THE “BIG FOUR”: ANTI TRUST, POLITICAL POWER, AND BIG TECH IN THE TWENTY-FIRST CENTURY

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When discussing collegiate athletics, if one refers to the “Big Five,” most people will understand this in reference to the five most well-known conferences in the country: the Pac 12, Big 10, Big 12, SEC, and ACC. Similarly, in big tech, we have seen a twenty-first century emergence of a new “Big Four”: Facebook, Google, Amazon, and Apple. Just as the five collegiate conferences circulate throughout the press due to their poor recruiting practices, low player compensation, extremely generous coaching salaries, and ongoing campus scandals; the Big Four do just the same. We all love and root for them, but also love to despise their often-times unfair industry practices. Whether it is the Big Five conferences or the Big Four tech giants, both are frequently in the negative headlines and a hot topic of debate nationwide. We scrutinize them, we support them, and nothing changes.

I. INTRODUCTION

Chris Hughes, an entrepreneur and graduate from Harvard University, was part of the group that co-founded Facebook in Mark Zuckerberg’s sophomore dorm in 2002.1 Hughes was originally responsible for product suggestions, and he developed many of Facebook’s most popular features.2 In 2019, he is now responsible for the call to our United States government to break up the tech giant he once helped create.3 Hughes is confident that if Facebook—which now also owns Instagram and Whatsapp4— is not broken apart soon, it will dominate the market for decades.5 In Hughes’ New York Times article published in May 2019, he wrote:

5 McGirt, supra note 2.
“Back then, we competed with a whole host of social networks, not just Myspace, but also Friendster, Twitter, Tumblr, LiveJournal and others. The pressure to beat them spurred innovation and led to many of the features that distinguish Facebook . . . .”

As with Facebook, Google and Amazon each dominate their respective spaces in research and e-commerce. Google is the prominent search engine and research tool, while Amazon dominates the e-commerce space.

The larger these companies get, the less innovation resulting from competition the American people are likely to see. These tech giants’ domination in their industries has also led them to be some of the biggest political and social influencers of our day (i.e., Cambridge Analytica and the election of 2016). Unfortunately, lawmakers in the U.S. federal government do not understand the intricacies and technological functions of these companies. Our current laws and current government scheme are not enough to stop these tech powers. Although the Federal Trade Commission, Department of Justice, and House of Representatives are beginning their search into the allegedly monopolizing bodies, our current laws will have a hard time breaking up these big companies and it is unlikely the federal government will make changes to the long-standing body of antitrust law our government has existed under for the last century.

II. History

Fear of consolidated power is ingrained in American culture. The founding fathers feared faction or an evil majority. Thomas Jefferson and James Madison were readers of Adam Smith, who believed monopolies prevent the competition that spurs innovation and economic growth. The Sherman Anti-Trust Act of 1890 outlawed monopolistic business practices. It was named after Ohio senator John Sherman, who in response to the growing oil, railroad, and banking trusts of the gilded age, stood on the floor of congress and said:

If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessities of life. If we would not submit to an emperor, we

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6 Preceding this quote, Hughes discusses the IPO of Myspace in 2005, inferring “back then” was in reference to the very early days of Facebook.

7 McGirt, supra note 2.

8 In Hughes’ article he discusses how Zuckerberg made a fool of the senate members during the senate hearings. The somewhat aged members of our senate could not understand the concepts behind big data and therefore it led to a Zuckerberg win on the senate floor and little-to-no repercussions that would affect the future of Facebook. Hughes, supra note 3.
should not submit to an autocrat of trade with power to prevent competition and to fix the price of any commodity.\textsuperscript{9}

The Sherman Act was made up of two sections. The first outlawed contracts or conspiracies that would drive up consumer costs because of market power, resulting in criminal or civil penalties.\textsuperscript{10} The second section outlawed monopolies and read that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . [is] guilty of a felony.”\textsuperscript{11} The Sherman Act authorized the federal government to break up trusts and institute penalty proceedings against them where market power was eroding at customer protections and fair priced products.\textsuperscript{12}

The Clayton Antitrust Act of 1914 soon followed in hopes of strengthening earlier antitrust legislation. It was created to stop mergers and acquisitions (potentially the crux of what could break up the Big Four prowess). This included the regulation of mergers and acquisitions and outlawed any line of commerce in which such an acquisition would substantially lessen competition.\textsuperscript{13} The Clayton Act also included a provision to curb price discrimination and predatory pricing.\textsuperscript{14}

In response to this federal legislation, states began enacting fair trade laws.\textsuperscript{15} These laws were put in place to protect businesses and governments from companies or countries attempting to dump goods into the market at extremely low costs to rid competition.\textsuperscript{16} Soon after California enacted their fair trade law in 1931, most states had done the same. These state laws in the early twentieth century were hotly contested in court. In \textit{Old Dearborn Distribution Company v. Seagram Distillers Co.}, the Court held that state fair-trade laws were legitimate means of protecting manufacturers.\textsuperscript{17} Courts across the country went back and

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\item \textsuperscript{9} Eric H. Holder, Jr., \textit{Attorney General Eric Holder Speaks at the Sherman Act Award Ceremony}, DEPT. OF JUSTICE (Apr. 20, 2010), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-sherman-act-award-ceremony.
\item \textsuperscript{10} 15 U.S.C.A. § 1 (2004).
\item \textsuperscript{12} See id.
\item \textsuperscript{13} 15 U.S.C.A. § 12 (2002).
\item \textsuperscript{14} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Old Dearborn Distributing Co. v. Seagram-Distillers Co., 299 U.S. 183 (1936).
\end{itemize}
forth as to whether their state would rule against fair-trade statutes, making laws effective in some areas and meaningless in others.\textsuperscript{18}

These major federal antitrust acts were written during the industrial age in the early 1900s and were intended to successfully break up concentrated market power, price fixing, and stunted innovation. In the last forty years, these laws shifted from regulating coal, oil, and steel, to regulating technology, healthcare, and big-business in the twenty-first century. It is important to recognize the successes of these laws—producing innovative ideas and minimizing monopolistic practices in the new technological age—before they can be critiqued for their shortcomings in relation to the Big Four. For example, antitrust laws positively impacted the market during the communication revolutions of early cell phone usage and computer technologies.\textsuperscript{19} In 1982, the federal government broke up AT&T using the Sherman Antitrust Act.\textsuperscript{20} And, in the early 2000s the Department of Justice sued Microsoft over monopolistic practices. After oversight of the company commenced in 2011, the DOJ said that had the federal government not taken the measures it did, it is likely Microsoft would have been an uncontrollable monopoly in the twenty-first century.\textsuperscript{21} Lastly, in 2013, the government successfully sued Apple over attempting to conspire with book publishers to raise the price of e-books.\textsuperscript{22} Unfair practices have been stopped before, so why is the federal government moving at a snail’s pace to break up the Big Four companies that arguably have more power than AT&T and Microsoft combined at the time of their antitrust actions?

III. RECENT ACTION

In June 2019, the House of Representatives, DOJ, and FTC claimed that they will begin investigating whether the Big Four are violating United States antitrust law.\textsuperscript{23} By the end of July, the FTC had reached a $5 billion settlement with Facebook\textsuperscript{24} and the DOJ announced it had launched a sweeping antitrust probe into whether Silicon Valley companies are participating in monopolistic

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practices and stifling innovation. Justice Department Antitrust Chief, Makan Delrahim, said, “Without the discipline of meaningful market-based competition, digital platforms may act in ways that are not responsible to consumer demands.”

What these federal agencies have failed to understand is twofold. First, there are a whole host of issues that cannot be tackled in one swoop: privacy, election meddling, personal data breaches, lack of competition, concentration of large companies, and mergers. Second, under our current antitrust law a company must hurt consumers to prove a large threat and companies like Facebook, Google, and Amazon are offering the cheapest, if not free, products.

IV. A NEED FOR NEW ANTITRUST PRACTICES AND BREAKUPS

A. Historical antitrust litigation in the United States

One of the main issues with current antitrust law is the standard it places on consumer welfare and market-fixing costs of products. In the early years of antitrust doctrine, United States’ courts looked to price cutting as an inherent characteristic of market power worthy of breakup. For example, in United States v. Standard Oil, Standard Oil was routinely slashing prices in order to drive rivals out of the market. The Supreme Court ordered a breakup of the company and used the Sherman Act to do so, providing precedent for future antitrust cases to be prosecuted under this act. Legal experts have considered this case to be one of the contributions to the creation of the Clayton Antitrust Act, which on its face is arguably more comprehensive than the Sherman Act. Standard Oil had a dramatic effect on the United States oil industry and resulted in a major company with large profits to be broken up into thirty-four separate companies. Today, Exxon Mobile is one of the companies that originated from Standard Oil’s breakup. Standard Oil was one of the first major cases in antitrust law and has been used by courts for establishing a standard that puts price cutting and consumer harm at the forefront of monopolistic business practices.

In 1921, Kodak was one of the biggest names in the camera industry and had captured roughly ninety-six percent of the market in the United States. In

25 Stewart, supra note 23.
26 Id.
29 Id.
30 Id.
United States v. Eastman Kodak, the court ordered a consent decree and Kodak was forced to sell only their own film moving forward, instead of also selling other private label film. A few decades later, Kodak entered into another consent decree in 1954 after it had created its colored film. Kodak was the only company that could understand and produce color film. Because of this, the company was taking advantage of consumers by charging customers a fee to send, process, and deliver the film. The decree ultimately forced Kodak to license this product out to third parties to remedy their power and ability to overcharge customers for their valuable products. This is an example of government action in a relatively new industry of technology.

The Big Four companies exist in their own industries, all relatively new in this new age of technology. Because companies like Facebook and Google do not charge customers a flat fee, the federal government must protect consumers through other means. Specifically, the federal government should encourage the breakup of large tech companies into smaller companies that can then innovate in competition with each other. This measure has proved successful in the past, most notably in the cell service industry.

One of the most well-known antitrust issues of the twentieth century was the breakup of AT&T. In 1974, AT&T was monopolizing the telecommunications market and had done so with no interference for years. After the Attorney General filed suit against the company, it took another seven years before the case closed and the parties reached a settlement. AT&T agreed to be broken into seven different companies that would be allocated to different regional areas of the country. Five of these companies would eventually merge and the other two would be built into Verizon and Quest. Without companies like Verizon, T-Mobile, and Sprint, AT&T could set blanket standards on products and prices for cell phones and internet access on a national, if not international, scale.

B. How the United States’ antitrust law effects modern tech giants

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32 Eastman Kodak, 853 F. Supp. at 1457.
33 Id.
34 Id.
35 Id.
36 Most notably, with the company AT&T.
37 Eastman Kodak, 853 F. Supp. at 1457.
38 Id. It is also important to note that these processes can take an extremely long amount of time. If something like this were to happen to the Big Four, it could take years to work out the details. The later the process starts, the stronger the companies get, and the least likely a breakup is to be successful and timely.
39 Id.
Merger guidelines in 1968 established that the primary role of merger enforcement was merely to preserve market structure and healthy competition. The guidelines changed somewhat in 1982, when the Reagan administration reflected a new focus in the purpose of merger and acquisition oversight. The new guidelines established that mergers “should not be permitted to create or enhance ‘market power,’” defined as the “ability of one or more firms profitably to maintain prices above competitive levels.” Today this means a “showing of antitrust injury requires showing harm to consumer welfare, generally in the form of price increases and output restrictions.” Although the Big Four offer some of the cheapest ways to social network, use search engine features, or purchase products through the e-commerce stream, they are still taking something from consumers. That something is privacy, data preferences, and political choice. Although user friendly and cheap, the Big Four have stifled innovation and creativity in their respective markets.

One of the reasons the Big Four have been able to consolidate so much power is the leeway the federal government and FTC have given them in their merger and acquisition ventures. Hughes discusses the severe implication these companies have on innovation purely because of their ability to buy out any company that attempts to contend in the marketplace. Hughes explains that this cycle eliminates investor interest in start-up companies if capital investors know there is only so much monetary potential a company can reach when they are up against the big dogs. “Investors realize that if a company gets traction, Facebook will copy its innovations, shut it down or acquire it for a relatively modest sum.” Hughes goes on to give concrete examples of other industries, that do not have major players like Amazon, Apple, or Google, that have seen a boom in innovation and market competition. While the Big Four have taken over their spaces, “there has been plenty of innovation in areas where there is no monopolistic domination, such as in workplace productivity (Slack, Trello, Ansana), urban transpiration (Lyft, Uber, Lime, Bird) and cryptocurrency exchanges (Ripple, Coinbase, Circle).”

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41 Id.
42 Id.
43 Id.
44 Hughes, *supra* note 3.
45 Id.
46 Id. Facebook has done this numerous times. One example being their use of the “Instagram story” that copied the infamous “Snapchat story”.
47 Id.
48 Id.
The irony behind the Big Four, their quick success, and their future performance is that we are the foundation that keeps these companies’ success rates so astronomically high. Consumers like the idea of more competition, option, and innovation; however, consumers continue to go to these companies for internet, social media, and commerce needs instead of other companies. Most people fail to seek any alternatives whatsoever. Because of this, most of the efforts to probe these companies and implement sanctions have not impacted their user numbers or net value. In July 2019, the FTC approved a $5 billion fine against Facebook. This is a record fine for the FTC, yet this is still less than a quarter of Facebook’s annual profit. On top of this, Facebook’s stock hit its highest price in nearly a year directly after public reports released the FTC’s fine. In early 2019, the European Commission similarly hit Google with a fine of $1.7 billion for abusive practices in online advertising. The commission said the fines were a result of the advertising giant violating the European Union’s antitrust rules and abusing market power or limiting rivals from entering the space. However large the fine, it does not seem to have an effect on the company. This was the third time the European Commission fined Google (resulting in a total fine of more than $9 billion over time) and had critics pointing out that these monetary fines are not stopping unfair market practices.

Breakups are required in order to fully halt the rapid growth of the Big Four, growth that will soon eradicate all competition in the market. Breakups will also foster a new age of big tech innovation. Under current law and precedent, the federal government has an uphill battle in proving these companies have hurt consumers. Amazon remains one of the cheapest places to buy goods of almost any kind. On top of that, they also provide free two-day shipping with their Prime membership, that also happens to be free to large classes of individuals (i.e., students, certain businesses, large families and groups account sharing). Facebook and Google remain free services to consumers. They are both the cheapest, and most efficient platforms for search engines, directional mapping, and connecting to friends and family across the world. Although these companies appeal to

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50 Id.
51 Bill Chappell, *EU Fines Google $1.7 Billion Over ‘Abusive” Online Ad Strategies*, NPR (Mar. 20, 2019, 1:25 PM), https://www.npr.org/2019/03/20/705106450/eu-fines-google-1-7-billion-over-abusive-online-ad-strategies
52 Id.
54 Unless they hinge arguments on other intangible harms instead of monetary prices.
consumers because of cheap or invisible costs, they are hurting consumers in a
bigger way than pocket depth. Not only is current United States law inadequate to
make an impact or sanction these companies, but a whole host of new issues have
arisen, including data privacy, international cyber security, and campaign breach.
This is bigger than our current law, our Congress, and the slow-moving legislative
process our government has proven insufficient at.

V. AN ARGUMENT FOR CORPORATE CONSOLIDATION

Some argue that the size of the Big Four companies is good when looking
at the big picture. What if the federal government was able break up Google into
mini companies and what if these mini companies could not stand alone?
Google’s high user frequency has allowed for it to become extremely streamlined,
efficient, and in turn, helpful. Google is no longer just a research tool. It is used as
a type of Yelp to locate nearby restaurants, to download easy-to-use directions, to
figure out local public transportation routes, and to solve mathematical equations.
If a broken-up Google is unsuccessful at meeting consumer expectations,
consumers will be left frustrated.55

A similar argument can be made to support Facebook. If everyone is on
one platform, users can connect with everyone in one cyber location. If everyone
was on a variety of different platforms, it would be extremely ineffective.
Instagram would become something similar to Pinterest, a collection of photos
from unknown sources that appeal to the eye and are stored for a later glance, if
stored at all. But Instagram would no longer be somewhere for you to capture
your life in little squares to share with all of the people near and dear to you who
also use the app. If we all used different social media platforms, social media’s
purpose would be diluted. If we were forced to download eight different
competing apps and have different groups of our friends as users, we likely
wouldn’t be able to keep up. Advocates of big tech argue that bigger might also
mean better. In response to Hughes’ article, Mark Zuckerberg stated:

If what we care about is democracy and elections, then you want a
comp any like us to invest billions of dollars a year, like we are, in
building up really advanced tools to fight election interference. Our
budget for safety this year is bigger than the whole revenue of our
company was when we went public earlier this decade. A lot of

55 However, this would open the door for innovation, for a new search engine to serve this gap of
consumer needs. That being said, what is to say that the next company turns into another Google.
that is because we’ve been able to build a successful business that can now support that.\textsuperscript{56}

Facebook’s communications chief, Nick Clegg, responded to Hughes with a similar response:

Facebook accepts that with success comes accountability. But you don’t enforce accountability by calling for the break-up of a successful American company. Accountability of tech companies can only be achieved through the painstaking introduction of new rules for the internet. That is exactly what Mark Zuckerberg has called for.\textsuperscript{57}

Without a massive consumer base to please, these companies arguably would not have been able to become so effective, streamlined, and fast at what they do. They may have dominated their respective markets, but they have succeeded in providing a product most consumers love and can’t stop using.

VI. CONCLUSION

When is too much power enough to make changes? It is a wakeup call that even those who built these companies can recognize their potential destruction.\textsuperscript{58} The Big Four now have power over not only our social lives and economic transactions around the world, but also over our political elections and democratic processes. If our federal government does not take action, monopolistic practices and stifled innovation will only become more entrenched and the Big Four will have surmounting competitive advantages for decades to come.

\textsuperscript{56} Chance Miller, \textit{Mark Zuckerberg responds to cofounder’s call to break up Facebook, says it wouldn’t help anything}, 9TO5MAC (May 12, 2019, 5:17 PM), https://9to5mac.com/2019/05/12/break-up-facebook-zuckerberg-response/.


\textsuperscript{58} Hughes, \textit{supra} note 3 ("It took the 2016 election fallout and Cambridge Analytica to awaken me to the dangers of Facebook’s monopoly.")