startup firms provide competitive pressure because they are able to siphon off or "cream skim" customers and collect valuable data. Big Tech acquisition of startup companies may benefit the incumbent by reducing competitive pressure of potential entrants on the periphery of the market or by preventing future entry and expansion by such firms that could undermine the incumbent's dominance.

Such acquisitions are typically analyzed under the potential competition doctrine. In the next Part, we discuss how the Court transformed a once workable standard into a completely unworkable, open-ended prediction of future conduct and performance that could not be practically discharged. We discuss how the Court split the doctrine in two, creating the actual potential competition doctrine and the perceived potential competition doctrine, each with different evidentiary requirements. It ultimately expressed disdain over one of the doctrines it created, suggesting that no plaintiff could meet such a standard.

We then discuss, using public information, the competition harm story of Facebook's acquisitions of Instagram and WhatsApp. In each Part, we detail why antitrust enforcement agencies failed to challenge mergers. We then describe why the potential competition doctrine as currently applied would lead to a false negative; namely, an acquisition that is competitively harmful yet not challenged by federal antitrust enforcement agencies. The high initial burden on the plaintiff to present a case concerning future conduct and competitive effects serves as a serious deterrent to potential competition mergers, even by dominant firms.

In the next Part, we seek to alter the potential competition doctrine. Using the 1968 Merger Guidelines and additions from the potential competition literature, we assert that with simple structural presumption, the Federal Trade Commission (FTC) could have elected to challenge these mergers and shifted the burden to Facebook to demonstrate why no harm to future competition could occur, and why, given Facebook's resources it could not internally innovate to achieve its competitive goals.

I. FACEBOOK'S HISTORY OF ACQUISITIONS OF SMALL POTENTIAL COMPETITORS

Big Tech firms operate in online platform markets where they provide critical facilitation services between buyers and sellers, users and content providers, and advertisers and consumers.⁹ Their services include search

9. The Organisation for Economic Co-operation and Development (OECD) identifies platforms as the main intermediary between consumers and other digital market participants and distinguishes between attention platforms and matching platforms. Organisation for Economic Co-operation and Development [OECD], *Big Data: Bringing Competition Policy to the Digital Era*, at 12, OECD Doc. DAF/COMP(2016)14 (Oct. 27, 2016), [https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf). The European Commission offers a definition of

engines, social networks, ecommerce, digital advertising, app stores, and operating systems, where platforms connect parties online to facilitate transactions. The increased functionality and speed of the internet has made platforms exceptionally efficient in connecting end users. The tremendous profits earned by these firms create strong incentives for others to enter these markets, yet two or fewer Big Tech firms have dominated many of these markets for years.¹⁰ Some observers contend that the Big Tech large-scale acquisition programs have diluted the natural process of competitive entry, with firms entering the market with the sole intent of being acquired, as there would be no other plausible endgame.¹¹

Online platforms typically operate in two-sided markets including a consumer-facing market for digital services and a market for online advertising.¹² In order for a platform to maintain its position in both the digital services and the online advertising markets, it must maintain the most desirable platform for users and prevent users from switching to other platforms. In other words, user traffic is important to both markets because they each exhibit strong network effects.¹³ In social networking, for example, users value the social network with the most opportunities to reach others; advertisers benefit from

online platforms composed of several features: platforms “share key characteristics including the use of information and communication technologies to facilitate interactions (including commercial transactions) between users, collection and use of data about these interactions, and network effects which make the use of the platforms with most users most valuable to other users.” JASON FURMAN, DIANE COYLE, AMELIA FLETCHER, DEREK MCAULEY & PHILIP MARSDEN, UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL 21–22 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf (quoting *Online Platforms*, EUR. COMM’N, <https://ec.europa.eu/digital-single-market/en/online-platforms-digital-single-market> (Jan. 22, 2021)).

10. In June 2019, U.S. Assistant Attorney General Delrahim identified the internet search, social networks, mobile and desktop operating systems, and electronic book markets as controlled by one or two key firms. Makan Delrahim, Assistant Att’y Gen., “. . . And Justice for All”: Antitrust Enforcement and Digital Gatekeepers (June 11, 2019), in *Assistant Attorney General Makan Delrahim Delivers Remarks for the Antitrust New Frontiers Conference*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-antitrust-new-frontiers>. Fiona Scott Morton et al. identify search engines, social networks, network operating systems, ecommerce, and ride-sharing as markets where few firms or one firm hold significant market positions. FIONA SCOTT MORTON ET AL., STIGLER CTR. FOR THE STUDY OF ECON. & THE STATE, STIGLER COMMITTEE ON DIGITAL PLATFORMS 34 (2019), <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

11. Wu & Thompson, *supra* note 2.

12. See Timothy J. Muris, *Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets*, 2500 COLUM. BUS. L. REV. 515 (2005). The requirements of the market of a two-sided market are:

Three conditions must be present in a two-sided market: (1) two distinct groups of customers; (2) the value obtained by one group increases with the size of the other; and (3) an intermediary connects the two. Coordination of two-sided markets requires that this intermediary or “middleman” create a platform for the groups to interact. The intermediary must ensure the existence of a critical mass on both sides. Which side of the market exists first is not crucial; what does matter is that “the product may not exist at all if the business does not get the price structure right.”

Id. at 517–18 (quoting DAVID S. EVANS & RICHARD SCHMALENSEE, *PAYING WITH PLASTIC: THE DIGITAL REVOLUTION IN BUYING AND BORROWING* 4 (2d ed. 2005)).

13. EVANS & SCHMALENSEE, *supra* note 12, at 133.

greater user numbers in terms of reach and consumer targeting.¹⁴ Such direct and indirect network effects have resulted in Facebook becoming a dominant provider. Once a dominant firm establishes itself in an online platform market, the network effects and data-driven efficiencies in digital markets tend to reinforce dominance even when new rivals improve or produce novel products.¹⁵

While strong network effects can cause markets to tip and create a dominant firm, they can also allow small nascent competitors with a desirable alternative platform to scale quickly and challenge such dominance. Innovating startup firms provide competitive pressure in such markets when they exhibit rapid user growth and the potential to enter the dominant firm's core market. Prior to entry into the core market, these nascent firms demonstrate their potential by diverting users from the dominant platform or acquiring data that would be valuable on the advertising side of the market. This information provides a signal to the dominant firms, creating an incentive to absorb or eliminate the nascent rival. A nascent competitor can improve the economic performance of the market overall by preventing a dominant firm from reducing quality, raising prices, or curtailing innovation.¹⁶ The nascent startup that blossoms into a competitive rival can reinvigorate the competitive process within the dominant firm's core market. In this context, acquisitions of nascent competitors by dominant firms undermine both current and future competition, reinforcing the incumbent's dominance in the face of technological shifts.¹⁷

14. These "network effects" predate the internet, with common pre-internet examples being the telephone directory and shopping malls. See Muris, *supra* note 12, at 518 n.4.

15. This relationship is characterized by the OECD as a feedback loop in which a company with a large user base can collect more data to improve service quality and acquire new users, generating more user data to mine for monetization opportunities with the resulting funds channeled toward acquiring new users. In this scenario a consumer must choose between a smaller platform with better features but poorer information targeting and the dominant firm with less appealing features but the benefit of data richness. OECD, *supra* note 9, at 10.

16. We assume here that switching costs are low. See 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 merger may involve reduced innovation incentives, not just lessened future price competition.").

17. In a recent review of the Industrial Organization empirical literature, Steven Berry, Martin Gaynor, and Fiona Scott Morton describe potential competition as follows:

Acquisition of potential competitors when they are still small can be a way for a dominant firm to improve quality or to fold a complement into its core product—or just to block a future potential entrant. Traditional antitrust enforcement has often focused on whether a merger led to an immediate significant increase in market share, not on how it affected potential or nascent competition. But when a market is subject to strong network effects, competition is *for* the market, and the possibility that the nascent entrant could contest the incumbent is an important source of competition. Frequently mentioned anecdotes include big tech companies' acquisitions of small firms in adjacent product markets, such as Facebook's acquisitions of Instagram and WhatsApp. In a study of the pharmaceutical industry, Cunningham, Ederer, and Ma (2018) conclude that about 6.4 percent of pharma acquisitions are "killer acquisitions," where the acquisition eliminates entry by a potential competitor. However, both the probability and the value of potential entry are uncertain, and research on identifying or measuring these effects in different settings would be extremely useful.

Facebook's record demonstrates how acquisitions can play a critical role in the rise to dominance and the maintenance of dominance by a Big Tech incumbent. At the time of Facebook's launch in 2004, the social media market was highly competitive, with multiple new social networks emerging each year.¹⁸ Facebook's famed beginnings in a Harvard dorm room filled a new niche in the social networking market. The site opened exclusively to the Harvard community—requiring a Harvard.edu email address to join—before extending services to Stanford, Columbia, and Yale.¹⁹ The interface was simple, providing a few core social networking functions, including profile pages where users could post a single photo and personalized information, as well as a “friend graph” or database of connections between individuals that could be searched via user names or other attributes to identify and request new connections.²⁰

The site was immediately popular and each new user added to its overall utility as more friends or potential friends joined the network. Despite its limited Ivy League user base, by December 2004 the site had grown to one million monthly active members.²¹ Its popularity drew the attention of funders. Funding drove expansion, first to more universities, then high schools, then workplaces, and finally in September 2006 to anyone in the world. By the time Facebook was opened to all people willing to register, the company had already received more than \$40 million in angel and venture capital investments.²² This funding enabled the company to pursue an ambitious growth strategy, including early acquisitions, which made it possible for the company to take advantage of economies of scale and scope and network effects in the social networking market.²³

Social media use grew rapidly in the years of Facebook's early expansion. According to survey data from the Pew Research Center, just 7% of U.S. adults participated in social networking in 2005. Over the following decade, that number would rise to 65%, with the fastest growth occurring before 2011.²⁴ Facebook positioned itself to take advantage of this market growth by expanding its user base, articulating a qualitative product differentiation between itself and

Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. ECON. PERSPS. 44, 61 (2019).

18. danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 212 (2008) (providing a timeline of “Major Social Network Sites” showing the launch of six sites in 2003, twelve in 2004, and nine in 2005).

19. *Id.* at 218; Adam P. Schneider, *Facebook Expands Beyond Harvard*, HARVARD CRIMSON (Mar. 1, 2004), <https://www.thecrimson.com/article/2004/3/1/facebook-expands-beyond-harvard-harvard-students/>.

20. Alan J. Tabak, *Hundreds Register for New Facebook Website*, HARVARD CRIMSON (Feb. 9, 2004), <https://www.thecrimson.com/article/2004/2/9/hundreds-register-for-new-facebook-website/>; Alyson Shontell, *The Only 8 Features Facebook Had When It Launched in 2004*, BUS. INSIDER (Aug. 25, 2014, 12:49 PM), <https://www.businessinsider.com/facebooks-first-8-features-from-2004-2014-8>.

21. *Company Info*, FACEBOOK, <https://newsroom.fb.com/company-info/> (last visited Feb. 4, 2021).

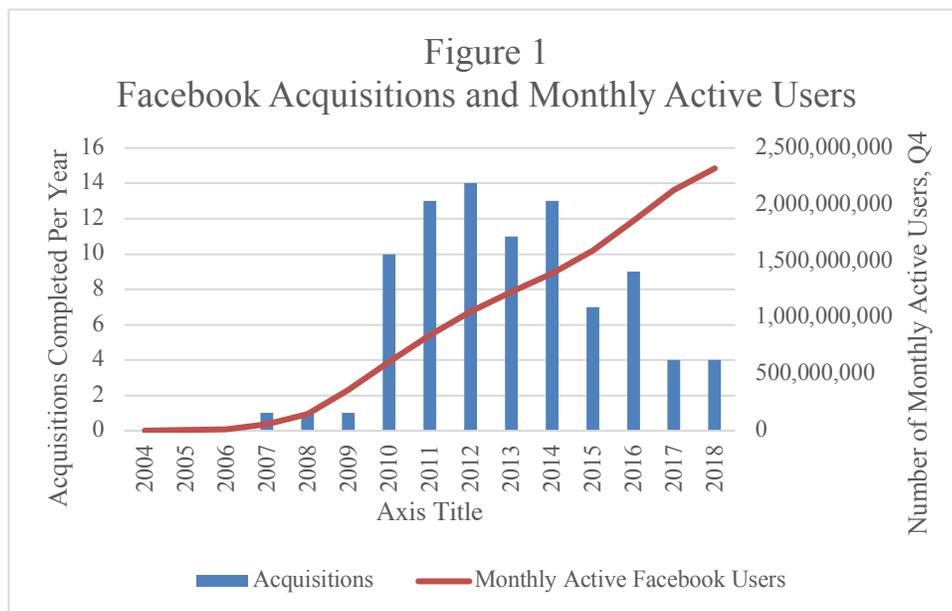
22. *Facebook Funding Rounds*, CRUNCHBASE (May 20, 2019), https://www.crunchbase.com/organization/facebook/funding_rounds/funding_rounds_list#section-funding-rounds.

23. Chris Hughes, *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>.

24. Andrew Perrin, *Social Media Usage: 2005–2015*, PEW RSCH. CTR. (Oct. 8, 2015), <https://www.pewresearch.org/internet/2015/10/08/social-networking-usage-2005-2015/>.

its competitors,²⁵ and integrating new ways of engaging users into its suite of social networking functions by offering new features and functionalities.

Facebook operated in a rapidly changing competitive environment where the basic technological undergirding of the social network was evolving, including the increasing importance of mobile technology to connect users online. Beginning in 2007, the company initiated a series of acquisitions of both its potential rivals in the social media market and firms in adjacent markets that could divert user engagement away from the social network. This tactic arguably propelled Facebook's growth strategy as the company overtook its main competitors. Figure 1 shows the number of acquisitions Facebook completed each year from 2004 to 2018, as well as the number of monthly active users reported by the company each year.²⁶



Partially as a result of Facebook's acquisition strategy, when market user growth leveled off, competitors like MySpace, Windows Live Spaces, and

25. See Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 47–49 (2019). Srinivasan provides a careful account of competition based on perceived privacy protections as Facebook's user growth accelerated from 2005 to 2014. *Id.* at 54–55. She argues that the representations and misrepresentations of Facebook as a privacy-focused company were strategic decisions to establish trust in the brand and drive user growth—a strategy that diminished in importance after Facebook achieved monopoly power in the social media market. *Id.*

26. Acquisitions data from Thomson Reuters Mergers and Acquisitions (M&A) Data (2019) and Nexis Uni Mergers and Acquisitions Data (2019). Number of users reported is monthly active users (MAUs) from corporate reports of Q4 results. *Investor Relations*, FACEBOOK, <https://investor.fb.com/home/default.aspx>; *Company Info*, *supra* note 21.

Google's Orkut suffered significantly, while the number of new users active on Facebook each year continued to measure in the hundreds of millions.²⁷ Facebook first surpassed its main rival, MySpace, to become the most popular website in the United States in 2009, just five years after its founding.²⁸ By 2011, when more than half of all adults and two-thirds of internet users were regular users of social networks, Facebook dominated the industry by a wide margin.²⁹ Pew Research Center data from 2011 showed that while 92% of social network users regularly accessed Facebook, just 29% utilized the nearest competitor, MySpace, while 18% used LinkedIn and 13% used Twitter.³⁰

From 2007 to 2018 Facebook acquired or attempted to acquire more than 100 companies in competing and adjacent markets.³¹ The ninety acquisitions completed since the company's founding, and documented in the Appendix, range from small acquisitions like the \$2.5 million purchase of location services network Nextstop to the \$19 billion acquisition of popular instant messaging rival WhatsApp in 2014.³² They include deals that transferred key technology and expertise to the company in markets for app development platforms, instant messaging, photo sharing, location services, user information and surveillance, and advertising and analytics. Many of the acquisitions converted stand-alone apps, websites, and platforms that worked inter-operably across competing

27. Erick Schonfeld, *Top Social Media Sites of 2008 (Facebook Still Rising)*, TECHCRUNCH (Dec. 31, 2008, 10:47 AM), <https://techcrunch.com/2008/12/31/top-social-media-sites-of-2008-facebook-still-rising/>; Matthew Garrahan, *The Rise and Fall of MySpace*, FIN. TIMES (Dec. 4, 2009, 3:30 PM), <https://www.ft.com/content/fd9ffd9c-dee5-11de-adff-00144feab49a>; Nicholas Jackson & Alexis C. Madrigal, *The Rise and Fall of MySpace*, ATLANTIC (Jan. 12, 2011), <https://www.theatlantic.com/technology/archive/2011/01/the-rise-and-fall-of-myspace/69444/>.

28. *More Americans Go to Facebook than Myspace*, PC MAG (June 16, 2009), <https://www.pcmag.com/news/241432/more-americans-go-to-facebook-than-myspace>.

29. KEITH N. HAMPTON, LAUREN SESSIONS GOULET, LEE RAINIE & KRISTEN PURCELL, PEW RSCH. CTR., *SOCIAL NETWORKING SITES AND OUR LIVES* 3, 13 (2011), <https://www.pewinternet.org/wp-content/uploads/sites/9/media/Files/Reports/2011/PIP-Social-networking-sites-and-our-lives.pdf>.

30. *Id.*

31. Acquisitions data from Thomson Reuters Mergers and Acquisitions (M&A) Data (2019) and Nexis Uni Mergers and Acquisitions Data (2019). Snapchat and Twitter famously rejected acquisition bids from Facebook. Evelyn M. Rusli & Douglas MacMillan, *Messaging Service Snapchat Spurned \$3 Billion Facebook Bid*, WALL ST. J. (Nov. 13, 2013, 9:34 PM), <https://www.wsj.com/articles/SB10001424052702303789604579196023009484870>; Henry Blodget, *Twitter Rejects \$500 Million Takeover Offer from Facebook*, BUS. INSIDER (Nov. 24, 2008, 10:45 AM), <https://www.businessinsider.com/2008/11/twitter-rejects-500-million-takeover-offer-from-facebook>. Reported attempts by Facebook to purchase Skype and Waze terminated when Microsoft purchased Skype for \$8.5 billion in 2011 and Google purchased Waze for \$966 million in 2013. See Peter Bright, *Microsoft Buys Skype for \$8.5 Billion. Why, Exactly?*, WIRED (May 10, 2011, 9:00 AM), <https://www.wired.com/2011/05/microsoft-buys-skype-2/>; Peter Cohan, *Google to Spite Facebook, Buy Waze for \$1.3 Billion*, FORBES (June 9, 2013, 2:16 PM), <https://www.forbes.com/sites/petercohan/2013/06/09/google-to-spite-facebook-buy-waze-for-1-3-billion/?sh=49d5ab162280>; Dara Kerr, *Google Reveals It Spent \$966 Million in Waze Acquisition*, CNET (July 25, 2013, 8:22 PM), <https://www.cnet.com/news/google-reveals-it-spent-966-million-in-waze-acquisition/>.

32. *Facebook to Acquire WhatsApp*, FACEBOOK (Feb. 19, 2014), <https://about.fb.com/news/2014/02/facebook-to-acquire-whatsapp/>.

networks into Facebook-exclusive features. Other products were simply shuttered in the days or months following their acquisition.³³

Today, Facebook is number three on the list of most-trafficked websites in the world.³⁴ With Instagram, Messenger, Facebook, and WhatsApp, the company now owns four of the most popular mobile apps in the United States.³⁵ Facebook is responsible for about ten percent of the mobile browser market, representing a substantial share of mobile users for whom Facebook is the main point of entry for online content.³⁶ This remarkable influence over how individuals engage and consume online is the product of over a decade of strategic internal growth, as well as the acquisition of potential competitors and the integration of their user traffic and functionality within the Facebook structure.

Remarkably, Facebook's ascendancy in concert with its numerous acquisitions stimulated little interest by the antitrust agencies. A march to dominance, accompanied by numerous acquisitions of potential competitors, puts Facebook's strategy directly within the merger regulatory power of the government through its ability to enforce § 7 of the Clayton Act.³⁷ Yet, few of

33. For example, in 2010 Facebook absorbed and closed Divvyshot, a photo sharing service with functions integrated across Flickr, Twitter, and Facebook. Erick Schonfeld, *Facebook Buys Up Divvyshot to Make Facebook Photos Even Better*, TECHCRUNCH (Apr. 2, 2010, 12:46 PM), <https://techcrunch.com/2010/04/02/facebook-buys-up-divvyshot-to-make-facebook-photos-even-better/>. Divvyshot's staff transitioned to work on Facebook Photos. Josh Constine, *Facebook Hires Team from Android Photosharing App Dev Lightbox to Quiet Mobile Fears*, TECHCRUNCH (May 15, 2012, 9:15 AM), <https://techcrunch.com/2012/05/15/facebook-lightbox/> [hereinafter Constine, *Facebook Hires Team*]. In May 2011, after the announcement of the Instagram acquisition, Facebook acquired and closed Lightbox, an Android-native social photo app that was perceived as an "Instagram killer" before Instagram's Android launch. Emil Protalinski, *Facebook Acquires Mobile Photo Sharing Startup Lightbox*, ZDNET (May 15, 2012, 10:38 AM), <https://www.zdnet.com/article/facebook-acquires-mobile-photo-sharing-startup-lightbox/>; Naina Khedekar, *Interview with Stephen Robert Morse from Lightbox*, FIRSTPOST (Jan. 18, 2012), <https://www.firstpost.com/tech/news-analysis/interview-with-stephen-robert-morse-from-lightbox-3593563.html>. More recently, Facebook purchased the popular social polling application for teens tbh. Josh Constine, *Facebook Acquires Anonymous Teen Compliment App tbh, Will Let It Run*, TECHCRUNCH (Oct. 16, 2017, 1:04 PM), <https://techcrunch.com/2017/10/16/facebook-acquires-anonymous-teen-compliment-app-tbh-will-let-it-run/>. Facebook allowed tbh to operate under its own brand name for eight months before terminating the application due to low usage. Jacob Kastrenakes, *Facebook Is Shutting Down a Teen App It Bought Eight Months Ago*, VERGE (July 2, 2018, 8:06 PM), <https://www.theverge.com/2018/7/2/17528896/facebook-tbh-moves-hello-shut-down-low-usage>; Ingrid Lunden, *Facebook Is Shutting Down Hello, Moves and the Anonymous Teen App tbh Due to 'Low Usage'*, TECHCRUNCH (July 2, 2018, 3:56 PM), <https://techcrunch.com/2018/07/02/facebook-is-shutting-down-hello-moves-and-the-anonymous-teen-app-tbh-due-to-low-usage/>.

34. *The Top 500 Sites on the Web*, ALEXA, <https://www.alexa.com/topsites> (last visited Feb. 4, 2021).

35. Max Zahn, *Facebook Owns 4 of the Top 5 Most Downloaded Apps*, YAHOO FIN. (July 25, 2019), <https://finance.yahoo.com/news/facebook-messenger-whatsapp-instagram-125929036.html>; *Apple Presents the Best of 2018*, APPLE (Dec. 3, 2018), <https://www.apple.com/newsroom/2018/12/apple-presents-the-best-of-2018/>; *Best of 2019: The Year's Top Apps*, APPLE, <https://apps.apple.com/us/story/id1484100916> (last visited Feb. 4, 2021); *Most Popular Apps*, MICROSOFT, <https://www.microsoft.com/en-us/store/most-popular/apps/pc> (last visited Feb. 4, 2021).

36. Sarah Perez, *Facebook Is Now a Major Mobile Browser in U.S., with 10%+ Market Share in Many States*, TECHCRUNCH (Aug. 6, 2018, 8:12 AM), <https://techcrunch.com/2018/08/06/facebook-is-now-a-major-mobile-browser-in-u-s-with-10-market-share-in-many-states/>.

37. 15 U.S.C. § 18.

the acquisitions faced review from antitrust authorities in the United States. In 2012, the FTC conducted a nonpublic investigation of the \$1 billion Facebook-Instagram merger and did not recommend any further action.³⁸ In 2014, U.S. regulators cleared Facebook's \$19 billion acquisition of the messaging application WhatsApp, though the FTC did send both companies a letter reminding them of their obligation to maintain privacy practices in accordance with the WhatsApp user agreement in place at the time that user data was collected.³⁹

Unlike many other companies acquired by Facebook, Instagram and WhatsApp remained separate from Facebook's social network in branding until 2019, and in some features of interoperability and data autonomy. They are also globally important market leaders in social networking, photo sharing, and instant messaging. The scale, innovation, and popularity of these products have made them frequent examples of potential competitors both at the times of the acquisitions and in the years since.

The question arises why the federal antitrust enforcement agencies demonstrated reluctance to seriously confront the competitive impact of these and similar mergers among high tech companies. We argue below that the potential competition doctrine, as developed during the years of the influence of the Chicago School of antitrust,⁴⁰ has played an important role in insulating acquisitions of startups by the dominant tech companies from the levels of antitrust scrutiny necessary to protect consumers and the competitive process in technology markets.

II. THE POTENTIAL COMPETITION DOCTRINE

Facebook and other Big Tech companies maintain their market dominance by harnessing the network effects that reinforce user value in the consumer-facing market and advertiser benefits in digital advertising markets. Innovative startup firms provide competitive pressure in these markets despite the tendency toward tipping when small firms exist that have the potential to rapidly siphon off users to more desirable or innovative platforms, collect valuable data on end users, or both. In this context, the acquisition of startup companies may benefit the dominant firm by reducing the disciplining competitive pressure of potential entrants on the periphery of the market or by preventing future entry and expansion by such firms that could undermine the incumbent's dominance. Under the common law of antitrust, an acquisition of a potential entrant is

38. Letter from April J. Tabor, Acting Sec'y, U.S. Fed. Trade Comm'n, to Thomas O. Barnett, Esq., Covington & Burling LLP (Aug. 22, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822barnettfacebookltr.pdf.

39. Letter from Jessica L. Rich, Dir., Bureau of Consumer Prot., to Erin Egan, Chief Priv. Officer, Facebook Inc. & Anne Hoge, Gen. Couns., WhatsApp Inc. (Apr. 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/297701/140410facebookwhatapltr.pdf.

40. See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 226–29 (1985).

analyzed under the potential competition doctrine.⁴¹ Thus, to understand the ability and potential to regulate acquisitions by dominant tech firms it is important to understand how the law of potential competition mergers developed and why it has been so underutilized to date.

The history of the potential competition doctrine informs the analysis of tech industry acquisitions because it demonstrates how a shift in the standard of analysis beginning in the 1960s and culminating in the 1974 *United States v. Marine Bancorporation* decision undermined the applicability of the doctrine in a range of contexts including online platform markets. The potential competition doctrine emerged in the aftermath of the 1950 Amendment to § 7 of the Clayton Act.⁴² As described by the Supreme Court in *Brown Shoe v. United States*, the “dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.”⁴³ In 1963, the Supreme Court, in *United States v. Philadelphia National Bank*, explained that the “intense congressional concern” about increasing concentration “warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects.”⁴⁴

Under this standard, expectations of the market-disciplining effects of potential competition operated to preserve competition in cases where the doctrine applied. The Court explained that when there is a structural increase in concentration due to a merger, the merger “is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”⁴⁵ Thus, the Court created a presumption of an anticompetitive effect from a structural increase in concentration, placing the burden on the merging parties to refute the presumption. The plaintiff would still be required to define the relevant markets involved and measure market shares and concentration, but a full-blown analysis of the impact of the merger was judged by the Court to be unrealistic and counter to the congressional intent to stem the rising levels of concentration in the United States.⁴⁶

The Court’s approach is often referred to as a “structural approach,” which is shorthand for the belief that mergers above a certain concentration threshold

41. For a discussion of the merger guidelines and potential competition, see *infra* notes 75–78 and accompanying text.

42. Celler-Kefauver Act, ch. 1184, 64 Stat. 1125 (1950); Joseph F. Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 *YALE L.J.* 1, 4 (1977).

43. *Brown Shoe Co. v. United States*, 370 U.S. 294, 315 (1962).

44. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963).

45. *Id.* (citing *United States v. Koppers Co.*, 202 F. Supp. 437 (W.D. Pa. 1962)).

46. Today the analysis of a relevant market can involve sophisticated economic techniques and analysis of data. See Jonathan B. Baker, *Market Definition: An Analytical Overview*, 74 *ANTITRUST L.J.* 129 (2007).

have a reasonable probability of harming competition.⁴⁷ The structural approach to merger analysis contrasts to the effects-based approach, which requires a prediction of the future competitive effects of the merger by use of detailed economic analysis. The *Philadelphia Bank* opinion implicitly rejected the effects-based approach because of its intractability.⁴⁸ As the Eighth Circuit later commented, the structural approach is preferable in cases concerning potential competition since “proof of liability under either [potential competition] theory is certain to entail expensive, uncertain litigation, even if, as here, the acquiring firm is rich and powerful and the acquired firm’s market highly concentrated.”⁴⁹ The practical requirements of proving the competitive effects of the threat of entry were deemed nearly insurmountable despite the importance of these effects.

In contrast to the *Philadelphia Bank* paradigm, later Supreme Court cases developed an unworkable legal standard for the potential competition doctrine. The Court imposed an initial stage open-ended proof requirement involving prediction of future conduct and performance that could not be practically discharged. In developing this standard, the Court divided potential competition into two separate legal doctrines—the actual potential competition doctrine⁵⁰ and the perceived potential competition doctrine⁵¹—with distinct evidentiary requirements. After separating actual and perceived potential competition, the Court twice expressed doubt regarding the viability of the actual potential competition doctrine.⁵² In these cases, the Court discussed the actual potential competition doctrine primarily in the context of acquisitions targeting a dominant firm, and not the context relevant to the current Big Tech mergers in which a dominant firm targets a startup.

The Supreme Court first addressed the issue of harm to potential competition from a merger one year after the *Philadelphia Bank* decision in *United States v. El Paso Natural Gas Co.*⁵³ This case provides important insights

47. Jonathan Baker refers to this approach as “truncated condemnation.” BAKER, *supra* note 16, at 142 (“Condemnation is described as truncated because it does not require a comprehensive analysis of the nature, history, purpose, and actual or probable effect of the practice evaluated.”).

48. Brodley, *supra* note 42, at 8–9.

49. Ginsburg v. InBev NV/SA, 623 F.3d 1229, 1234 (8th Cir. 2010).

50. Actual potential competition denoted the future increase in rivalry from the entry itself. “Actual potential competition occurs when the potential competitor is not having a present procompetitive effect on the market, but considerable evidence exists that the uncommitted firm is going to enter the market. The competitive effect from actual potential competition occurs in the future.” Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1046 (2004).

51. Perceived potential competition referred to the pre-entry competitive restraint of the potential entrant. “This theory states that a given transaction may remove present procompetitive influences that the acquired firm has on the target market, which stems from the target market’s *perceptions* of the acquired firm’s ability to enter the target market.” Henry S. Klimowicz, Comment, *Reinvigorating the Perceived Potential Competition Theory: An Analysis of the Potential Competition Doctrine and FTC v. Steris Corp.*, 49 SETON HALL L. REV. 173, 177 (2018).

52. See *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602, 639 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 537 (1973).

53. *United States v. El Paso Nat. Gas Co.*, 376 U.S. 651, 652 (1964).

for the viability of the potential competition doctrine to Big Tech mergers since it is the chief example of the doctrine applied to a case where the potential entrant is the target firm. The case involved the merger between two natural gas pipeline companies and their impact on the California market. El Paso Natural Gas was the only supplier of natural gas to California when it attempted to acquire Pacific Northwest.⁵⁴ The Court noted that Pacific Northwest had attempted to enter the California market by supplying Canadian natural gas to one of El Paso's customers in Southern California, Southern California Edison Co.⁵⁵ The deal fell through only when El Paso agreed to a more favorable contract with its customer.⁵⁶ The Court conceived of the potential harm from the merger as the elimination of influence of the potential entrant on El Paso, or the perceived potential competitive impact of Pacific Northwest.⁵⁷ Pacific Northwest's threat of entry forced El Paso to act competitively, despite the company's monopoly in the California market.⁵⁸ The evidence showed that El Paso did prevent Pacific Northwest's entry by matching and exceeding Pacific Northwest's offer to a California customer. If Pacific Northwest had captured the customer, it would have entered the market.⁵⁹ Nevertheless, the Court chose to focus on the current impact of the entry attempt on El Paso's bid, rather than the more significant future impact Pacific Northwest might have had had it become a competitor in the California market.⁶⁰ The Supreme Court would follow this emphasis on the impact of perceived potential competition in subsequent cases.

In the same year, the Supreme Court issued an opinion in another potential competition case. In *United States v. Penn-Olin Chemical Co.*, the Court appeared to reject the structural approach of *Philadelphia Bank*, defaulting to a vague, open-ended analysis. *Penn-Olin Chemical Co.* involved a joint venture rather than a merger.⁶¹ All joint ventures raise potential competition issues because absent the joint venture one or both of the same companies might enter into the market alone.⁶²

In the Court's analysis, the joint venture eliminated a perceived potential entrant, removing the impact of an "aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market" which disciplined the existing competitors.⁶³

54. *Id.* at 658.

55. *Id.* at 654.

56. *Id.* at 654-55.

57. As the Court stated, "[w]e would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State." *Id.* at 659.

58. *Id.* at 655.

59. *See id.* at 661.

60. *Id.*

61. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 160 (1964).

62. *See* William M. Landes, *Harm to Competition: Cartels, Mergers and Joint Ventures*, 52 ANTITRUST L.J. 625, 630-31 (1983).

63. *Penn-Olin Chem. Co.*, 378 U.S. at 174.

Citing the *El Paso Natural Gas* case, the Court stated that potential competition “is not ‘susceptible of a ready and precise answer.’”⁶⁴ It stated that analysis of the impact of a potential entrant depends on “the nature or extent of that market and by the nearness of the absorbed company to it, that company’s eagerness to enter that market, its resourcefulness, and so on.”⁶⁵

In *Philadelphia Bank*, the Court had addressed the comparable complications of predicting the future effects of a horizontal merger by establishing structural judicial guidelines. Now, when addressing a parallel prediction of the impact of a potential competitor, the Court surprisingly defaulted to an ambiguous and open-ended narrative. The Court might be forgiven because it resolved the controversy by remanding the case back to the lower court to consider the perceived potential competition impact of the joint venture, but it did so without clear guidance on how such an analysis should proceed. In so doing, the case set a precedent in which the structural approach to potential competition was set aside in favor of a range of claims and presumptions about the intentions and perceptions of merging firms.

In 1967, the Supreme Court again confronted a potential competition problem in *Federal Trade Commission v. Procter & Gamble Co.*, and moved the doctrine closer to the unworkable effects-based approach deduced from a subjective and imprecise evaluation of competitive conditions.⁶⁶ Following the acquisition of Clorox Chemical by Procter & Gamble, the FTC blocked the merger, asserting, among other reasons, that Procter & Gamble was likely to enter the bleach market absent the acquisition.⁶⁷ Procter & Gamble was a potential competitor in the market and had already launched an abrasive cleaner that was a differentiated substitute for liquid bleach.⁶⁸ Procter & Gamble knew the liquid cleaning business, the customers of Clorox and Procter & Gamble largely overlapped, and the company advertised and merchandised in the same manner as Clorox.⁶⁹ All of the factors led the FTC to conclude that the acquisition of Clorox by Procter & Gamble would eliminate a likely entrant into the liquid bleach market.⁷⁰ Yet the court of appeals rejected the evidence of the closeness and proximity of the two markets and declared that there was insufficient evidence from the management of Procter & Gamble that it intended to enter the liquid bleach market.⁷¹

The Supreme Court reversed the court of appeals,⁷² but without offering a helpful analysis of the potential competition issues. The Court abstained from

64. *Id.*

65. *Id.* (quoting *El Paso Nat. Gas Co.*, 376 U.S. at 660).

66. *See* Fed. Trade Comm’n v. Procter & Gamble Co., 386 U.S. 568, 577 (1967).

67. *Id.* at 577–81.

68. *Id.* at 580.

69. *Id.*

70. *Id.* at 581.

71. *Id.* at 575–81.

72. *Id.* at 581.

analysis of actual potential competition and focused solely on the impact of Procter & Gamble as a restraining perceived potential competitor, even though the Court opined that it was “the most likely entrant” into the liquid bleach market.⁷³ The Court also found, without explaining its basis, that Procter & Gamble did not face a barrier to entry and that “the number of potential entrants was not so large that the elimination of one would be insignificant.”⁷⁴ The focus of the court of appeals and the Supreme Court on aspects of competition such as the potential competitor’s intention of entry, the likelihood of entry, and the number of potential entrants would support the inclusion of such difficult and even subjective or illusory criteria in the evidentiary standards for potential competition cases.

In 1968, the Department of Justice issued Merger Guidelines.⁷⁵ While the Supreme Court was grappling with the early cases involving mergers that harm competition by preventing future entry, the Department of Justice developed a clear policy to protect new entry from mergers by dominant firms. According to the 1968 Merger Guidelines:

Since potential competition (i.e., the threat of entry, either through internal expansion or through acquisition and expansion of a small firm, by firms not already or only marginally in the market) may often be the most significant competitive limitation on the exercise of market power by leading firms, as well as the most likely source of additional actual competition, the Department will ordinarily challenge any merger between one of the most likely entrants in the market [and a firm with a large share of the relevant market.]⁷⁶

The acquiring or target firm must be one with the ability and incentive to enter and must be “one of the most likely potential entrants into the market.”⁷⁷ As discussed in a later Part of this Article, the 1968 Merger Guidelines faltered when addressing the evidentiary burden required to show that a target is one of the most likely potential entrants.⁷⁸

The 1968 Merger Guidelines’ explanation of the required evidence to demonstrate potential entry is not a model of clarity. It requires that the Department of Justice marshal evidence demonstrating that entry by the firm

73. *Id.*

74. *Id.*

75. U.S. DEP’T OF JUST., 1968 MERGER GUIDELINES (1968), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf>.

76. *Id.* § 18.

77. *Id.*

78. See discussion *infra* Part III. According to the 1968 Guidelines:

In determining whether a firm is one of the most likely potential entrants into a market, the Department accords primary significance to the firm’s capability of entering on a competitively significant scale relative to the capability of other firms (i.e., the technological and financial resources available to it) and to the firm’s economic incentive to enter (evidenced by, for example, the general attractiveness of the market in terms of risk and profit; or any special relationship of the firm to the market; or the firm’s manifested interest in entry; or the natural expansion pattern of the firm; or the like).

U.S. DEP’T OF JUST., *supra* note 75, § 18(a)(iv).

would be more profitable and less risky than other unidentified non-litigant third-party firms. In 1984, the Department of Justice would give more structure to this inquiry but would continue to require unworkable conduct and performance evidence that would make the potential competition analysis impractical and infrequent.

More clarity emerged from the Supreme Court's 1973 opinion in *United States v. Falstaff Brewing Corp.*⁷⁹ The case involved the acquisition of Narragansett Brewing by Falstaff.⁸⁰ Narragansett produced beer sold in the New England regional geographic market.⁸¹ Falstaff sold beer in thirty-two states and was the largest beer producer not in the New England market.⁸² The district court considered both the theory that Falstaff disciplined competition as a potential entrant and that Falstaff was a future actual entrant into New England.⁸³ The district court held that evidence from Falstaff's management cast doubt on whether Falstaff was going to enter the New England market and that competition had not decreased since the consummated acquisition.⁸⁴ Again, despite acknowledging the pertinence of the actual potential competition doctrine, in their decision the Supreme Court focused solely on the perceived potential competition aspect of the situation in which the merger "eliminates a potential competitor exercising present influence on the market."⁸⁵ The district court erred by assuming that the subjective evidence from Falstaff's management meant that, as a matter of fact, Falstaff was not a potential entrant.⁸⁶ Instead, the district court should have considered the objective evidence.⁸⁷

If the district court's approach had prevailed, it would have meant that plaintiffs asserting potential competition cases could be defeated by the uncontroverted testimony of the management of one of the merging entities.⁸⁸ Instead, the Court thought that the proper inquiry was whether a rational incumbent firm would have perceived the acquirer as a likely entrant. It stated that "if it would appear to rational beer merchants in New England that Falstaff

79. See *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

80. *Id.* at 527.

81. *Id.* at 528.

82. *Id.*

83. *Id.* at 530.

84. *Id.*

85. *Id.* at 532.

86. *Id.* at 533.

87. According to the Supreme Court:

The specific question with respect to this phase of the case is not what Falstaff's internal company decisions were but whether, given its financial capabilities and conditions in the New England market, it would be reasonable to consider it a potential entrant into that market. . . . The District Court should therefore have appraised the economic facts about Falstaff and the New England market in order to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition.

Id. at 533–34.

88. This lesson would be overlooked by subsequent lower court opinions discussed below. See discussion *infra* Part III.

might well build a new brewery to supply the northeastern market then its entry by merger becomes suspect under § 7.⁸⁹ However, the Court does not inform us concerning what “economic facts about Falstaff and the New England market” should have been analyzed or what objective evidence should be consulted in order to ascertain the beliefs of a rational beer merchant.⁹⁰ It appears that a complex, open-ended inquiry of this nature would lead to an unmanageable problem for a court. For an actual potential competition case, the Court offered even less, declining to even hold that a merger that prevents actual entry violates § 7 of the Clayton Act.⁹¹

The Court’s reluctance is puzzling. As described by Joseph Brodley,⁹² the Court has ample scope to apply and interpret the actual potential competition doctrine in both law and precedent. In early Supreme Court cases, the Sherman Act has been held to cover actual potential competition,⁹³ and the Clayton Act “is an incipency statute designed to prevent [mergers] that are beyond the scope of the Sherman Act.”⁹⁴

The last and most influential Supreme Court case addressing the potential competition doctrine is *United States v. Marine Bancorporation, Inc.*⁹⁵ The 1974 opinion, penned by Justice Powell, established the extraordinarily high requirements of proof that inoculate potentially anticompetitive mergers from scrutiny under the potential competition doctrine today. The case concerned the acquisition by Marine Bancorporation, a large Seattle-based bank, of the Washington Trust Bank, a smaller bank headquartered in Spokane, Washington.⁹⁶ The government challenged the merger on both perceived and actual potential competition grounds.⁹⁷ It argued that Marine Bancorporation’s presence on the fringe of the Spokane market disciplined Spokane competitors, and that absent the merger, Marine Bancorporation would likely enter the Spokane market.⁹⁸

89. *Falstaff Brewing Corp.*, 410 U.S. at 533.

90. *Id.* at 533–36.

91. The Court’s punt was hardly convincing:

We leave for another day the question of the applicability of § 7 to a merger that will leave competition in the marketplace exactly as it was, neither hurt nor helped, and that is challengeable under § 7 only on grounds that the company could, but did not, enter *de novo* or through “toe-hold” acquisition and that there is less competition than there would have been had entry been in such a manner.

Id. at 537.

92. Joseph F. Brodley, *Potential Competition Under the Merger Guidelines*, 71 CALIF. L. REV. 376, 381 (1983).

93. *E.g.*, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927).

94. Brodley, *supra* note **Error! Bookmark not defined.**, at 381.

95. *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974).

96. *Id.* at 605.

97. *Id.*

98. *Id.* at 605, 633.

The district court found against the government because Washington's state banking regulations prevented the kind of entry the government's theories predicted.⁹⁹ The Supreme Court affirmed, but this time took the opportunity to develop a general methodology for analyzing actual potential competition mergers.¹⁰⁰ According to the Court, "[t]wo essential preconditions must exist" before an actual potential competition theory "establishes a violation of § 7."¹⁰¹ First, that the potential competitor could enter the market at issue absent the merger. Second, that such entry would produce a likelihood of deconcentration or other significant procompetitive effects.¹⁰² Moreover, with respect to the first prong, the Court implied that "unequivocal proof" of actual future de novo entry is required.¹⁰³ The standard of proof for the second prong is also exacting. The potential entry must accomplish more than simply increased competitive rivalry. It must deconcentrate the market or accomplish another "significant" but unspecified procompetitive transformation. Moreover, the Court expressed doubt that an actual potential competition case would be viable, even when these exacting standards are met.¹⁰⁴ Because the government did not meet its burden regarding *Marine Bancorporation*, the Court would "express no view on the appropriate resolution of the question reserved in *Falstaff*."¹⁰⁵

Lower court interpretations of the binding precedent set forth in *Marine Bancorporation* demonstrate both the unworkable nature of the proof requirements and the difficulties attendant to requiring the judiciary to grapple with complicated conduct and performance predictions. For example, a few years after the *Marine Bancorporation* decision, the Fourth Circuit considered a potential competition claim by the FTC in 1977 in *Federal Trade Commission v. Atlantic Richfield Co.*¹⁰⁶ The case involved the acquisition of Anaconda, a copper and aluminum mining and processing company, by ARCO, a large oil and petroleum company.¹⁰⁷ The FTC claimed that ARCO was a likely entrant into the copper market.¹⁰⁸ The Court interpreted Supreme Court precedent to require "clear proof" of entry (citing to the *Marine Bancorporation* standard of

99. *Id.* at 639–40.

100. For the perceived potential competition theory, the required showing is that the acquired firm is a perceived entrant and that this perception "tempers" noncompetitive behavior in the market. *Id.* at 640.

101. *Id.* at 633. However, in another part of the opinion, the Court states that "[i]ndeed, since the preconditions for that theory are not present, we do not reach it, and therefore we express no view on the appropriate resolution of the question reserved in *Falstaff*." *Id.* at 639. In *Fraser v. Major League Soccer*, the Court refused to find that § 7 of the Clayton Act can be violated by the elimination of actual potential competition. *See* 284 F.3d 47, 70–71 (1st Cir. 2002). The Court stated that "[i]t is uncertain how the Supreme Court will ultimately resolve the issue." *Id.* at 70.

102. *Marine Bancorporation, Inc.*, 418 U.S. at 633.

103. *See id.* at 624.

104. *Id.*

105. *Id.* at 639.

106. *Fed. Trade Comm'n v. Atl. Richfield Co.*, 549 F.2d 289, 291 (4th Cir. 1977).

107. *Id.*

108. *Id.* at 292–95.

“unequivocal proof”).¹⁰⁹ The Court then relied on the testimony of ARCO’s management.¹¹⁰ This is precisely the type of evidence eschewed by *Falstaff*. The Court found that “Arco would never seriously consider original entry or entry by toehold acquisition.”¹¹¹ Lack of proof of entry also doomed the government’s cases in *British Oxygen Co. International v. Federal Trade Commission*,¹¹² *Tenneco, Inc. v. Federal Trade Commission*,¹¹³ *United States v. Siemens Corp.*,¹¹⁴ and *Fraser v. Major League Soccer*.¹¹⁵

The Fifth Circuit, in *Mercantile Texas Corp. v. Board of Governors of the Federal Reserve System*,¹¹⁶ set forth a detailed analysis of its understanding of the proof requirements of an actual potential competition violation of the Clayton Act.¹¹⁷ According to that court, the required elements are: (1) a concentrated market; (2) no other potential entrants exist other than the target (or acquirer); (3) probability of procompetitive entry; and (4) procompetitive effects of independent entry.¹¹⁸ The court stated that when there are several potential entrants, the elimination of any one entrant would not be significant.¹¹⁹ It then added, following Richard Posner, that “[e]conomic theory suggests that, where oligopoly profits are available, a multitude of firms will eagerly seek to enter the market.”¹²⁰ Thus, the proponent of an actual potential competition case must show in the Fifth Circuit, contrary to the general case, that the specific facts at issue suggest that only the target (or acquiring) firm is a likely entrant. Thus, the court found that the plaintiff failed to demonstrate that the actual potential competition was “significant” because of the presence of other unanalyzed

109. *Id.* at 294; see *United States v. Siemens Corp.*, 621 F.2d 499, 506–07 (2d Cir. 1980) (“Assuming that the theory of elimination of actual potential competition may be the basis of preliminary injunctive relief, about which some respected authorities have voiced understandable doubt, there must, for purposes of determining whether such relief is appropriate, be at least a ‘reasonable probability’ that the acquiring firm would enter the market, and preferably clear proof that entry would occur . . .” (citations omitted)). *But see* *Yamaha Motor Co. v. Fed. Trade Comm’n*, 657 F.2d 971, 977 (8th Cir. 1981) (requiring that the potential entrant have “available feasible means” for entering the relevant market, not clear proof of eventual entry (quoting *Marine Bancorporation Inc.*, 418 U.S. at 633)).

110. *Atl. Richfield Co.*, 549 F.2d at 296.

111. *Id.* at 297.

112. *Brit. Oxygen Co. Int’l v. Fed. Trade Comm’n*, 557 F.2d 24, 29–30 (2d Cir. 1977).

113. *Tenneco, Inc. v. Fed. Trade Comm’n*, 689 F.2d 346, 357–58 (2d Cir. 1982).

114. *Siemens Corp.*, 621 F.2d at 504.

115. *Fraser v. Major League Soccer*, 284 F.3d 47, 69–70 (1st Cir. 2002).

116. *Mercantile Tex. Corp. v. Bd. of Governors of Fed. Reserve Sys.*, 638 F.2d 1255 (5th Cir. 1981).

117. *Id.* at 1266–68.

118. The Fifth Circuit declined to follow the Fourth Circuit and require “entry of the outside firm must appear to be certain.” *Id.* at 1268. Instead, it endorsed a standard of proof of “reasonable probability” of entry. *Id.*

119. *Id.* at 1267.

120. *Id.* Posner writes that “[t]he doctrine of potential competition was introduced into antitrust law by the Supreme Court, and the Court can abandon it—and should do so.” RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 123 (1976). Posner’s critique of the potential competition doctrine is that it is impossible to determine the universe of potential entrants at any time, let alone the likelihood that each would enter. *See id.*

potential entrants and that there was insufficient evidence that entry would have had a “significant” procompetitive effect.¹²¹

The Department of Justice addressed the potential competition issue again in the 1982 Merger Guidelines drafted by appointees of Ronald Reagan, who were heavily influenced by the Chicago School of Economics.¹²² They were revised in 1984, and this was the last time potential competition mergers are addressed by the Merger Guidelines.¹²³ The 1984 Merger Guidelines built upon but also significantly revised the Department of Justice’s position developed in the 1968 Merger Guidelines. The 1984 Merger Guidelines treated perceived and actual potential competition together, thus implicitly rejecting the artificial division made by the Supreme Court. The Department of Justice considered four factors. First, the acquired firm’s market must be concentrated, above 1800 HHI.¹²⁴ Second, the acquiring firm must have specific entry advantages; otherwise, the elimination of the target still leaves many potential entrants. The number of firms likely to enter should be less than three. If there are more than three likely entrants then there must be direct evidence of likely entry. Third, the target must have a larger market share of twenty percent or more to make a challenge likely. Fourth, the 1984 Merger Guidelines required an analysis of the efficiencies of the proposed merger.¹²⁵

The 1984 Merger Guidelines were both a step forward and a step back from the 1968 Merger Guidelines. Unlike the 1968 Merger Guidelines, the 1984 version assumed that the acquiring firm is the potential entrant. The Department of Justice should have made clear that the potential competition doctrine can be applied in either direction; a merger can prevent entry by the acquiring firm or the acquired firm. The 1984 Merger Guidelines further provide that where entry is easy no merger challenge will be undertaken.¹²⁶ This is a step backward from the 1968 Merger Guidelines. The 1984 Merger Guidelines never define ease of entry. At most, the 1984 Merger Guidelines declared that ease of entry is the likelihood and probable magnitude of entry in response to a small but significant and nontransitory increase in price.¹²⁷ While the newer version of the Merger Guidelines added structure to the more opaque 1968 Merger Guidelines, it relied on another undefined concept, “entry advantage.” As the antitrust scholar Joseph

121. The government prevailed on its potential competition claims in *Polypore International v. Federal Trade Commission*, 686 F.3d 1208 (11th Cir. 2012) and *Yamaha v. Federal Trade Commission*, 657 F.2d 971 (8th Cir. 1981).

122. U.S. DEP’T OF JUST., 1982 MERGER GUIDELINES (1982), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf>.

123. U.S. DEP’T OF JUST., 1984 MERGER GUIDELINES (1984), <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>.

124. The Herfindahl-Hirschman Index (HHI) is a measure of market concentration equal to the sum of squared market shares and bounded between 0 and 10,000. U.S. DEP’T OF JUST., *supra* note 123, § 3.1. Markets demonstrating an HHI of greater than 1800 are considered highly concentrated. *Id.*

125. U.S. DEP’T OF JUST., *supra* note 123, § 4.13 *et seq.*

126. *Id.* § 3.3.

127. *See id.*

Brodley points out, the most probable market entrant under the analytical structure of the 1984 Merger Guidelines is the firm that would achieve the greatest anticipated return from entry.¹²⁸ According to Professor Brodley, “[c]ourts lack the expertise to resolve complex and speculative factual issues as to future costs and economic conditions. The cases are bound to be burdensome and expensive, especially when competing experts escalate the subtlety of the analysis.”¹²⁹

Professor Brodley is correct. Analysis of entry under the Merger Guidelines requires a fairly sophisticated predictive financial analysis. To require a similar analysis for firms that are not parties to the analysis appears intractable.

Thus, the plaintiff asserting a violation of § 7 of the Clayton Act against a dominant firm in a digital market seeking to acquire a startup based on actual potential competition has a difficult uphill climb. First, many circuits do not recognize a reduction of actual potential competition as a viable theory under § 7 of the Clayton Act. Second, most courts, but not all, have considered the situation where the acquirer is the potential entrant rather than the incumbent, dominant firm. Third, the courts have demanded a high standard of proof for demonstrating that the startup would likely enter the market dominated by the acquirer. Fourth, even where entry is likely, the courts require that the target be uniquely situated to enter and not be one of many potential entrants. Fifth, the courts require proof that the startup’s entry will significantly reduce the dominance of the dominant firm in its relevant market. These onerous requirements would deter even the most committed antitrust enforcer or plaintiff.

III. APPLICATION OF THE POTENTIAL COMPETITION DOCTRINE TO THE INSTAGRAM AND WHATSAPP MERGERS

In this Part of the Article, we describe the difficulty of applying the potential competition doctrine to Facebook’s widely criticized acquisitions of Instagram and WhatsApp. Our intent is not to demonstrate that these acquisitions were anticompetitive but to show that the potential competition doctrine as presently formulated does not allow for a serious inquiry into tech mergers.¹³⁰

128. Brodley, *supra* note 92, at 390 (discussing the 1982 Merger Guidelines). The 1982 and 1984 Merger Guidelines treat potential competition mergers in an equivalent way. The 1984 Merger Guidelines added a sentence stating that efficiencies will be considered. *See* U.S. DEP’T OF JUST., *supra* note 123, § 3.5.

129. Brodley, *supra* note 92, at 391.

130. Many commentators have suggested that the Instagram acquisition was anticompetitive. *E.g.*, BAKER, *supra* note 16, at 161 (“Consider Facebook’s acquisition of Instagram in 2012. This merger could have harmed future competition by reducing incentives to innovate.”); Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT’L J. INDUS. ORG. 714, 740 (2018) (“One common fact pattern that can involve a loss of future competition occurs when a large incumbent firm acquires a highly capable firm operating in an adjacent space. This happens frequently in the technology sector. Prominent examples include Google’s acquisition of YouTube in 2006 and DoubleClick in 2007, Facebook’s acquisition of Instagram in 2012 . . .”).

A. THE INSTAGRAM ACQUISITION

When Facebook announced its \$1 billion acquisition of Instagram on April 9, 2012, it was something of an anomaly.¹³¹ Although Facebook had made thirty-one acquisitions up to this point, none approached the price tag paid for Instagram.¹³² However, Instagram was different, and the opportunity arose at a critical crossroads for Facebook. On the eve of its May 2012 IPO, Facebook was under great pressure by investors to increase its revenue base. At the same time, the rise of mobile technology and its rapid adoption by consumers created hurdles for Facebook to satisfy these demands.

Two problems confronted the company as an increasing share of users accessed the internet from mobile devices. First, Facebook struggled to reorient its network from a desktop-based platform, and second, it had yet to monetize its mobile user base by incorporating advertising on the limited display area available on mobile screens.¹³³ As other companies developed mobile-first applications that optimized web access using smartphones, Facebook elected to invest in an HTML5-based multi-platform strategy. On mobile devices, their HTML5 approach was slower and less stable than native iOS and Android applications.¹³⁴ At the same time, mobile-native applications with social features such as Instagram and Foursquare were attracting growing user numbers and threatened to draw user engagement away from Facebook precisely when its revenue base was under scrutiny.

Photo sharing had been a key facet of Facebook's user engagement since its introduction on the network. By 2009, Facebook Photos was the largest photo sharing service in the world.¹³⁵ In ensuing years as dramatic improvements in smartphone camera features made photo sharing an increasingly mobile-based activity, Facebook struggled to adapt to the shift to mobile technology. At this pivotal juncture, Stanford engineering graduates Kevin Systrom and Mike

131. See Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, N.Y. TIMES: DEALBOOK (Apr. 9, 2012, 1:15 PM), <https://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/>.

132. See *infra* Appendix.

133. In Facebook's 2012 SEC Form S-1 Registration Statement, the company records 845 million monthly active users, and 432 million monthly active users accessing the network through mobile products in December 2011. Facebook Inc., Annual Report (Form 10-K) (Jan. 29, 2013), https://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/FB_2012_10K.pdf. Among the company's risk factors are two mobile-related risks: (1) "Growth in the use of Facebook through our mobile products as a substitute for use on personal computers may negatively affect our revenue and financial results[.]" and, (2) "Facebook user growth and engagement on mobile devices depend upon effective operation with mobile operating systems, networks, and standards that we do not control." *Id.* at 18.

134. MG Siegler, *Facebook for iPhone Updated: No iOS 4 Support, No iPad Support, Broken UI*, TECHCRUNCH (June 19, 2010, 6:24 PM), <https://techcrunch.com/2010/06/19/facebook-iphone-app/>; see also Drew Olanoff, *Mark Zuckerberg: Our Biggest Mistake Was Betting Too Much on HTML5*, TECHCRUNCH (Sept. 11, 2012, 2:20 PM), <https://techcrunch.com/2012/09/11/mark-zuckerberg-our-biggest-mistake-with-mobile-was-betting-too-much-on-html5/>; Om Malik, *Here Is Why Facebook Bought Instagram*, GIGAOM (Apr. 9, 2012, 11:28 AM), <https://gigaom.com/2012/04/09/here-is-why-did-facebook-bought-instagram/>.

135. Erick Schonfeld, *Facebook Photos Pulls Away from the Pack*, TECHCRUNCH (Feb. 22, 2009, 9:15 AM), <https://techcrunch.com/2009/02/22/facebook-photos-pulls-away-from-the-pack/>.

Krieger launched the native iOS photo sharing social network Instagram.¹³⁶ On Instagram, users could upload, edit, and share pictures from their iPhones and follow, comment, and like the images posted by others. The app also enabled users to post their Instagram images across social networks, including Facebook and Twitter. But the founders did not aim to be a mere content creator for other social networks. Rather, Systrom and Krieger envisioned their app as a rival to the incumbent social networking giants based on a community united under the premise that “the next network is people interested in sharing life visually.”¹³⁷ The company was poised to compete in the social networking market.¹³⁸

Within the first week of its October 6, 2010 launch on the Apple App Store, Instagram had garnered 100,000 user downloads.¹³⁹ Ten weeks later it had accrued over 1 million registered users.¹⁴⁰ The company quickly attracted the attention of venture capital that would allow it to scale. The firm’s initial funding round brought former Facebook VP of Product Management Matt Cohler to Instagram’s Board of Directors, who advised the company to pursue growth first without monetization in order to achieve the network effects that would drive advertising revenue later.¹⁴¹ One month before the company revealed its acquisition, just two and half years after its introduction on the App Store, Instagram founder Kevin Systrom announced that Instagram had reached 27 million registered users and “Facebook-level engagement.”¹⁴² In the following weeks, Instagram branched out from iOS to launch on Android and brought in 1 million new users in the first twenty-four hours.¹⁴³ When Facebook and

136. Gaurav Sangwani, *The Story of How Instagram Started and What Entrepreneurs Can Learn from It*, FIN. EXPRESS (Apr. 26, 2018, 12:39 PM), <https://www.financialexpress.com/industry/sme/the-story-of-how-instagram-started-and-what-entrepreneurs-can-learn-from-it/1146377/#:~:text=Instagram%20was%20developed%20in%20the%20US%20by%20Kevin%20Systrom%20and%20Mike%20Krieger.&text=He%20so%20came%20up%20with.got%20them%20to%20discuss%20Burbn>.

137. Claire Cain Miller, *A Photo-Sharing App with Bigger Aspirations*, N.Y. TIMES: BITS (Oct. 19, 2010, 12:00 PM), <https://bits.blogs.nytimes.com/2010/10/19/a-photo-sharing-app-with-bigger-aspirations/>.

138. As Tim Wu describes:

What made Instagram especially dangerous to Facebook was that it was strong where Facebook was weak. Instagram was native to mobile; Facebook was struggling on that platform. And photo sharing was incredibly fast and easy on Instagram. As business writer Nicholas Carlson observed, Instagram “allows people to do what they like to do on Facebook easier and faster.” Perhaps even more alarming, Instagram appealed to a younger demographic and had a cachet that Facebook was starting to lose.

Tim Wu, *The Case for Breaking Up Facebook and Instagram*, WASH. POST (Sept. 28, 2018, 10:11 AM), <https://www.washingtonpost.com/outlook/2018/09/28/case-breaking-up-facebook-instagram/>.

139. MG Siegler, *Instagram Captures 100,000 Mobile Photo Addicts in Less Than a Week*, TECHCRUNCH (Oct. 13, 2010, 1:02 PM), <https://techcrunch.com/2010/10/13/instagram-users/>.

140. MG Siegler, *Instagram Captures a Million Users. Up Next: API, Android, and Funding*, TECHCRUNCH (Dec. 21, 2012, 3:20 PM), <https://techcrunch.com/2010/12/21/instagram-one-million/>.

141. Kim-Mai Cutler, *From 0 to \$1 Billion in Two Years: Instagram’s Rose-Tinted Ride to Glory*, TECHCRUNCH (Apr. 9, 2012, 6:14 PM), <https://techcrunch.com/2012/04/09/instagram-story-facebook-acquisition/>.

142. *Id.*

143. *Id.*

Instagram announced the acquisition six days after the Android launch, Instagram had over 30 million users and just thirteen employees.¹⁴⁴

According to Silicon Valley folklore, Zuckerberg invited Systrom to his home on a Saturday. By Monday the billion-dollar deal was done.¹⁴⁵ Observers at the time registered their suspicions that the acquisition was an act of “squashing a potential rival” and pointed to the impending monetization of Instagram as a source of competition that could have driven down prices in online advertising markets.¹⁴⁶ The merger triggered a Hart-Scott-Rodino filing, but ultimately the antitrust agencies took no action. The FTC investigation was nonpublic and enforcers did not disclose the basis for their decision at the time.¹⁴⁷ One likely obstacle was the user price of zero set by Facebook and Instagram for their social networking services, which complicates estimates of markups above the competitive price or estimates of entry in response to a small price increase. In the social networking market, companies compete for user attention. The consumer-facing market generally has a price of zero, with services monetized in the advertising market by selling access to the user attention captured on the social network. Instagram operated in the social networking market and it was encouraging users to defect from Facebook to Instagram, but the competitive dimensions of this market are challenging to measure and interpret since users may participate on both networks and neither network charged for the services involved.¹⁴⁸ Several economists have offered solutions to this problem, including measures of user engagement such as the

144. Thomas Houston, *Facebook to Buy Instagram for \$1 Billion*, VERGE (Apr. 9, 2012, 1:06 PM), <https://www.theverge.com/2012/4/9/2936375/facebook-buys-instagram>.

145. Steven Bertoni, *Instagram's Kevin Systrom: The Stanford Billionaire Machine Strikes Again*, FORBES (Aug. 1, 2012, 9:00 AM), <https://www.forbes.com/sites/stevenbertoni/2012/08/01/instagrams-kevin-systrom-the-stanford-millionaire-machine-strikes-again/>.

146. In *The New York Times*, Somini Sengupta points directly at issues of potential competition, stating,

Instagram had no advertisements, but it could have one day started to attract advertisements. That would have meant real competition for Facebook, especially on mobile devices, where the social network has been unable to, by its own admission, generate “meaningful revenue.” A rival that happens to be hugely popular on mobiles could have potentially driven down advertising prices.

Somini Sengupta, *Why Would the Feds Investigate the Facebook-Instagram Deal?*, N.Y. TIMES (May 10, 2012, 9:22 AM), <https://bits.blogs.nytimes.com/2012/05/10/why-would-the-feds-be-probing-the-facebook-instagram-deal>. According to TechCrunch, “[l]ast year, documents for a standalone Facebook mobile photo sharing app were attained by TechCrunch. Now it seems Facebook would rather buy Instagram which comes with a built-in community of photographers and photo lovers, while simultaneously squashing a threat to its dominance in photo sharing.” *Facebook Buys Instagram for \$1 Billion, Turns Budding Rival into Its Standalone Photo App*, TECHCRUNCH (Apr. 9, 2012, 10:06 AM), <https://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/>.

147. Alexei Oreskovic, *FTC Clears Facebook's Acquisition of Instagram*, REUTERS (Aug. 22, 2012, 5:40 PM), <https://www.reuters.com/article/us-facebook-instagram/ftc-clears-facebooks-acquisition-of-instagram-idUSBRE87L14W20120823>.

148. See John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1509 (2019).

number of users or the amount of time spent on a website.¹⁴⁹ By any reasonable measure, Instagram was already a competitor.¹⁵⁰

In contrast, advertising markets are not free. Digital advertising market analysts widely acknowledge the dominance of a duopoly in digital advertising composed of Google and Facebook, which jointly claim approximately 60% of total revenue in the market.¹⁵¹ For Facebook that dominance amounted to \$16.6 billion in advertising income during the second quarter of 2019 and more than 98% of its total revenue.¹⁵² Facebook's advertising market power is even more significant when compared to similar advertising platforms. For example, during the 2007 investigation of the Google/DoubleClick merger, the FTC determined that search advertising (advertising delivered in response to a consumer search query) should be separated from display advertising (including image, video, rich media, etc., purchased on a webpage).¹⁵³ According to the FTC, "the evidence shows that the sale of search advertising does not operate as a significant constraint on the prices or quality of other online advertising sold directly or indirectly by publishers or vice versa."¹⁵⁴

Today, Facebook leads the market in digital display advertising with a market share of over 40%.¹⁵⁵ Arguably, an even smaller relevant market might exist for advertising on social networks.¹⁵⁶ In 2011 and 2012, as Facebook struggled to monetize its mobile user base, Google and Facebook battled for the top spot, each controlling about 14% of the digital display advertising market in

149. David S. Evans, *Attention Rivalry Among Online Platforms*, 9 J. COMPETITION L. & ECON. 313, 346–48 (2013); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 793–99 (2019); see also John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 182–189 (2015).

150. According to Facebook's 2012 Annual Report, the company believed that Instagram was drawing users away from engagement with Facebook, stating, "We believe that some of our users have reduced their engagement with Facebook in favor of increased engagement with other products and services such as Instagram." Facebook Inc., *supra* note 133, at 19.

151. *US Digital Ad Spending Will Surpass Traditional in 2019*, EMARKETER (Feb. 19, 2019), <https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019>; APPNEXUS, THE DIGITAL ADVERTISING STATS YOU NEED FOR 2018, at 49 (2018), https://www.appnexus.com/sites/default/files/whitepapers/guide-2018stats_2.pdf.

152. FACEBOOK INC., INVESTOR RELATIONS, FACEBOOK Q2 2019 RESULTS (2019), https://s21.q4cdn.com/399680738/files/doc_financials/2019/Q2/Q2-2019-Earnings-Presentation-07.24.2019.pdf.

153. FTC, Statement of the Federal Trade Commission Concerning Google/DoubleClick, FTC File No. 071-0170, https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

154. *Id.* at 3.

155. Ginny Marvin, *Report: Facebook's Display Ad Domination to Grow as US Digital Ad Spend Hits \$83B in 2017*, MARKETING LAND (Mar. 14, 2017, 9:38 AM), <https://marketingland.com/emarketer-facebook-dominate-15-9-pct-digital-ad-spend-growth-2017-209045>; NICOLE PERRIN, EMARKETER, US DIGITAL DISPLAY ADVERTISING 2020: A GUIDE TO EMARKETER'S COMPLETE FORECAST (2020), <https://www.emarketer.com/content/us-digital-display-advertising-2020>.

156. BAKER, *supra* note 16, at 162–63 ("Instagram was one of a few significant potential rivals to Facebook with the capability of someday offering attractive advertising services on a social network. If social networks were, or were likely to become, particularly good vehicles for some types of advertisers, and more attractive to those advertisers than advertising in response to user searches, then Facebook and Instagram would have been close rivals in an innovation market and a future product market for advertising on social media platforms." (footnotes omitted)).

2011 and 15% in 2012.¹⁵⁷ At the time of the merger, the majority of Facebook's revenue came from display advertising.¹⁵⁸ Instagram did not sell advertising at the time of the acquisition, but it had been working directly with brands to support image-oriented ways of connecting companies with users.¹⁵⁹ As the Instagram network grew, more businesses saw it as an important medium to reach consumers.¹⁶⁰ When Instagram was ready for monetization, it would be unlikely to charge users for social networking services in a market where the going price was zero. Once Instagram introduced advertising it would likely compete with Facebook in the digital display advertising market as well as social networking. Instagram was an actual potential entrant in both of these markets. Thus, the Instagram merger presented a classic case of a potential competition merger under § 7 of the Clayton Act.

Although the FTC did not outline the considerations that guided its investigation, in August 2012 the United Kingdom's Office of Fair Trading (OFT) published an outline of its decision to refrain from referring the Instagram acquisition to the Competition Commission.¹⁶¹ OFT determined that Instagram was a current competitor in social networking services, and that Facebook's large share of the market achieved the threshold for investigation.¹⁶² OFT interpreted Instagram's rapid growth as an indication of low barriers to entry in social networking and photo sharing, concluding that Instagram did not evince a uniquely competitive product such that its acquisition would foreclose competition in either market.¹⁶³ OFT considered Instagram as a potential competitor in digital advertising markets, but determined that Facebook's

157. *Google, Facebook Continue to Lead in Digital Display Earnings*, EMARKETER (Mar. 29, 2013), <https://www.emarketer.com/Article/Google-Facebook-Continue-Lead-Digital-Display-Earnings/1009769>.

158. The United Kingdom's Office of Fair Trading notes that the majority of Facebook's advertising is display advertising, and the company's 2012 annual report shows that approximately 85% of total revenues come from advertising. OFF. OF FAIR TRADING, ANTICIPATED ACQUISITION BY FACEBOOK INC OF INSTAGRAM INC para. 8 (2012), https://webarchive.nationalarchives.gov.uk/20140402232639/http://www.oft.gov.uk/shared_of/mergers_ea02/2012/facebook.pdf; Facebook Inc., *supra* note 133, at 62.

159. See MG Siegler, *Beyond the Filters: Brands Begin to Pour into Instagram*, TECHCRUNCH (Jan. 13, 2011, 12:06 PM), <https://techcrunch.com/2011/01/13/instagram-brands/>; MG Siegler, *Instagram Taps Hashtags to Bundle Pictures; Brands Quickly Jump on Board*, TECHCRUNCH (Jan. 27, 2011, 11:00 AM), <https://techcrunch.com/2011/01/27/instagram-hashtags/>.

160. See Siegler, *supra* note 159.

161. OFF. OF FAIR TRADING, *supra* note 158, para. 5.

162. According to the release,

[t]he parties overlap in the supply of virtual social networking services. Facebook's share of supply in the UK of virtual social networking services is over 25 per cent and, given that Instagram is active in the supply of virtual social networking services, the Transaction would result in an increment. Consequently, the share of supply test in section 23 of the Act is met.

Id. (citations omitted).

163.

In terms of whether other apps or social networks could replicate Instagram's success, it is relevant that Instagram grew rapidly from having 1.4 million users in January 2011 to around 24 million users in February 2012. Whilst this indicates the strength of Instagram's product, it also indicates that barriers to expansion are relatively low and that the attractiveness of apps can be 'faddish'.

Id. para. 36.

competition from Google, Yahoo, and Microsoft dwarfed the potential competitive impact of entry by Instagram. It determined that there was “no realistic prospect that the merger may result in a substantial lessening of competition in the supply of display advertising.”¹⁶⁴

Today, Facebook claims a dominant position in the social networking and online social photo services markets, and market power through the Facebook-Google duopoly over digital advertising. If the antitrust agencies faltered, it was likely because the potential competition doctrine created difficult obstacles for a merger challenge. Consider the following facts of the Instagram merger in light of the required proof under the 1984 Merger Guidelines to justify a Department of Justice challenge.

1. Market Concentration

The 1984 Merger Guidelines state that a challenge is unlikely if concentration in the acquired firm’s market is below 1800 HHI.¹⁶⁵ In the case of the Instagram merger, the relevant market to measure concentration would be the acquiring firm’s market. Facebook operates in markets for social networking and digital advertising. By 2011, Facebook dominated the social networking industry by a wide margin in terms of user numbers and engagement, but HHI calculations lack defined measures for markets where the user price is zero.¹⁶⁶ A workable measure of concentration is critical for markets like social networking in which the good or service is free. As zero-price markets proliferate, antitrust institutions must adopt new instruments for analysis or risk the amplification of consumer harms.¹⁶⁷ Scholarship on the application of antitrust in these markets suggests that enforcement focus on attention and informational costs or metrics such as “time on site” to indicate the extent of competition for user engagement.¹⁶⁸ Such a measure could have demonstrated

164. *Id.* para. 29.

165. For the definition of HHI, see *supra* note 124.

166. See HAMPTON ET AL., *supra* note 29, at 13.

167. Newman, *supra* note 149, at 182–83, 189–92.

168. Newman argues that free products are not, in fact, free and thus involve measurable changes in the cost to consumers, stating: “Consumers of zero-price products pay for those products, at least when the zero-price products are offered as part of a sustainable business model. In the absence of a tying arrangement involving some positive-price product, consumers generally pay with their attention, information, or both.” *Id.* at 202 (footnotes omitted). Tim Wu argues for time on site as a readily available proxy for market share in attention, stating,

One relatively simple way of measuring market power in attentional markets is to focus on the industry’s own metric: time spent, or in Silicon Valley jargon, “time on site.” Time serves as a proxy for attention and time on site is readily measurable, and already tracked by both industry and observers. For example, a 2017 comScore report suggests that Facebook held roughly 1,000 monthly minutes of the average American’s time, as compared with about 250 for Instagram and Snap, respectively, and less than 200 for Twitter, and 50 for Google+. Relying on these data for hypothetical purposes . . . if consumers nationwide spent a total of some 2000 minutes per week on all social networking apps, and overall spent 55 percent of those hours on Facebook and 12.5 percent on Instagram, we would have some sense of the structural importance of a transaction like the Facebook/Instagram combination.

important implications of a Facebook-Instagram merger for competition in the market.

In the digital advertising market, the Facebook-Google duopoly already controlled 45.5% of revenue in 2011, although the majority of that share was attributable to Google.¹⁶⁹ Narrowing the scope to the display advertising market, the top six firms in 2011 collected approximately 49% of the digital display advertising revenue and the HHI among those six firms amounted to just 546.¹⁷⁰ In the years following the 2012 acquisition of Instagram, the Facebook-Google duopoly consolidated their market power in both the digital advertising and the display advertising markets. By 2018, both markets displayed HHIs of over 1800 and Facebook's share of display advertising revenue in the U.S. market rose to more than 20%—even higher if a more narrow market were defined.¹⁷¹ Thus, while it is likely that a measure of concentration for the social networking market would have satisfied the first prong of the merger guidelines analysis, the concentration levels measured for the display advertising market concentration levels would not have been sufficient.

2. *Conditions of Entry Generally*

The Department of Justice will not challenge a potential competition merger if entry into the market is easy.¹⁷² This protocol requires the Department of Justice to demonstrate some difficulty of entry or barriers to entry in the concentrated market. Through 2011, the markets for social networking and digital advertising had been dynamic as firms in these markets competed for dominance. The economies of scale and network effects that typify platform markets represent traditional barriers to entry that would reinforce the incumbency of dominant firms,¹⁷³ but Instagram was showing the potential for a nascent competitor to siphon off users and gain market share. Entry into social networking or digital advertising markets was achievable for small and startup firms that operated in any of several adjacent markets if they exhibited the rapid growth in user engagement that would lead to increasing value on both sides of

Wu, *supra* note 149, at 794 (footnotes omitted).

169. EMARKETER, BEYOND THE DUOPOLY: EXPLORING DIGITAL ADVERTISING OUTSIDE GOOGLE AND FACEBOOK (2017), <https://www.emarketer.com/Report/Beyond-Duopoly-Exploring-Digital-Advertising-Outside-Google-Facebook/2002174>.

170. *Google, Facebook Continue to Lead in Digital Display Earnings*, *supra* note 157 (adding together the percentages of total display ad revenues from 2011 for the six firms). The Authors calculated the HHI from the information given in the table. Each firm's market share was calculated with firm revenues divided by total digital display revenues. Then the HHI calculated as the sum of the squared market shares for the listed firms. The data is on file with the Authors.

171. *US Digital Ad Spending Will Surpass Traditional in 2019*, *supra* note 151; Marvin, *supra* note 155.

172. See Brodley, *supra* note 92, at 388.

173. See Newman, *supra* note 148, at 1514.

the market and if they had access to the funding that would allow the company to scale up.¹⁷⁴

There is one significant barrier to entry in online platform markets that is unlike the traditional barriers considered in other markets: access to data.¹⁷⁵ A dominant firm with access to broad user data has a significant advantage over new entrants. The data advantage allows a dominant firm to reinforce its market power in three ways. The firm can use data to review and improve user services in the core market and expand user engagement, generating more data. The firm can leverage its data advantage to reach new users through entry into adjacent markets and likewise expand its data access. Finally, the scope and magnitude of consumer data available to a dominant firm allows it to sell high-value, targeted advertising with revenues that may be invested in increasing user engagement and amassing more consumer data. These three advantages create a positive feedback loop for the dominant firm.¹⁷⁶

The drive to exploit user attention and access to data may translate to gains for consumers who enjoy higher quality services and seemingly individuated advertising. For startups with comparatively little data access, the competitive advantage of large firms' data scale and efficiencies poses a significant barrier to entry. As a result of these advantages, the dominant, consumer-facing platforms also dominate advertising markets—a tendency exemplified in the Facebook-Google duopoly.

Despite these structural barriers, demonstrating the difficulty of entry into the social networking or digital advertising markets presents a challenge. For one thing, the data barrier is specific to online platform markets. For another, competition for user attention forces the dominant firm to compete with platforms and applications operating across a variety of markets. There is no direct substitute for Facebook in the social networking market, but smaller firms offering complementary or adjacent features have the ability to capture user attention that draws engagement and profits away from the network, even if the smaller firm is not competing in social networking.¹⁷⁷ This ability to capture user attention also makes these smaller, adjacent firms potential competitors in digital advertising. Extending consideration to potential competitors in adjacent markets where entry is relatively easy could undermine the government's ability to isolate any impact from the elimination of a single rival.

174. See ROB MAHINI, AM. ANITRUST INST., GETTING IT RIGHT: MARKET DEFINITION IN THE TECHNOLOGY SECTOR 2–3 (2020), <https://www.antitrustinstitute.org/wp-content/uploads/2020/06/Mahini.pdf>.

175. FURMAN ET AL., *supra* note 9, at 33.

176. *Id.* at 34.

177. During a 2018 congressional hearing, Facebook CEO Mark Zuckerberg responded to the question “[w]ho is your biggest competitor?” by insisting that the company competes in three main categories, rather than facing a direct competitor in one primary market. *Facebook, Social Media Privacy, and the Use and Abuse of Data: Hearing Before the S. Comm. on the Judiciary and the S. Comm. on Com., Sci., and Transp.*, 115th Cong. 29–30 (2018) (statement of Sen. Lindsey Graham). Zuckerberg also mentioned that a typical American uses eight different communications software applications but did not mention that Facebook owns several of them. *Id.*

3. *The Target Firm's Entry Advantage*

If entry is not easy generally, then the Department of Justice has to show that Instagram had an entry advantage not possessed by three or more firms. For reasons discussed later, the potential for firms to enter social networking or digital advertising markets from a variety of adjacent or complementary markets makes it impossible to identify limits to potential entrants. Isolating the photo sharing market in the case of Instagram provides a good example of this difficulty.

Despite Facebook's dominance in photo sharing, several desktop-based and mobile applications existed at the time. Most of these platforms lacked the social features that distinguished the social networking elements available through Facebook and Instagram. Facebook even purchased several other photo-related services leading up to the Instagram acquisition, including the photo sharing and tagging website Divvyshot in April 2010, the file sharing, messaging, and commenting service Drop.io in October 2010, and video and image recording and editing app developer Digital Staircase in November 2011.¹⁷⁸ In May 2012, after announcing the Instagram acquisition but before it was finalized, Facebook purchased Lightbox.com, a mobile social photo sharing application designed for Android, in the period before Instagram introduced its Android app.¹⁷⁹ While Lightbox had amassed 1.5 million downloads in its first seven months of operation, Instagram's Android launch in April reached 1 million within a week.¹⁸⁰ Facebook purchased and shuttered the Lightbox application, absorbing its employees and pulling the app from the market immediately.¹⁸¹ Facebook launched its own camera app, Facebook Camera, on May 24, 2012, weeks after announcing its intention to acquire Instagram.¹⁸²

The United Kingdom's OFT decision lists six competing apps in the photo sharing market, including Camera Awesome, Camera +, Flickr, Hipstamatic, Path, and Pixable.¹⁸³ Of these services, only Camera+, Hipstamatic, and Camera Awesome included camera applications. Flickr is a photo storage and management tool and Pixable was an aggregator that scraped images from social networks including Facebook, Twitter, and Instagram.¹⁸⁴ Path was a social network conceived as a competitor to Facebook that offered a more private experience, limiting social connections to invite more personal interactions.¹⁸⁵

178. See *infra* Appendix.

179. Protalinski, *supra* note 33.

180. Khedekar, *supra* note 33.

181. Constine, *Facebook Hires Team*, *supra* note 33.

182. Dirk Stoop, *Introducing Facebook Camera*, FACEBOOK (May 24, 2012), <https://newsroom.fb.com/news/2012/05/introducing-facebook-camera/>.

183. *Id.*; OFF. OF FAIR TRADING, *supra* note 158, para. 15.

184. Chris Anderson, *Pixable Closing Up Shop After One Crazy, Awesome Ride*, MEDIUM (Nov. 30, 2015), https://medium.com/@chris_anderson/pixable-closing-up-shop-after-one-crazy-awesome-ride-59192743528b.

185. Elise Moreau, *A Look Back on the Social Networking App Called Path*, LIFEWIRE <https://www.lifewire.com/what-is-path-3486483> (July 17, 2020); Jon Russell, *Mobile Social Network Path*,

Hipstamatic and Camera+ provided photo taking and editing tools but lacked the social features that distinguished Instagram.¹⁸⁶ In addition, Hipstamatic and Camera Awesome had entered into a partnership with Instagram that streamlined posting photos taken with those apps to Instagram's social network.¹⁸⁷ The OFT's list of competitors illustrates the difficulty of identifying potential entrants in the social networking or digital advertising markets. In online platform markets, new entrants often offer just a subset of the services offered by the dominant provider.¹⁸⁸ Firms like Instagram that gain the popularity and funding to scale become rivals for user attention and potentially rivals for the market over time. Facebook would likely argue that Instagram is just one of many potential entrants into social networking, and that any of the other photo sharing apps could replace the potential competition lost through the Instagram acquisition. Moreover, when consumers multi-home by using several apps at once, entry by multiple firms becomes even more likely.

Facebook named Instagram as an important competitor, but it was not the only competitor. Instagram's entry advantages were the extraordinary user growth rate and venture capital investments that might allow the firm to overcome barriers of scale and data access in the social networking and digital advertising markets. These same advantages gained the attention of Facebook and its buyout proposal.

4. *Deconcentration from Instagram Entry*

The final criteria for a potential competition claim is for the government to show that Instagram's entry into the social networking or advertising markets would deconcentrate the market or have a significant procompetitive effect. Under the Merger Guidelines, this effect can be established by showing that Instagram had a market share of 5% or more.¹⁸⁹ In 2012, the first year Instagram was included in the Pew Social Media Survey, 12% of adults—and a significantly higher share of young people—used Instagram despite the fact that it was a mobile-only application.¹⁹⁰ There are no attentional measures such as

Once a Challenger to Facebook, Is Closing Down, TECHCRUNCH (Sept. 17, 2018, 12:52 AM), <https://techcrunch.com/2018/09/17/rip-path/>.

186. According to Hipstamatic cofounder Lucas Buick, “[w]e’ve never been a social networking company, but we clearly benefit from social networks.” Austin Carr, *Exclusive: Hipstamatic, Instagram to Unveil Photo-Sharing Partnership*, FAST CO. (Mar. 21, 2012) <https://www.fastcompany.com/1824797/exclusive-hipstamatic-instagram-unveil-photo-sharing-partnership>.

187. *Id.*; Kim-Mai Cutler, *Bootstrapped Is Better? Smugmug’s Camera Awesome Crosses 4M Downloads, Adds Instagram Support*, TECHCRUNCH (Mar. 27, 2012, 11:52 AM), <https://techcrunch.com/2012/03/27/smugmug-camera-awesome/>.

188. Jacques Crémer, Yves-Alexandre de Montjoye & Heike Schweitzer, Eur. Comm’n, *Competition Policy for the Digital Era* 57, E.C. Doc. B-1049 (2019), <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>.

189. See U.S. DEP’T OF JUST., *supra* note 75, § 6.

190. LEE RAINIE, JOANNA BRENNER & KRISTEN PURCELL, PEW RSCH. CTR., *PHOTOS AND VIDEOS AS SOCIAL CURRENCY* ONLINE 3, 11 (2012), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/media/Files/Reports/2012/PIP_OnlineLifeinPictures_PDF.pdf.

time on site available for the period before acquisition, but multi-homing and Instagram's own interoperability would suggest that the company claimed a small share of total social networking users' attention. The market draw for Instagram was its popularity with important demographic groups at a time when Facebook saw reaching young people and their preferred technologies as key to maintaining dominance in the market.¹⁹¹

At the time of the Facebook acquisition, Instagram had not entered the digital advertising market and had no advertising revenue.¹⁹² It would be impossible to establish a procompetitive effect of Instagram's entry into the advertising market through the 5% threshold because competition from Instagram lay entirely in the future.

The potential competition challenge by the Department of Justice would have certainly failed under its own guidelines. But consider the post-acquisition information that retrospectively demonstrates how the guidelines produce a false negative result. Since the acquisition was finalized in 2012, Instagram has generated a significant share of user engagement and revenue for Facebook. With Facebook's resources and expertise guiding its evolution, Instagram reached 1 billion monthly active users in June 2018 even as Facebook's own user growth dwindled.¹⁹³ According to the Pew Research Center, Instagram trails Facebook as the third-most popular social network in the United States with 37% of adults using the platform in 2019.¹⁹⁴ It is the most-used social network for American teens.¹⁹⁵ Although Facebook does not disclose Instagram's financial details, market analysts estimate that 15% of Facebook's revenues come from advertising on Instagram, a number expected to grow over

191. As described in Facebook's 2012 Annual Report:

Some of our current and potential competitors may have significantly greater resources or better competitive positions in certain product segments, geographic regions or user demographics than we do. These factors may allow our competitors to respond more effectively than us to new or emerging technologies and changes in market conditions. We believe that some of our users, particularly our younger users, are aware of and actively engaging with other products and services similar to, or as a substitute for, Facebook. For example, we believe that some of our users have reduced their engagement with Facebook in favor of increased engagement with other products and services such as Instagram. In the event that our users increasingly engage with other products and services, we may experience a decline in user engagement and our business could be harmed.

Facebook Inc., *supra* note 133, at 19.

192. 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>.

193. Josh Constine, *Instagram Hits 1 Billion Monthly Users, Up from 800M in September*, TECHCRUNCH (June 20, 2018, 10:58 AM), <https://techcrunch.com/2018/06/20/instagram-1-billion-users/>.

194. Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (Apr. 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/>.

195. Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, PEW RSCH. CTR. (May 31, 2018), <https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/>; Sean Wolfe, *Instagram Just Surpassed Snapchat as the Most Used App Among American Teens, According to a New Wall Street Survey*, BUS. INSIDER (Oct. 22, 2018, 9:32 AM), <https://www.businessinsider.com/instagram-snapchat-popularity-teens-piper-jaffray-2018-10>.

time.¹⁹⁶ In 2019, Instagram launched a checkout feature allowing users to make purchases from within the app and delivering a new source of revenue to its parent company.¹⁹⁷ It is impossible to know if Instagram would have developed into such a powerful position without Facebook's guidance, but it is clear that Facebook's ownership of Instagram allows it to reach a larger user base and achieve greater levels of user engagement and revenue generation than Facebook alone. The economies of scale and scope that characterize online platform markets are simultaneously a source of efficiency gains from the acquisition of Instagram and a barrier to entry reinforcing Facebook's dominance in the social networking market.

The Instagram case shows that the potential competition doctrine must be reformed. Common sense suggests that concentration must be measured either by an alternative metric in markets where goods are offered to the public without charge, such as user engagement, or possibly by the advertising dollars that flow to social networks. As we will discuss in the last Part of this Article, concentration should serve as a structural rebuttable presumption when a dominant firm purchases a potential entrant. Before turning to that issue, we briefly discuss Facebook's acquisition of WhatsApp.

B. THE WHATSAPP ACQUISITION

Facebook's \$19 billion acquisition of WhatsApp was another landmark deal. In 2014, mobile messaging applications were the fastest growing app category in the mobile market as social media evolved to accommodate increasing smartphone usage.¹⁹⁸ Users relied on these applications for far more than text messaging, with a variety of social activities taking place on the apps including voice calling, image and video sharing, and gaming.¹⁹⁹ Five-year-old WhatsApp was already the largest and fastest growing of these applications worldwide. The app offered a reliable and affordable cross-platform technology for text, voice, image, and video sharing in one-to-one or group contexts that worked across national borders complete with end-to-end encryption. At the

196. Sarah Frier & Jeran Wittenstein, *Facebook's Quarterly Ad Revenue to Get Lift from Instagram*, BLOOMBERG (July 25, 2018, 7:12 AM), <https://www.bloomberg.com/news/articles/2018-07-25/facebook-s-quarterly-ad-revenue-to-get-lift-from-instagram>; Kurt Wagner & Rani Molla, *Facebook Will Soon Rely on Instagram for the Majority of Its Ad Revenue Growth*, VOX (Oct. 9, 2018, 7:40 AM), <https://www.vox.com/2018/10/9/17938356/facebook-instagram-future-revenue-growth-kevin-systrom>; Eric Jhonsa, *Instagram Has Become Facebook's Main Growth Engine During Its Transition Period*, REAL MONEY (July 12, 2019, 4:22 PM), <https://realmoney.thestreet.com/investing/technology/instagram-has-become-facebook-s-main-growth-engine-during-its-transition-period-15018209>.

197. Josh Constine, *Instagram Launches Shopping Checkout, Charging Sellers a Fee*, TECHCRUNCH (Mar. 19, 2019, 6:33 AM), <https://techcrunch.com/2019/03/19/instagram-checkout/>.

198. Emily Adler, *Here's How Many of the Fastest-Growing Messaging Apps Are Already Earning Significant Revenue*, BUS. INSIDER (Nov. 20, 2014, 11:15 AM), <https://www.businessinsider.com/many-of-the-fastest-growing-messaging-apps-are-already-earning-significant-revenues-2014-11>. For mobile uptake, see *Mobile Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewinternet.org/fact-sheet/mobile/>.

199. IPG MEDIA LAB, MESSAGING APPS: THE NEW FACE OF SOCIAL MEDIA AND WHAT IT MEANS FOR BRANDS 6-7 (2014), https://ipglab.com/wp-content/uploads/2014/04/MessagingApps_Whitepaper_Final.pdf.

time of the acquisition, WhatsApp had 450 million monthly active users and was gaining users at a record rate of one million per day.²⁰⁰ Importantly, WhatsApp users were unusually engaged; more than 70% of WhatsApp users accessed the app daily and its volume of messaging rivaled the global total of telecom SMS.²⁰¹

Two characteristics distinguished WhatsApp from its rival messaging services, and from Facebook's corporate model. First, WhatsApp's founders committed the service to almost complete data privacy.²⁰² Second, WhatsApp was advertising-free.²⁰³ Instead of the intensive data collection, aggregation, and analysis driving advertising revenue on other apps and networks, the company elected a paid model with most users charged a \$0.99 annual subscription fee after their first year of service.²⁰⁴ The app offered an alternative entry point into scaled-down social networking using only existing phone contacts to connect users; it was more personalized and lacked the privacy concerns and tracking characteristic of Facebook.

In February 2014 when Facebook and WhatsApp announced their merger, Facebook served over 1.2 billion monthly active users. Mobile devices had become an essential component of that usership. More than 75% of active users accessed the network through mobile technology and in the fourth quarter of

200. *Facebook to Acquire WhatsApp*, FACEBOOK (Feb. 19, 2014), <https://newsroom.fb.com/news/2014/02/facebook-to-acquire-whatsapp/>.

201. *Id.*

202. In a blog post following the 2014 acquisition announcement, founder Jan Koum explained the privacy policy to skeptical consumers:

Respect for your privacy is coded into our DNA, and we built WhatsApp around the goal of knowing as little about you as possible: You don't have to give us your name and we don't ask for your email address. We don't know your birthday. We don't know your home address. We don't know where you work. We don't know your likes, what you search for on the internet or collect your GPS location. None of that data has ever been collected and stored by WhatsApp, and we really have no plans to change that.

Setting the Record Straight, WHATSAPP: BLOG (Mar. 17, 2014), <https://blog.whatsapp.com/529/Setting-the-record-straight>.

203. *Why We Don't Sell Ads*, WHATSAPP: BLOG (June 18, 2012), <https://blog.whatsapp.com/?p=245>.

204. WhatsApp extended the subscription model across platforms over time. As a result, some early adopters of the service were exempt from charges, others paid \$0.99 for the initial download. Parmy Olson, *Exclusive: The Rags-To-Riches Tale of How Jan Koum Built WhatsApp Into Facebook's New \$19 Billion Baby*, FORBES (Feb. 19, 2014, 7:58 PM), <https://www.forbes.com/sites/parmyolson/2014/02/19/exclusive-inside-story-how-jan-koum-built-whatsapp-into-facebooks-new-19-billion-baby>; Kim-Mai Cutler, *The Granddaddy of Messaging Apps, WhatsApp, Finally Goes for a Subscription Model on iOS*, TECHCRUNCH (July 16, 2013, 7:59 PM), <https://techcrunch.com/2013/07/16/whatsapp-free/>. Venture Capitalist and early WhatsApp investor Jim Goetz of Sequoia Capital observed:

When we first partnered with WhatsApp in January 2011, it had more than a dozen direct competitors, and all were supported by advertising. (In Botswana alone there were 16 social messaging apps). Jan and Brian ignored conventional wisdom. Rather than target users with ads—an approach they had grown to dislike during their time at Yahoo—they chose the opposite tack and charged a dollar for a product that is based on knowing as little about you as possible.

Jim Goetz, *Four Numbers That Explain Why Facebook Acquired WhatsApp*, TUMBLR: SEQUOIA CAPITAL (Feb. 19, 2014), <https://sequoiacapital.tumblr.com/post/77211282835/four-numbers-that-explain-why-facebook-acquired>.

2013 mobile Facebook users outnumbered those using personal computers for the first time in the company's history.²⁰⁵ Growth in user engagement was increasingly driven by mobile access to the social network and Facebook anticipated that future growth would similarly depend on mobile connections.²⁰⁶ In its 2013 Annual Report, Facebook identified mobile applications with competing social features including text messaging, voice, image, and video sharing as a key source of competition for the network.²⁰⁷

Facebook's reorientation toward mobile-first engagement led the company to develop and release its own standalone messaging app, Facebook Messenger. As mobile users sought short, private, and real-time communication options, Facebook identified and acquired one of the best-received startups in the mobile messaging market, Beluga, and refashioned it into a Facebook product.²⁰⁸ Upon its release in August 2011, Messenger became the number one most-downloaded app on the Apple store overnight.²⁰⁹ Although Messenger quickly claimed the status of the most-utilized iPhone messaging application in the United States, Facebook struggled to make headway in markets like Europe where early movers had an established advantage and in emerging markets where consumers were more likely to access their networks through feature phones.²¹⁰ In early 2014, when Facebook and WhatsApp agreed on their merger, Facebook Messenger had 200 million users compared to WhatsApp's 450 million.²¹¹ With

205. Facebook Inc., Annual Report (Form 10-K) 15 (Jan. 31, 2014).

206. *Id.* at 36–40.

207. *Id.* at 9–15.

208. Jason Kincaid, *Facebook Launches Standalone iPhone/Android Messenger App (And It's Beluga)*, TECHCRUNCH (Aug. 9, 2011, 12:00 PM), <https://techcrunch.com/2011/08/09/facebook-launches-standalone-mobile-messenger-app-and-it%E2%80%99s-beluga/>; Kim-Mai Cutler, *How Beluga Metamorphosed Into Facebook Messenger*, ADWEEK (Aug. 12, 2011), <https://www.adweek.com/digital/facebook-messenger-beluga/>.

209. See Tim Bradshaw, *Facebook Launches Messenger App*, FIN. TIMES (Aug. 10, 2011), <https://www.ft.com/content/c1975e8a-c372-11e0-b163-00144feabdc0>.

210. According to analytics from spyware app Onavo (a company acquired by Facebook for around \$120 million in 2014), Facebook's Messenger accounted for 11% of monthly active usage on iPhones in the relatively fragmented US messaging market, compared to WhatsApp's penetration at above 80% and 90% in several European markets, 71% in Brazil, and 34% in Russia. Kim-Mai Cutler, *The Reality of the Global Messaging App Market: It's Really Freaking Fragmented*, TECHCRUNCH (Dec. 4, 2012, 3:20 PM), <https://techcrunch.com/2012/12/04/global-messaging-market/>; Josh Constine, *Facebook Pays Teens to Install VPN That Spies on Them*, TECHCRUNCH (Jan. 29, 2019, 3:36 PM), <https://techcrunch.com/2019/01/29/facebook-project-atlas/>. Moreover, users were sending more than twice as many messages per day on WhatsApp compared to Messenger. Charlie Warzel & Ryan Mac, *These Confidential Charts Show Why Facebook Bought WhatsApp*, BUZZFEED NEWS (Dec. 5, 2018, 12:29 PM), <https://www.buzzfeednews.com/article/charliwarzel/why-facebook-bought-whatsapp>; Josh Constine & Kim-Mai Cutler, *Why Facebook Dropped \$19B on WhatsApp: Reach Into Europe, Emerging Markets*, TECHCRUNCH (Feb. 19, 2014, 6:54 AM), <https://techcrunch.com/2014/02/19/facebook-whatsapp/>; Robinson Meyer, *Why Facebook Just Spent \$19 Billion on a Messaging App*, ATLANTIC (Feb. 19, 2014) <https://www.theatlantic.com/technology/archive/2014/02/why-facebook-just-spent-19-billion-on-a-messaging-app/283959/>.

211. Jillian D'Onfro, *Mark Zuckerberg Says That Facebook Messenger Has 200 Million Monthly Active Users*, BUS. INSIDER (Apr. 23, 2014, 2:49 PM), <https://www.businessinsider.com/facebook-messenger-users-200-million-mau-2014-4>.

the purchase of WhatsApp, Facebook would claim ownership of the world's top two messaging companies in terms of market share by user numbers.²¹²

The \$19 billion price tag made the WhatsApp acquisition one of the largest mergers in Silicon Valley history.²¹³ Facebook's offer nearly doubled a prior bid from Google to buy the startup for \$10 billion.²¹⁴ Moreover, the \$19 billion deal amounted to approximately one-tenth of Facebook's total market value, while the monetization opportunities associated with WhatsApp were as yet unproven.²¹⁵ In 2013, WhatsApp operated at a \$138 million loss.²¹⁶ WhatsApp's commitment to maintain privacy precluded merging its users with Facebook's social graph and adding advertising or other monetization options would require a substantial change in WhatsApp's approach to the messaging market. For Facebook, the benefits of owning WhatsApp clearly involved future competitive advantages in messaging and social media. Firstly, the purchase thwarted rival Google's attempt to gain ground as a social network. Secondly, the transition from social sharing on broad networks to one-to-one and group messages promoting private, real-time interactions indicated a significant shift in the social networking services market. Facebook CEO Mark Zuckerberg increasingly alluded to this shift as an important guide for advancing social networking and other social media with his declaration that "the future is private."²¹⁷

True to form, the FTC cleared the merger without challenge in April of 2014, with a letter warning both companies about their responsibility to maintain the privacy agreements in place when WhatsApp users accepted the company's terms of service.²¹⁸ The letter highlights the distinction between Facebook's data collection and advertising platform model and WhatsApp's promises that it will

212. Adrian Covert, *Facebook Buys WhatsApp for \$19 Billion*, CNN: BUS. (Feb. 19, 2014, 6:54 PM) <https://money.cnn.com/2014/02/19/technology/social/facebook-whatsapp/index.html>.

213. Chris O'Brien, *Where Does WhatsApp Acquisition Rank in History of Tech Deals?*, L.A. TIMES (Feb. 20, 2014, 11:25 AM), <https://www.latimes.com/business/technology/la-fi-tn-where-does-whatsapp-rank-in-history-of-tech-deals-20140220-story.html>; Jim Edwards, *WhatsApp Is the 2nd-Biggest Tech Acquisition of All Time*, BUS. INSIDER (Feb. 20, 2014, 8:57 AM), <https://www.businessinsider.com/whatsapp-is-the-2nd-biggest-tech-acquisition-of-all-time-2014-2>.

214. David Gelles, *For Facebook, It's Users First and Profits Later*, N.Y. TIMES: DEALBOOK (Feb. 20, 2014, 8:52 PM), <https://dealbook.nytimes.com/2014/02/20/for-facebook-its-users-first-and-profits-later/>.

215. David Gelles, *Facebook's \$21.8 Billion WhatsApp Acquisition Lost \$138 Million Last Year*, N.Y. TIMES: DEALBOOK (Oct. 28, 2014, 5:46 PM), <https://dealbook.nytimes.com/2014/10/28/facebooks-21-8-billion-acquisition-lost-138-million-last-year/>.

216. Kurt Wagner, *Facebook Paid \$19 Billion for WhatsApp, Which Lost \$138 Million Last Year*, VOX: RECODE (Oct. 28, 2014, 2:55 PM), <https://www.vox.com/2014/10/28/11632404/facebook-paid-19-billion-for-whatsapp-which-lost-138-million-last-year>; Gelles, *supra* note 215.

217. At Facebook's annual F8 developer conference in 2019, Zuckerberg introduced a new, privacy-focused vision for the entire Facebook platform, stating "[t]he future is private. . . . Over time, I believe that a private social platform will be even more important to our lives than our digital town squares." Nick Statt, *Facebook CEO Mark Zuckerberg Says the 'Future Is Private'*, VERGE (Apr. 30, 2019, 1:22 PM), <https://www.theverge.com/2019/4/30/18524188/facebook-f8-keynote-mark-zuckerberg-privacy-future-2019>.

218. Letter from Jessica L. Rich to Erin Egan & Anne Hoge, *supra* note 39, at 2-3.

not collect any personal or contact data from mobile phones or messages or send any marketing material without the user's consent.²¹⁹

The European Commission also conducted an investigation of the transaction and cleared the deal.²²⁰ The European Union (EU) primarily analyzed the merger within the confines of the relevant market for consumer communications services, not as a potential competition merger. Consumer communication services includes stand-alone apps such as WhatsApp, Viber, Line, WeChat, Facebook Messenger, Skype, and those integrated with smartphone hardware or operating systems like Apple's iMessage. In their analysis of consumer communications services, the Commission noted that low switching costs, the tendency for users to multi-home, and the overlap between consumers of the two platforms would undermine any barriers to entry derived from the network effects captured by the merged companies. On these grounds, they concluded that the merger would be unlikely to lead to increased concentration in consumer communications services.²²¹

The Commission ultimately found no competitive concerns in the online advertising services market, based on WhatsApp's abstention from advertising and data collection and the number of providers supplying online advertising at the time.²²² The EU also analyzed the social networking market and again found no competitive concerns.²²³ According to the EU analysis, WhatsApp was not a participant in the social networking market. The Commission considered a social network to involve many functions in addition to communications, including contact lists, user profiles, relationship status, and other social features of online activity.²²⁴ Although the EU reported that several industry participants informed the Commission that they considered WhatsApp to be a social network already, and predicted that absent the merger WhatsApp would expand and scale in this market, the Commission dismissed these opinions.²²⁵ The EU placed considerable weight on statements from WhatsApp management, stating "[n]o indication was found of WhatsApp's plans to become a social network [as defined by the EU] which would compete with Facebook absent the merger."²²⁶ In the Commission's view, identifying WhatsApp as a potential competitor in social networking would expand the scope of alternative sources of competition to include other prominent firms in the consumer communications market,

219. *Id.*

220. The deal did not meet the EU thresholds but was taken up as a referral request from Facebook for an Article 4(5) review. *See* Commission Decision of Mar. 10, 2014 Declaring a Concentration to be Compatible with the Common Market (Case No. COMP/M.7217—Facebook/WhatsApp) According to Council Regulation (EC) No. 139/2004, 2014 O.J. (C 7239), https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

221. *Id.* § 5.1.3.3–3.4.

222. *Id.* §§ 4.3.1, 5.3.1.

223. *Id.* § 4.2.2.2.

224. *Id.* §§ 4.2.2.1, para. 50, 4.2.2.2, paras. 53–56.

225. *Id.* § 5.2.1, para. 144.

226. *Id.* para. 145.

including LINE, WeChat, iMessage, Skype, Snapchat, Viber, and Hangouts. Such an expansion would only make it less likely that the elimination of a single rival would raise competitive concerns.²²⁷

Next, the Commission evaluated the potential for Facebook to gain market power in social networking by integrating the two platforms. The addition of WhatsApp's consumer base to Facebook's social graph would reinforce the network effects that maintained Facebook's dominance in the market for social networking services. According to the Commission's report and later documents, Facebook testified that technical limitations would prevent any such integration without significant user involvement.²²⁸ The claims that technical issues prevented integration were proven false just two years later in 2016 when Facebook began to add WhatsApp user data to the Facebook social graph.²²⁹ The EU fined Facebook €110 million (\$122 million) for misleading the Commission but did not reverse its authorization of the acquisition.²³⁰

What the EU did not consider was the possibility that the social networking market could be disrupted by a mobile, reliable, private, no-frills competitor. While the Commission noted that innovation in communications services was driven by consumer demand for reliability, privacy, and security, and acknowledged that the social networking services and consumer communications services markets exhibited significant overlap,²³¹ it did not identify the trends in consumer behavior pointing toward the increasing importance of private, mobile social platforms. Facebook had honed in on the competitive threat that this shift in consumer preferences presented for social networking, especially as it manifested in demographic and geographic groups critical to user growth such as young mobile users and those in emerging markets.

WhatsApp may have posed important potential competition issues. The strength of its reliable private messaging capabilities, its social orientation connecting users through their address books, its access to unique user data, and its ability to scale untethered to a monetization strategy based on consumer

227. *See id.* § 4.2.2.3, para. 62.

228. *Id.* § 5.1.3.5, para. 138.

229. Amar Toor, *Facebook Fined \$122 Million by EU for 'Misleading Information' About WhatsApp Acquisition*, VERGE (May 18, 2017, 3:19 AM), <https://www.theverge.com/2017/5/18/15657158/facebook-whatsapp-european-commission-fine-data-sharing>.

230. European Commission Press Release (IP/17/1369), *Mergers: Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover* (May 18, 2017), https://europa.eu/rapid/press-release_IP-17-1369_en.htm. In 2018, WhatsApp co-founder Brian Acton revealed that Facebook's legal team had coached him to assert that it would be difficult to merge the data in advance of his testimony, and that unbeknownst to him there were plans and the means to bridge the data all along. Parmy Olson, *Exclusive: WhatsApp Cofounder Brian Acton Gives the Inside Story on #DeleteFacebook and Why He Left \$850 Million Behind*, FORBES (Sept. 26, 2018, 6:30 AM), <https://www.forbes.com/sites/parmyolson/2018/09/26/exclusive-whatsapp-cofounder-brian-acton-gives-the-inside-story-on-deletefacebook-and-why-he-left-850-million-behind/>.

231. Commission Decision of Mar. 10, 2014 Declaring a Concentration to be Compatible with the Common Market (Case No. COMP/M.7217—Facebook/WhatsApp), *supra* note 220, § 5.1.1, para. 87.

surveillance could have raised a threat to Facebook's social network strategy. WhatsApp also may have been able to partner with complementary service providers to generate revenue and develop innovative and competitive social communications products. We will never know.

The EU's analysis highlights the problems with the potential competition doctrine. First, the problems of evaluating concentration in the social networking and mobile messaging markets are identical to those pertaining to the acquisition of Instagram: enforcement agencies have yet to identify a workable measure of concentration or a credible data source. The European Commission's report notes the lack of appropriate measure, despite its own reliance on user numbers (provided by Facebook) as a proxy for market shares.²³² Second, the perceived ease of entry and broad consideration of potential competitors ignores the data barrier that reinforces firm dominance in online platform markets and makes it difficult for the government to isolate the impact of eliminating individual rival companies. Finally, according to the U.S. Horizontal Merger Guidelines, a five percent market share would substantiate the potential for WhatsApp to have significant procompetitive effects in markets for social networking or digital advertising.²³³ The EU cites conflicting views on the distinct boundaries of social networking markets, but even if these boundaries were clear, proof of deconcentration still demands appropriate measures of market share and current participation in the market.²³⁴ Harm to potential future competition was alone inadequate to challenge the merger.

The high initial burden on the plaintiff to present a case concerning future conduct and competitive effects serves as a serious deterrent to potential competition mergers, even by dominant firms. Under a simply structural presumption the FTC could have elected to challenge the merger and shifted the burden to Facebook to demonstrate why no harm to future competition could occur, and why, given Facebook's resources it could not internally innovate to achieve its competitive goals. A structural standard of this type should be embraced by critics of agency intervention who believe that the government is poorly positioned to make a strong empirical case, since representatives of the private sector would be the first source of analysis.

232. *Id.* § 5.1.3.1, para. 97. According to the Commission, the Onavo data presented numerous shortcomings and alternative data are not available:

The Commission notes that the market shares indicated above are likely to underestimate the Parties' position, and present some shortcomings. During the market investigation, the Commission attempted to collect additional metrics to measure the competitive importance of players in the market for consumer communications apps. However, no reliable dataset could be produced.

Id. (footnote omitted).

233. *See id.* para. 95.

234. *See id.* § 4.2.2.2, para. 52.

IV. REFORM OF THE POTENTIAL COMPETITION DOCTRINE

The Instagram and WhatsApp examples demonstrate how the potential competition doctrine is designed to fail by placing an unrealistic burden on the government in a challenge to any of the hundreds of mergers by dominant technology firms. We do not think this case is merely the result of new technology that has rendered the law obsolete and unworkable. We argue that the law was made unworkable because of the ideological goals of the Chicago School of Economics.

A comparison of the law of horizontal mergers with potential competition mergers is instructive. The *Philadelphia National Bank* structural presumption remains intact today.²³⁵ The plaintiff, typically the government, bears the initial burden in a § 7 horizontal merger case of demonstrating that the challenged merger should be presumed to substantially harm competition. This is accomplished by showing that the transaction will lead to undue concentration.²³⁶ The burden then shifts to the defendant to rebut the presumption. If successful, the burden then shifts back to the government to present additional evidence of competitive harm. The structural presumption has survived despite erosion by the lower courts. For example, in *United States v. Baker Hughes, Inc.*, Justice Thomas (then on the D.C. Circuit) sought to dilute the presumption stating:

The Supreme Court has adopted a totality-of-the-circumstances approach to the statute, weighing a variety of factors to determine the effects of particular transactions on competition. That the government can establish a prima facie case through evidence on only one factor, market concentration, does not negate the breadth of this analysis.²³⁷

In contrast to the courts, when the Reagan Administration appointees to the Department of Justice revised the Merger Guidelines in 1982 they replaced the strong structural presumption in the 1968 Guidelines with a detailed multi-step effects approach that placed the full burden of demonstrating a merger will harm competition on the government itself.²³⁸ The shift was motivated by the Chicago School supposition that most mergers are efficiency producing, an assumption that was never backed by empirical evidence.²³⁹ The higher burden made it much less likely that the antitrust agencies would bring a merger challenge, and when

235. Herbert J. Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 YALE L.J. 1996, 2008–14 (2018).

236. See *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982–83 (D.C. Cir. 1990); *Fed. Trade Comm'n v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001).

237. *Baker Hughes*, 908 F.2d at 984. In a recent article, Carl Shapiro referred to the *Baker Hughes* departure from the *Philadelphia Bank* precedent as “brazen.” Carl Shapiro, *Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets*, 33 J. ECON. PERSPS. 69, 74 (2019).

238. Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479, 491–92 (2019).

239. See John Kwoka, *The Structural Presumption and the Safe Harbor in Merger Review: False Positives or Unwarranted Concerns?*, 81 ANTITRUST L.J. 837 (2017); JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015).

they did, defendants could point to any defects in the agency's proof induced by its own standards.²⁴⁰

The shift away from the *Philadelphia Bank* structural presumption for mergers that impact potential competition came earlier. It was achieved in complete form in Justice Powell's opinion in *United States v. Marine Bancorporation*.²⁴¹ This wrong turn in 1974 must be corrected in order for the potential competition doctrine to have any practical application in tech markets.

Thus, the starting point for our approach would be to resurrect the pre-*Marine Bancorporation* 1968 Merger Guidelines. Under the 1968 Merger Guidelines, a merger would be likely to be challenged when a firm with a large market share (above 25%) purchases a firm that is "one of the most likely entrants into the market."²⁴² The determination of whether a firm is a likely entrant is based on the capacity of the firm to enter, an incentive to enter based on attractiveness or a special relationship of the market, and potential profitability of entry, or a manifested interest in entry. While a possible starting point, a further correction is required. The 1968 Guidelines' analysis of entry is open ended and not sufficiently amenable to a tractable structural presumption that could be used by the courts.

What is needed to address the intractability of proof in a potential competition merger is a reasonable proxy that can incorporate a structural presumption for the likely entry or entry advantage of the startup. Thus, the second component of our test is to adopt the proxy that Professor Joe Brodley referred to as a "legal surrogate to identify the entry advantage of the acquiring firm."²⁴³ Professor Brodley recommended the use of the concept of "proximate markets" to provide the structural presumption of ability to enter and entry advantage for a target firm. As Professor Brodley explained:

Market proximity is a concept of presumptive entry advantage. Two markets are proximate to the extent that a knowledgeable firm in one market

240. See *Baker Hughes*, 908 F.2d at 985.

241. Whether this was Judge Powell's first attempt at an application of the Chicago School's skepticism regarding merger regulation cannot be determined. Three years prior to authoring his opinion in *United States v. Marine Bancorporation*, Justice Powell, then an influential corporate attorney, wrote his famous 1971 memo to the U.S. Chamber of Commerce titled "Attack on American Free Enterprise System." Lewis F. Powell, Jr., *Attack on American Free Enterprise System* (1971), <https://scholarlycommons.law.wlu.edu/cgi/viewcontent.cgi?article=1000&context=powellmemo>. The Powell memo "is widely cited as the beginning of the corporate mobilization to transform American law and politics." NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* 125 (2017). The Powell memo inspired business support of free market ideas and skepticism about business regulation through funding of several major conservative think tanks including the Business Roundtable, founded in 1972, and the Heritage Foundation, established in 1973. JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS* 117-23 (2010); see also Bill Black, *The Powell Memorandum's 40th Anniversary: Impunity for Control Fraud*, *BUS. INSIDER* (Apr. 25, 2011, 2:06 PM), <https://www.businessinsider.com/the-powell-memorandums-40th-anniversary-impunity-for-control-fraud-2011-4>. Following the *Marine Bancorporation* opinion, Justice Powell is credited with authorship of the first major antitrust opinion openly applying Chicago School economics in 1977, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

242. U.S. DEP'T OF JUST., *supra* note 75, § 18.

243. Brodley, *supra* note 92, at 391.

possesses the necessary production and marketing information and other capabilities to operate in the other. Market proximity provides a suitable surrogate for entry advantage because, other factors being equal, there is less risk and therefore less expense involved in entering a familiar market.²⁴⁴

To establish proximity, Professor Brodley focused on the factors that would be critical to the entry analysis of a business: production, marketing, technology, and customer relations similarities.²⁴⁵ More pointed criteria can be defined given the accumulated knowledge concerning tech industry mergers. For example, proximity to the general search market in which Google is dominant would include factors such as specialized search features, search advertising abilities, and the overlap of users with Google properties. The criteria would capture a vertical shopping site that is supported by search advertising and would clearly be a proximate market to the general search market. There are many such vertical markets that are potential rivals to Google's general search advertising revenues. Proximate markets to the social networking market certainly would include markets that compete with the functions hosted by Facebook's social network for user engagement and/or compete for similar targeted advertising dollars. In addition, the ability to gather user data complementary to Facebook's may be indicia of proximity.

We pause to recognize that other scholars have proposed different tests. We argue here that these tests do not create a sufficient standard for potential competition cases, and would condemn the plaintiffs in such cases to unworkable standards.

To start, Professor John Kwoka proposed a test²⁴⁶ involving two components, one involving structure and one involving effect: "(1) satisfaction of one structural precondition for concern with mergers involving non-incumbent firms, and then (2) demonstration of certain features specific to the case of (a) a deconstraining merger or (b) an entry-negating merger."²⁴⁷

The first step, demonstration of a structural precondition, requires that there be moderate concentration according to the 1992 Guidelines approach.²⁴⁸ Under recent guidelines, the standard for moderate concentration is substantially increased.²⁴⁹ Regardless, substantial concentration is a condition for bringing any merger challenge. Over-reliance on the guidelines (in any version) will effectively eliminate a potential competition claim and analysis we seek to bring.

Under Professor Kwoka's test, if the structural precondition holds, then the analysis hinges upon whether the merger is entry-negating or deconstraining.²⁵⁰

244. *Id.*

245. *Id.* at 392.

246. John E. Kwoka, *Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors*, 52 CASE W. RES. L. REV. 173, 198 (2001).

247. *Id.*

248. *Id.*

249. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010), <https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf>.

250. Kwoka, *supra* note 246, at 200.

If the merger is deconstraining, the transaction “would likely be challenged on the basis of convincing evidence that the firm represented an effective and significant constraint on competition among incumbents.”²⁵¹ Such “convincing evidence” would include “documents in the possession of incumbent firms indicating active monitoring of and reaction to the non-incumbent party to the merger” or “market data that demonstrate significant responsiveness by incumbents to actions of the allegedly constraining firm.”²⁵²

With respect to an entry-negating merger, Professor Kwoka would have the enforcement agencies challenge such transactions if the transaction meets a multi-factored analysis.²⁵³ These factors are all focused on intent and ability to enter.²⁵⁴

One of the authors of this Article, along with Salvatore Massa,²⁵⁵ proposed a two-step approach for a party moving to show entry with an opportunity for the non-moving party to rebut the claim. In that article, the first step is to determine whether the firm intends to and has the ability to enter the market.²⁵⁶ Evidence that directly relates to the commitments and investments a firm has made for entry are the most direct and relevant.²⁵⁷ The difficulty with this test is that if the evidence is more equivocal, there is little guidance as to how to proceed—a point admitted to in the original article.²⁵⁸

251. *Id.*

252. *Id.*

253. *Id.* at 199. Professor Kwoka’s test requires that:

- (1) The non-incumbent competitor has the capability to enter within a period of two years.
- (2) The non-incumbent competitor would likely find entry profitable if price were to remain at its present level (or rise by some predictable amount).
- (3) The non-incumbent competitor could enter at a scale sufficient to reduce price by a small but significant and nontransitory amount (or hold it constant if it otherwise would rise by at least a small but significant amount), or could enter at a smaller initial scale but with the capability and incentive to expand substantially within a period of two years.
- (4) The non-incumbent competitor is one of no more than five equally well-positioned prospective entrants, or is significantly better positioned to enter than any other possible entrant.

Id. As noted earlier, in the presence of many equally well-positioned non-incumbents, the elimination of a single one would arguably not affect future market performance. Presumably, although it is not explicit, all of these conditions must hold simultaneously for there to be a problem under Professor Kwoka’s analysis.

254. *See id.* at 199–200.

255. *See* Bush & Massa, *supra* note 50.

256. *Id.* at 1143.

257.

Sunk cost investments for entry, customer contracts, bids, entry plans, and other firm documents, such as e-mails, memos, or consultant reports discussing entry, are all strong evidence of entry. In the strong cases—where there is a reasonable probability that a firm will enter a market—there is no need to move to the second step, because the moving party has met its burden of showing entry. At the other extreme, if there is no internal evidence that shows the firm was contemplating entry, or the evidence shows it rejected entry well before the conduct at issue in the case, then the moving party has failed to meet its burden and there is no need to move to the second step.

Id.

258.

The second step considered other factors that may influence the relevance of potential entry.²⁵⁹ The primary issue is whether the potential entrant firm has an ongoing influence on the market. To make this determination, the court may turn to external factors, such as general industry knowledge and the internal documents of competitors, to see if there is a perception that the firm is a potential entry threat. Econometric evidence that a potential competitor is constraining prices in the market is the strongest evidence. Where econometric evidence is ambiguous, courts could look to other evidence.²⁶⁰ Regardless, the party not asserting potential competition would have the ability to rebut the potential competition claim to demonstrate that the firm would not be able to discipline the market, have too remote an entry date, is unfit to enter the market, or is not unique in its ability to enter.²⁶¹

There are multiple problems with this approach. Most pressing apart from the test's complication, however, is that the ability to rebut will likely swallow the claim. In particular, uniqueness would likely be difficult to argue against.

Others have argued that the potential competition doctrine is "superfluous," and could be integrated into the recent Horizontal Merger Guidelines.²⁶² The authors argue that the potential competition doctrine, whether actual or potential, is a meaningless distinction: "Whichever label is applied, the theory must involve a unilateral or coordinated horizontal effect, and its evaluation should be essentially the same. The new Horizontal Merger Guidelines are consistent with this approach."²⁶³

The more difficult case to show potential entry is one where the evidence is more equivocal and some documents show some interest in entering the market in some fashion, but it is more uncertain. A firm's exploration of entry may be in an early stage and the firm may be considering other alternatives, such as a merger or other competing business project. The firm may have rejected entry as a strategy after considering the alternatives, finding others, such as an acquisition, more desirable. Entry may also be more remote because it may take several years to enter. Of course, future entry could be important in industries where entry requires a long time and barriers to entry are high. In these ambiguous cases, a moving party must go to the second step of the analysis.

Id. at 1143–44.

259. *Id.* at 1144.

260.

If evidence of an ongoing effect is ambiguous, a court should consider three other factors related to the second step because econometric data does not bear out the effect, but documents or other information suggests incumbents perceive the firm as a potential entrant. If the market is marked by recent regulatory reforms, such as the changes occurring in the electricity and telecommunications markets, or is an otherwise nascent market, the second step should be satisfied with evidence that shows that the firm might have an effect on the market. For example, internal documents from players in the industry listing the firm as a potential entry threat when coupled with concern about greater competition would suffice.

Id.

261. *Id.* at 1144–45.

262. Gregory J. Werden & Kristen C. Limarzi, *Forward-Looking Merger Analysis and the Superfluous Potential Competition Doctrine*, 77 ANTITRUST L.J. 109, 119 (2010). We should point out that at the time of the article's publication both authors were employees of the Department of Justice Antitrust Division.

263. *Id.* at 111–12.

We consider this a weird flex. For one, it is not as if there have been a plethora of potential competition cases under any version of the Guidelines. To the extent that the Non-Horizontal Merger guidelines raised issues inconsistent with consumer welfare, those Guidelines have been disavowed.²⁶⁴ Moreover, even the Department of Justice has not consistently adopted a guidelines approach when seeking to prove potential competition, particularly outside of the area of § 7.²⁶⁵ Even within the realm of § 7, the Guidelines approach has proven problematic, and any rebranding of the Guidelines is unlikely to cure the issues we describe here.²⁶⁶ In short, neither Instagram nor WhatsApp would have been challenged successfully under any of these tests.

Under our approach, both the Instagram and the WhatsApp mergers might have been challenged. Instagram operated in a proximate market. In the months before the Instagram acquisition, Facebook identified photo sharing as a key component of social network functionality, particularly on the mobile platform, and a key facet of Facebook's own success.²⁶⁷ The social features common to Facebook and Instagram demonstrate considerable proximity between the two companies. The private messaging offered by WhatsApp was rapidly becoming a prevailing aspect of online communication for individuals and groups, with networks established via the user's own address book posing an alternative to the public platform approach. In both cases, users' increasing reliance on mobile technology for digital interactions forced a collision between Facebook and the proximate markets that provided the aspects of online interaction its users increasingly demanded. Under the structural approach, tech mergers like Facebook's acquisitions of Instagram and WhatsApp could be challenged and receive the scrutiny they deserve. Regardless of the particular cases engaged, the process would develop a new guide to judicial decision making in tech markets.

We advocate the informed development of a fully structural presumption for potential competition mergers in technology markets. We think that this is how the law of potential competition mergers should have developed after the *Philadelphia Bank* case but was derailed by *United States v. Marine Bancorporation*.

264. U.S. DEP'T OF JUST., ANTITRUST DIVISION MANUAL II-24 (5th ed. 2012), <https://www.justice.gov/atr/file/761166/download> ("The NonHorizontal Merger Guidelines from Section 4 of the 1984 Merger Guidelines remain in effect for nonhorizontal mergers (*i.e.*, vertical mergers; mergers that eliminate potential competitors), although they do not describe the full range of potential anti-competitive effects of nonhorizontal mergers.").

265. *See, e.g.*, *United States v. Rochester Gas & Elec.*, 4 F. Supp. 2d 172 (W.D.N.Y. 1998).

266. For other difficulties with more recent versions of the Guidelines, see Bush & Massa, *supra* note 50, at 1080-91.

267. MG Siegler, *Zuckerberg: Facebook Photos Used 5 or 6 Times More Than Competitors—Combined*, TECHCRUNCH (Aug. 27, 2010, 7:10 PM), <https://techcrunch.com/2010/08/27/facebook-photos-usage/>.

CONCLUSION

Big Tech has demonstrated that it has an insatiable appetite for acquisitions of small startups. The sheer number of acquisitions should raise red flags for the antitrust agencies. After many hundreds of such acquisitions, so few challenges or requests to fully investigate these acquisitions demands some explanation. We argue that one aspect of the problem is that the law of potential competition has developed in a manner that essentially ties the hands of the antitrust agencies because it demands levels of proof that are intractable, particularly for a court.

We have arrived at this point because of the widespread acceptance of the Chicago School's approach to mergers. The Chicago School asserted that only mergers to monopoly were a legitimate antitrust concern, and that mergers that do not result in monopoly are usually efficiency increasing and undertaken for that purpose.²⁶⁸ With these background presumptions, the Chicago School advocates jettisoned the structural approach to mergers and replaced it with an effects analysis that raised the burden to merger challenges and provided defense counsel with multiple avenues to attack a government challenge.

The efficacy of the potential competition doctrine fell to the same unsound premises beginning in 1974 in *United States v. Bancorporation*. The doctrine now embraces difficult tests of conduct and performance. In markets where tipping occurs, technology is rapidly changing, and startup firms can scale and challenge dominant incumbents, a viable potential competition law is critical to protect competition and consumers. What is needed is to untie the hands of government antitrust enforcers by articulating a clear structural test to identify acquisitions of potential competition. To achieve this standard, we contend that very little innovation in law or in economics is necessary. We need only reverse the damage brought by the Chicago School and its neoliberal revolution and return to the potential competition doctrine of the 1968 Merger Guidelines.

268. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 3 (1984); see ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 221 (1978).

APPENDIX

Facebook's Completed Acquisitions					
Announce Date	Effective Date	Price (USD)	Company	Year Founded	Primary Market
07/19/2007	07/19/2007	undisclosed	Parakey	2005	Platform
06/23/2008	06/23/2008	\$31 million ^d	Connect U	2004	Social Networking
08/10/2009	08/10/2008	\$47.5 million ^d	Friend Feed	2007	Social Networking
02/01/2010	02/19/2010	undisclosed	Octazen	2006	Data & Analytics
04/03/2010	03/02/2010	undisclosed	Divvyshot	2009	Media sharing
05/13/2010	05/13/2010	40000000 ^d	Friendster (patents)	2001	Social Networking
05/26/2010	05/26/2010	undisclosed	ShareGrove	2008	Messaging
07/08/2010	07/08/2010	\$2.5 million ^c	Nextstop	2009	Location services
08/15/2010	08/15/2010	\$10 million ^{bc}	Chai Labs	2007	Location services
08/20/2010	08/20/2010	\$10 million ^c	Hot Potato	2009	Location services
10/29/2010	10/29/2010	\$10 million ^d	Drop.io	2007	Media sharing
11/16/2010	11/16/2010	undisclosed	Walletin	2010	Gaming
11/16/2010	11/16/2010	undisclosed	Zenbe	2006	Messaging
01/25/2011	01/25/2011	undisclosed	Rel8tion	2010	Advertising
03/01/2011	03/02/2011	undisclosed	Beluga	2010	Messaging
03/20/2011	03/20/2011	\$70 million ^{bc}	Snaptu	2007	Platform
03/24/2011	03/24/2011	undisclosed	Recrec	2010	Platform
04/27/2011	04/27/2011	undisclosed	Datum	2011	Data & Analytics
06/09/2011	06/09/2011	undisclosed	Sofa	2006	Design
08/02/2011	08/02/2011	undisclosed	Push Pop Press	2010	E-Publishing
10/11/2011	10/10/2011	undisclosed	Friend.ly	2010	Data & Analytics
11/08/2011	11/08/2011	undisclosed	Strobe	2011	Developer Tools

Facebook's Completed Acquisitions					
Announce Date	Effective Date	Price (USD)	Company	Year Founded	Primary Market
11/08/2011		undisclosed	Digital Staircase	2008	Media sharing
11/15/2011	11/15/2011	undisclosed	MailRank	2010	Messaging
11/23/2011		undisclosed	WhoGlue	2000	Messaging
12/02/2011	12/02/2011	3000000 ^c	Gowalla	2007	Location services
02/12/2012	02/12/2012	undisclosed	Caffeinated Mind	2010	Media sharing
03/08/2012		undisclosed	Gazehawk	2009	Data & Analytics
04/09/2012	09/06/2012	\$1 billion ^a	Instagram	2010	Media sharing
04/13/2012	04/13/2012	undisclosed	Malbec Labs, Inc/Tagtile	2011	E-commerce
04/23/2012	06/14/2012	\$550 million ^a	AOL Patents via Microsoft		Platform
05/08/2012		undisclosed	Glancee	2010	Location services
05/15/2012	05/15/2012	undisclosed	Lightbox.com	2010	Media sharing
05/18/2012		\$80 million ^d	Karma	2011	E-commerce
05/24/2012	05/24/2012	undisclosed	Bolt Peters	2002	Data & Analytics
06/12/2012		undisclosed	Peiceable	2010	Developer Tools
06/18/2012		\$100 million ^b	Face.com	2005	Developer Tools
07/14/2012		undisclosed	Spool / Blueprint Labs	2010	media sharing
07/20/2012	07/20/2012	undisclosed	Acrylic Software	2008	Design
08/24/2012		undisclosed	Threadsy	2008	Data & Analytics
03/01/2013	04/26/2013	\$50-\$100 million ^d	Atlas Advertiser Suite	2001	Advertising
03/08/2013		undisclosed	Mixtent/Storylane	2010	Social Networking
03/14/2013		undisclosed	Hot Studio	1997	Design

Facebook's Completed Acquisitions					
Announce Date	Effective Date	Price (USD)	Company	Year Founded	Primary Market
04/11/2013		undisclosed	Osmeta	2011	Developer Tools
04/23/2013		undisclosed	Spaceport.io	2007	Developer Tools
04/25/2013	05/23/2013	\$85 million ^{bc}	Parse	2011	Developer Tools
07/18/2013		undisclosed	Monoidics	2009	Developer Tools
08/12/2013	09/25/2013	undisclosed	Mobile Technologies Jibbigio	2001	Artificial Intelligence
08/23/2013		undisclosed	Midnox Luma	2011	Media sharing
10/14/2013		\$200 million ^b	Onavo	2010	Data & Analytics
12/17/2013		undisclosed	Sportstream	2012	Social Networking
01/08/2014		\$15 million ^b	Little Eye Labs	2012	Developer Tools
01/13/2014		\$15 million ^b	Branch Media	2011	Messaging
02/19/2014	10/03/2014	\$19 billion ^a	WhatsApp	2009	Messaging
03/25/2014		\$3 billion ^d	Oculus	2012	Virtual Reality
03/28/2014		\$20 million ^c	Ascenta	2010	Hardware
04/24/2014		undisclosed	ProtoGeo Oy Moves	2012	Data & Analytics
06/03/2014		undisclosed	Pryte	2010	Platform
06/24/2014		undisclosed	Carbon Design Group	1993	Hardware
07/02/2014	08/14/2014	\$500 million ^{bc}	LiveRail	2007	Advertising
07/07/2014		undisclosed	RakNet	2001	Developer Tools
08/08/2014		undisclosed	PrivateCore	2011	Platform
12/14/2014		undisclosed	Nimble VR	2012	Virtual Reality
12/16/2014		undisclosed	13th Lab	2010	Virtual Reality

Facebook's Completed Acquisitions					
Announce Date	Effective Date	Price (USD)	Company	Year Founded	Primary Market
01/06/2015		undisclosed	Wit.ai	2013	Developer Tools
01/08/2015		undisclosed	QuickFire Networks	2012	Media Sharing
03/13/2015		undisclosed	The Find	2004	E-commerce
05/19/2015		undisclosed	TugBoat Yards	2012	E-commerce
05/26/2015		undisclosed	Surreal Vision	2014	Virtual Reality
07/16/2015		\$60 million ^{bc}	Pebbles Interfaces	2010	Virtual Reality
10/03/2015		undisclosed	Engada	2014	Emerging markets
03/09/2016		\$150 million ^d	Masquerade	2015	Media Sharing
05/23/2016		undisclosed	Two Big Ears	2013	Virtual Reality
08/08/2016		undisclosed	Eyegroove	2013	Media Sharing
09/19/2016	09/20/2016	undisclosed	Nascent Objects Inc	2014	Hardware
10/13/2016		undisclosed	InfiniLED	2010	Hardware
11/11/2016		undisclosed	Crowd Tangle	2012	Data & Analytics
11/11/2016		undisclosed	Zurich Eye	2015	Hardware
11/16/2016		undisclosed	Faciometrics	2015	Media Sharing
12/29/2016		undisclosed	The Eye Tribe	2011	Virtual Reality
07/24/2017		undisclosed	Source3 Inc	2014	Platform
07/31/2017		undisclosed	Ozlo	2013	Artificial Intelligence
08/11/2017		undisclosed	Fayteq AG	2011	Media Sharing
10/16/2017		\$100 million ^d	Midnight Labs tbh	2013	Social Networking
01/23/2018		undisclosed	confirm.io	2015	Platform

Facebook's Completed Acquisitions					
Announce Date	Effective Date	Price (USD)	Company	Year Founded	Primary Market
07/02/2018		\$30 million ^b	Bloomsbury AI	2015	Artificial Intelligence
07/26/2018		\$100 million ^b	Redkix	2014	Platform
08/13/2018		undisclosed	Vidpresso	2012	Media Sharing
02/04/2019		undisclosed	Chain Space	2018	Digital Currency
02/08/2019		undisclosed	Grokstyle	2016	Artificial Intelligence
^a Terms reported by transacting parties.					
^b Terms reported in Thomson Reuters M&A Database.					
^c Terms reported in Crunchbase Pro.					
^d Terms reported by media coverage of the transaction. Contact Authors for citations.					