MAKING THE POTENTIAL COMPETITION DOCTRINE GREAT AGAIN

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Making the Potential Competition Doctrine Great Again

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Antitrust enforcement efforts against "big-tech" have been hobbled by the destruction of the "potential competition doctrine." This post describes how the Supreme Court made the doctrine ineffective after creating the doctrine. It then describes how the antitrust enforcement agencies handcuffed themselves further in the development of the doctrine through their merger guidelines. As currently formulated, the potential competition doctrine makes merger enforcement by tech companies impotent. The paper uses Facebook's Instagram acquisition as an example. It then offers a proposal on how to fix the doctrine to render potential competition a meaningful tool in antitrust enforcement.

I. INTRODUCTION

Google, Amazon, Apple, Facebook (Meta), and Microsoft ("Big Tech") dominate the American technology sector.[2] All of these companies exercise considerable market power through various strategic practices. A growing chorus of commentators have argued that Big Tech's dominance has been advanced and maintained by hundreds of acquisitions of smaller start-up firms, many below the Hart-Scott-Rodino thresholds.[3] Some of these firms, had they remained independent, might have quickly scaled, or entered into alliances, and challenged the Big Tech firms.[4] To prevent this from occurring, Big Tech stopped these potential competitors in the cradle by establishing "kill zones" where the potential challengers are either targeted for acquisition or destruction. This practice not only solidifies Big Tech's market power, but it reduces innovation by replacing highly motivated founders of the start-up firms who are residual claimants, with managerial oversight by Big Tech. Why is this process allowed to continue?

We believe that considerable responsibility lies with the gutting of the potential competition doctrine.[5] The potential competition doctrine was an early antitrust casualty of the Chicago School's influence on antitrust, part of the larger neoliberal revolution that swept through the United States beginning in the 1970s.[6] The Chicago School pushed for the elimination of traditional antitrust goals and their replacement by a single "consumer welfare" objective.[7] It contended that only "economic effects" are relevant and structural presumptions should be abandoned, and it increased the burdens facing plaintiffs in order to preserve assumed (but elusive) "efficiencies."[8] Today we face the results of the Chicago School's successes, one of which is the inability to effectively challenge the dominance of Big Tech.

II. SCOTUS TAKES A WRONG TURN

The potential competition doctrine emerged in the aftermath of the 1950 Amendment to Section 7 of the Clayton Act.[9] As the Supreme Court described 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."[10] Congress considered concentration not only a problem for consumers, but also for small businesses and American democracy. As its Senator Kefauver stated:

> I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of very few people is too clear to pass over easily. A point is eventually reached, and we are rapidly reaching that point in this country, where the public steps in to take over when concentration and monopoly gain too much power. The taking over by the public through its government always follows one or two methods and has one or two political results. It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.[11]

In 1963, in *United States v. Philadelphia National Bank*, SCOTUS explained that the "intense congressional concern" with increasing concentration "warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive

2 Thomas Philippon, The Great Reversal: How America Gave up on Free Markets 240 (2019) at 240 (Big Tech firms are top five global firms by market value). However, as Philippon explains: "The notion that the biggest tech firms are somehow the pillars of the U.S. economy is false on its face…If we exclude Amazon, the defining feature of the new stars is how few people they employ and how little they buy from other firms." *Id.* at 256.

3 Tim Wu & Stuart Thompson, "The Roots of Big Tech Run Disturbingly Deep," N.Y. Times (June 7, 2019).

4 Strong network effects can cause high tech markets to tip, but they also allow a nascent alternative platform to scale quickly.

5 See Generally Darren Bush & Salvatore Massa, *Rethinking the Potential Competition Doctrine*, 2004 Wis. L. Rev. 1035.

6 Mark Glick, "Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust," 64 Antitrust Bull. 295 (2019) (describing the rise of the neoliberalism in the United States). David Kotz, THE RISE AND FALL OF NEOLIBERAL CAPITALISM, Harvard (2017).

7 Robert Bork, The Antitrust Paradox: a Policy at War with Itself 80 (2021)("Looked at from the standpoint of those who must obey the law, the case for excusive adherence to a Consumer Welfare Standard is clear.").

8 John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy 149 (2015)("Overall, these data corroborate the findings of the single-merger studies regarding product prices, such a decrease is found with respect to price but also with respect to quality, R&D, and more often than not, efficiency."). Most of the many studies of merger efficiencies find few or no such benefits. See Robert Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 Ariz. St. L. J. 75, 84-86 (2020).

9 Joseph Brodley, *Potential Competition Mergers: A Structural Synthesis*, 87 Yale L. J. 1, 4 (1977).

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

11 Quoted in Robert Lande & Sandeep Vaheesan, *Preventing the Curse of Bigness Through Conglomerate Merger Legislation*, 52 Ariz. St. L. J. 75, 84-86 (2020). Lande & Vaheesan assembly numerous statements with similar import during the 1950 Amendment's Congressional debate.

effects."[12] 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."[13] 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 Court's approach is referred to as a "structural approach." In contrast, the effects-based approach requires a prediction of the future competitive impact of a merger. When the "effects" at issue are only economic, and more narrowly the effects on consumer welfare, it is easy for burdens to be shifted to plaintiffs. When there is concern for the political and distributional effects of firm dominance it is more difficult to contend that the firm seeking to justify an increase in such dominance should not bear the burden of proof in an antitrust challenge.[14]

In 1974, SCOTUS effectively hobbled the potential competition doctrine in *United States v. Marine Bancorporation*, Inc.[15] The opinion was penned by Justice Powell. Powell was a patrician of the neoliberal revolution and was the author of the Powell memo three years earlier before arriving on the bench. The memo was a call to collective action by corporate interests that Powell argued were under assault in the United States.[16] The Marine Bancorporation opinion appeared to advance Powell's concern about over scrutiny of big corporations. The case concerned the acquisition by Marine Bancorp., a large Seattle-based bank, of the Washington Trust Bank, a smaller bank headquartered in Spokane, Washington. The government challenged the merger on both perceived and actual potential competition grounds, arguing that Marine Bancorp.'s presence on the fringe of the Spokane market disciplined Spokane competitors, and that absent the merger, Marine Bancorp. would likely enter the Spokane market.

The Court found against the government (as did the lower courts). According to SCOTUS, "[t]wo essential preconditions must exist" before an actual potential competition theory "establishes a violation of § 7." First, that the potential competitor could enter the market at issue absent the merger. Second, that such entry would produce a likelihood of de-concentration or other significant procompetitive effects. It should already be obvious that these factors could not be established to stop a Big Tech company from purchasing a start-up deemed to be a competitive threat. First, how can the plaintiff prove that the start-up would enter? The Powell opinion implied that "unequivocal proof" of actual future de novo entry is required. Even worse, the future fate of a start-up is unpredictable. Yet the plaintiff must prove that the potential entry will deconcentrate the market or accomplish another "significant" but unspecified procompetitive transformation. For good measure, SCOTUS even expressed doubt that an actual potential competition case (the kind that best characterizes the numerous Big Tech mergers) would be viable, even when these exacting standards are met. Thus, controlling Supreme Court precedent erects an unreachable burden for any plaintiff that challenges any of the slew of Big-Tech mergers.

III. THE REAGAN DOJ MAKES THE DOCTRINE WORSE

Ronald Reagan's Department of Justice addressed the potential competition issue in the 1982 Merger Guidelines,[17] which were revised in 1984. This was the last time potential competition mergers are addressed by the Merger Guidelines.[18] The 1984 Merger Guidelines built upon but also significantly revised the Justice Department's position developed in the 1968 Merger Guidelines. The 1984 Merger Guidelines treat perceived and actual potential competition together. Under the 1984 Guidelines the factors required for a challenge are: (1) the acquired firm's market must be concentrated above 1800 HHI. (2) The acquiring firm must have specific entry advantages; otherwise, the elimination of the target still leaves other 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. (3) The target must have a larger market share of at least 5 percent, and 20 percent or more to make a challenge likely. (4) There are no significant efficiencies of the proposed merger that offset the potential anticompetitive effects.

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

13 *Id.* at 363.

14 This point is made by Jonathan Baker in his book The Antitrust Paradigm: Restoring a Competitive Economy 76-77 (2019)("While the nature and strength of presumptions usually derives from two considerations related to error costs, deterrence policy and inferred effects, it may also depend on overarching policy goals.… Mid-twentieth-century courts justified antitrust rules limiting concentration by merger on political grounds. These courts argued that concentrated economic power produced political problems.").

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

16 The famous 1971 memo titled "Attack on the American Free Enterprise System," 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).

17 Available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf.

18 Available at https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf.

The 1984 Merger Guidelines abandoned the Philadelphia Bank's structural approach, as well as the non-consumer welfare antitrust goals. Worse, it requires the plaintiff (itself) to bear the burden on numerous difficult to prove economic effects factors. Under the Merger Guidelines scheme, the merger of a potential entrant could be included in the relevant market if it likely would switch position in supply in response to a small non-transitory increase in price, within a year, without incurring significant sunk costs. But in technology markets start-ups add features and functions to reposition themselves in different markets only with the expenditure of programing time, a sunk cost. Under the Guideline's potential competition scheme, a case against a Big Tech acquisition is unlikely.

Essentially, what technologies will merge and combine and reposition is virtually impossible to predict. Yet, the DOJ/FTC would have to know that there are three or less likely entrants and the target is the most likely, even with information obtained under subpoena or civil investigative demand. In particular, because these are third parties, such proof would not likely be forthcoming. Even if this hurdle is met, the target must have at least a 5% to 20% market share. Most start-ups are purchased before anything like this level of growth is achieved. Such difficult proof is required merely to justify the challenge. Once in the courtroom, the *Marine Bancorporation* factors apply.

IV. A HYPOTHETICAL DOJ INSTAGRAM CHALLENGE

Consider Facebook's acquisition of Instagram that was announced on April 9, 2012. It was Facebook's thirty second acquisition. It occurred on the eve of Facebook's IPO, and Facebook was under serious challenge because of the migration of users from the desktop to mobile platforms. Facebook was not a native iOS (iPhone's operating system) or Android application, and it struggled against mobile-native applications that were attracting growing user numbers. At the same time, photo sharing was forging ahead in popularity and was a key facet of Facebook's user engagement.

At this pivotal juncture, Stanford engineering graduates Kevin Systrom & Mike Krieger launched the native iOS photo sharing application Instagram.[19] Instagram users could post photos across social networks including Facebook and Twitter. Within ten weeks of its premier on the Apple App Store, Instagram had over 1 million users. By the time of the acquisition Instagram had twenty-seven million users and had launched on Android with 1 million users. The Instagram founders envisioned their app as a rival social network based on "people interested in sharing life visually" will text and comments playing a secondary role. Instagram had not yet executed an advertising monetization strategy, but tech observers in 2012 pointed to impending entry into the online advertising market.[20]

The billion-dollar price tag for Instagram triggered a Hart-Scott-Rodino filing. The FTC investigation was not public, but no challenge was forthcoming. Assume that the FTC was able to measure output among users of social networks and established market concentration above 1800 HHI.[21] Assume further that it converged on a market definition in online advertising that also resulted in high concentration.[22] What else would be required to justify a challenge?

The FTC would have to be convinced that entry into one or both markets is difficult. Through 2011, the markets for social networking and digital advertising had been fluid 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, but Instagram was showing the potential for a nascent competitor to siphon off users and gain market share. In online platform markets new entrants often offer just a subset of the services offered by the dominant provider.[23] 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. Moreover, when consumers multi-home by using several apps at once entry by multiple firms becomes even more likely.

For the FTC to demonstrate difficulty of entry into the social networking or digital advertising markets would have been challenging. There is no direct substitute for Facebook in the social networking market, but smaller firms offering complementary or adjacent features can capture user attention that draws engagement and profits away from the network, even if the smaller firm is not yet competing in social network-

19 Gaurav Sangwani, *The Story of How Instagram Started and What Entrepreneurs Can Learn from it*, Financial Express (April 26, 2018).

20 Somini Sengupta, Why Would the Feds Investigate the Facebook-Instagram Deal?, New York Times, May 10, 2012.

21 Measuring concentration is not straightforward in a zero-price market. See John Newman, *Antitrust in Zero-Price Markets: Applications*, 94 Wash. L. Rev. 49, 64-70 (2016).

22 James Ratliff & Daniel Rubinfeld, *Online Advertising: Defining Relevant Markets*, 6 J. of Comp. Law & Econ 653 (2010).

23 Jacques Crémer, Yves-Alexandre de Montjoye, & Heike Schweitzer, *Competition Policy for the Digital Era*, European Commission, 57 (2019), available at http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

ing.[24] Once users adopt a complementary product it is a small step to add social networking features. This ability to capture user attention also makes these smaller, adjacent firms' potential competitors in digital advertising.

If entry is not easy generally, then the FTC would have to show that Instagram had an entry advantage not possessed by three or more firms. This is another Herculean task. Consider the fact that 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.

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. 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.[25] Facebook purchased and shuttered the Lightbox application, absorbing its employees and pulling the app from the market immediately.[26] Facebook launched its own camera app, Facebook Camera, on May 24, 2012, weeks after announcing its intention to acquire Instagram.[27]

The UK's OFT investigation of the Facebook/Instagram merger lists six competing apps in the photo sharing market, including Camera Awesome, Camera +, Flickr, Hipstamatic, Path, and Pixable.[28] 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.[29] 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.[30] Hipstamatic and Camera+ provided photo taking and editing tools but lacked the social features that distinguished Instagram.[31] 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.[32] The OFT's list of competitors illustrates the difficulty of demonstrating a specific entry advantage by three or less potential entrants, even if only one type of application is considered.

The final criterion 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 five percent or more, and a challenge likely only at the twenty percent market share level. In 2012, the first year Instagram was included in the Pew Social Media Survey, 12 percent of adults – and a significantly higher share of

24 During a 2018 Congressional hearing Facebook CEO Mark Zuckerberg responded to the question "Who's your biggest competitor?" by insisting that the company competes in three main categories, rather than facing a direct competitor in one primary market. Zuckerberg also mentioned that a typical American uses eight different communications software applications, but did not mention that Facebook owns several of them. *Transcript of Mark Zuckerberg's Senate Hearing*. U.S. Senate 115th Congress, 2nd Session Sess. (2018), available at https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/.

25 Naina Khedekar, *Interview with Stephen Robert Morse from Lightbox*, Firstpost (Jan. 18, 2012), available at https://www.firstpost.com/tech/news-analysis/interview-with-stephen-robert-morse-from-lightbox-3593563.html.

26 Josh Constine, *Facebook Hires Team From Android Photosharing App Dev Lightbox To Quiet Mobile Fears*, TechCrunch (May 15, 2012), available at https://techcrunch.com/2012/05/15/facebook-lightbox/.

27 Dirk Stoop, *Introducing Facebook Camera*, Facebook Newsroom (May 24, 2012), available at https://newsroom.fb.com/news/2012/05/introducing-facebook-camera/.

28 Office of Fair Trading, *Full Text of the Decision Regarding the Anticipated Acquisition by Facebook Inc of Instagram Inc*, No. ME/5525/12 August 22, 2012, https://webarchive.nationalarchives.gov.uk/20140402232639/http://www.oft.gov.uk/shared_oft/mergers_ea02/2012/facebook.pdf.

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

30 Elise Moreau, *A Look Back on the Social Networking App Called Path*, Lifewire (June 1, 2019), available at https://www.lifewire.com/what-is-path-3486483. Jon Russell, *Mobile social network Path, once a challenger to Facebook, is closing down*, TechCrunch (September 17, 2018), available at https://techcrunch.com/2018/09/17/rip-path/.

31 According to Hipstamatic cofounder Lucas Buick, "We've never been a social networking company, but we clearly benefit from social networks." Quoted in Austin Carr, *Exclusive: Hipstamatic, Instagram To Unveil Photo-Sharing Partnership*, Fast Company (March 21, 2012), available at https://www.fastcompany.com/1824797/exclusive-hipstamatic-instagram-unveil-photo-sharing-partnership.

32 Austin Carr, *Exclusive: Hipstamatic, Instagram To Unveil Photo-Sharing Partnership*, Fast Company (March 21, 2012), available at https://www.fastcompany.com/1824797/exclusive-hipstamatic-instagram-unveil-photo-sharing-partnership. Kim-Mai Cutler, *Bootstrapped Is Better? Smugmug's Camera Awesome Crosses 4M Downloads, Adds Instagram Support*, TechCrunch (March 27, 2012) https://techcrunch.com/2012/03/27/smugmug-camera-awesome/.

young people – used Instagram despite the fact that it was a mobile-only application.[33] There are no attentional measures such as 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.[34]

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

A potential competition challenge by the FTC most certainly would have failed under its own Guidelines and unequivocally under Marine Bancorporation. But consider the post-acquisition information that retrospectively demonstrates how the Guidelines analysis would 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.[35] According to the Pew Research Center, Instagram trails Facebook as the second-most popular social network in the U.S. with 37 percent of adults using the platform in 2019.[36] It is the most-used social network for American teens.[37]

Although Facebook does not disclose Instagram's financial details, market analysts estimate that 15 percent of Facebook's revenues come from advertising on Instagram, a number expected to grow over time.[38] 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.[39] 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.

V. FIXING THE PROBLEM

For the potential competition doctrine to be meaningful we need to return to structural presumptions and reasonable burdens. Two facts are necessary for a structural presumption of competitive harm. First, the acquiring firm is a leading firm in a concentrated market. Second, the target firm operates in what Professor Joe Brodley refers to as a proximate market. According to Brodley:

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33 Lee Rainie, Joanna Brenner, & Kristin Purcell, *Photos and Videos as Social Currency Online*, Pew Research Center, (September 13, 2012) available at https://www.pewinternet.org/2012/09/13/photos-and-videos-as-social-currency-online/.

34 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."

SEC Form 10K for the fiscal year ended December 31, 2012, available at Facebook Investor Relations https://investor.fb.com/financials/?section=annualreports and https://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/FB_2012_10K.pdf.

35 Josh Constine, *Instagram hits 1 billion monthly users, up from 800M in September*, TechCrunch, June 20, 2018, https://techcrunch.com/2018/06/20/instagram-1-billion-users/.

36 Andrew Perrin & Monica Anderson, *Share of U.S. adults using social media, including Facebook, is mostly unchanged since 2018*, Pew Research Center, April 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/.

37 Monica Anderson & JingJing Jiang, *Teens, Social Media & Technology 2018,* the Pew Research Center (March 31, 2018), available at 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*, Business Insider (October 22, 2018), available at https://www.businessinsider.com/instagram-snapchat-popularity-teens-piper-jaffray-2018-10.

38 Sara Frier & Jeran Wittenstein, *Facebook's Quarterly Ad Revenue to Get Lift from Instagram*, Bloomberg (July 25, 2018), available at https://www.bloomberg.com/news/articles/2018-07-25/facebook-s-quarterly-ad-revenue-to-get-lift-from-instagram. Kurt Wagner & Roni Molla, *Facebook will soon rely on Instagram for the majority of its ad revenue growth*, Vox, (October 9, 2018), available at 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*, TheStreet (July 12, 2019) , available at https://realmoney.thestreet.com/investing/technology/instagram-has-become-facebook-s-main-growth-engine-during-its-transition-period-15018209.

39 Josh Constine, *Instagram Launches Shopping Checkout, Charging Sellers a Fee*, TechCrunch (March 19, 2019), available at https://techcrunch.com/2019/03/19/instagram-checkout/.

> Market proximity is a concept of presumptive entry advantage. Two markets are proximate to the extent that a knowledgeable firm in one market 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.[40]

Once these two presumptions are satisfied the burden should shift to the defendant. The Big Tech firm would then have to demonstrate that the target is not a potential entrant. Or if it is an entrant, what other potential entrants have the same entry advantages and would replace the competitive significance of the target. If the target isn't a new entrant, why would competition benefit from the acquisition? Why are consumers not better off with an independent target and the Big Tech firm forced to engage in internal development?

The massive advantages bestowed on big corporations by the influence of the Chicago School has not led to greater competitiveness or greater productivity and growth. It has led to the opposite.[41] The Big Tech firms have been given nearly immunity from scrutiny of their acquisitions of small potential competitors. It is time that the potential competition doctrine be reformed by adopting sensible structural presumptions and burdens of proof on Big Tech to prove that their business strategies benefit consumers.

40 *Id.*

41 Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrus*t, 64 Antitrust Bull 295, 335 (comparing growth, profits, productivity, wages, unemployment, investment, and income distribution under the New Deal Paradigm (1947-1973) and Neoliberalism (1980-2015) and finding decline in performance under every measure under neoliberalism).

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