

The Necessity of Antitrust and Privacy Legislation Concerning Big Tech

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Over 99% of data present in the world, including personal data, is stored through various digital means. Individuals are now able to shop for groceries, call a friend, and gain access to their house all from a single device. While some of this data is secure and kept private, a large amount of data is accessed and sold by tech companies that have collected individuals' data profiles to marketing and other data analysis buyers. This market, which is called Big Data, have not only given select tech company founders overwhelming control over certain sectors of the marketplace, but the market has also put millions of individuals personal information at risk, along with the information of their friends and loved ones. While individuals might strive to maintain greater privacy online, Big Tech companies have made opting into data privacy extremely difficult. Both antitrust divisions of the government and law makers have taken measures to try to stop the ever-growing machine that is Big Tech but have yet to find success. This paper serves three primary purposes. First, the paper shows how the rise of digitalization has led to the creation of the Big Data industry and, by extension, Big Tech. Secondly, the paper highlights how the rise of Big Tech has resulted in serious privacy and antitrust violations. Lastly, this paper presents the necessity for a two-prong method to help curtail Big Tech's uncontained growth that consists of both legislation for privacy protection and stricter antitrust regulation.

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I. INTRODUCTION

112 million. This number represents the number of people who had Amazon Prime accounts in December of 2019.¹ It’s also the number of people who had Instagram accounts in 2020.² And yet, neither of these compare with LinkedIn, who has 690 million members.³ Still, these numbers are not as awe-inspiring when compared to Google’s customer interactions, where the company has a search engine that performs 5.6 billion searches per day and roughly 2 trillion search per year.⁴ What’s even more impressive is that, at the start of the century, these companies either didn’t exist or were still in the early stages of development.⁵ And yet, these companies have grown exponentially, and seemingly without curtailment, to essentially become integrated into virtually every American’s life. These technology companies, known as Big Tech, consist of principally Amazon, Apple, Facebook (which owns Instagram), Google, and Microsoft(which owns LinkedIn), with some

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1. Stephanie Chevalier, *Number of U.S. Amazon Prime subscribers 2013-2019*, STATISTA, (May 4, 2022), <https://www.statista.com/statistics/546894/number-of-amazon-prime-paying-members/#:~:text=Amazon%20Prime%20is%20constantly%20growing,95%20million%20in%20June%202018>.

2. S. Dixon, *U.S. Instagram users 2022, by age group*, STATISTA, (Oct. 21, 2022), <https://www.statista.com/statistics/398166/us-instagram-user-age-distribution/>.

3. Mansoor Iqbal, *LinkedIn Usage and Revenue Statistics* BUS. APPS, (Jan. 9, 2023), <https://www.businessofapps.com/data/linkedin-statistics> (Jan. 9, 2023).

4. Meg Prater, *25 Google Search Statistics to Bookmark ASAP*, HUBSPOT BLOG, (June 9, 2021), <https://blog.hubspot.com/marketing/google-search-statistics#:~:text=How%20many%20Google%20searches%20per,trillion%20global%20searches%20per%20year>.

5. *The Big Five Tech Companies: How Did They Make It Big?*, TECHSLANG, (May 28, 2021), <https://www.techslang.com/the-big-five-tech-companies-how-did-they-make-it-big/>.

other names such as Twitter also considered as Big Tech at times.⁶ A consumer might wonder how a technology company, that started in someone's garage, or continued to burn and lose money for the first decade of existence, could come to control not only the technology sector, but seemingly almost all of one's daily living. While it is true that these companies all offer revolutionary products that have advanced human communication and consumer standards, beyond what might have ever been imaginable, there are two other reasons for their astronomical burst into stardom, and apparent residence there.⁷ The first reason is called Big Data, which is the largescale collection of individuals' data, through completely voluntary means, that has nevertheless led to major concerns about consumer privacy on the internet and whether Big Tech should be allowed to collect user's data without any kind of safeguards against possible mismanagement.⁸ The second reason can be summarized as market dominance.⁹ Even though the technology market, especially in terms of computer technology, has been an open and growing field for decades now, there has been little to no new players in the field.¹⁰ When there are new players, they are quickly bought out by Big Tech.¹¹ This market dominance is largely made possible because Big Tech companies acquire more Data through various means, such as mergers, to increase their data offerings.¹² Their market dominance is a carefully, albeit possibly not successfully, monitored phenomena that the antitrust division of the Department of Justice (DOJ) and Federal Trade Commission (FTC) have been seeking a solution to for years.¹³ While these two issues at first glance seem unrelated, they are, in fact, tragically intertwined. Part of the reason these companies are able to request endless amounts of user data, and part of the reason consumers are willing to give it to them, is because there are no other companies out there that are able to compete and don't ask for information that could be considered an invasion of privacy.¹⁴ On the market competition side, part of the reason these companies have come to control such a large part of the market is that money is made off of selling consumer data, which

6. Rob Shavell, "Better, but Still Not Good" - Making Sense of Big Tech's Privacy Push, CPO MAG., (Apr. 20, 2021), <https://www.cpomagazine.com/data-privacy/better-but-still-not-good-making-sense-of-big-techs-privacy-push/>.

7. Olivia T. Creser, *In Antitrust We Trust?: Big Tech Is Not the Problem-It's Weak Data Privacy Protections*, 73 FED. COMM'NS L. J. 289 (2021), available at http://www.felj.org/wp-content/uploads/2021/04/73.2.3.Antitrust-We-Trust.Olivia.FINAL_.pdf.

8. *Id.*

9. *Id.*

10. Diane Bartz, *Big Tech's little mergers draw more U.S. antitrust scrutiny*, REUTERS, (Sep. 15, 2021) <https://www.reuters.com/technology/ftc-staff-present-findings-big-techs-smaller-acquisitions-2021-09-15>.

11. *Id.*

12. *Id.*

13. *Id.*

14. Zachary Mack, *Big Tech's problem is its lack of competition*, VERGE, (June 25, 2019, 2:53 PM), <https://www.theverge.com/2019/6/25/18744342/big-tech-competition-antitrust-regulation-amazon-apple-facebook-google-kara-swisher-vergecast>.

in turn aids these companies in acquiring competitors, which eventually leaks back into the issue of protecting privacy.¹⁵ When there is concern over Big Tech's ability to access friends' and families' personal information, through one's personal account with the company, concerns over the fact that the company's ability to gain access to that information through a merger, that failed to raise any red flags, should be the next concern to be addressed. The purpose of this article is to show how the overreaching power of Big Tech is not exclusively a privacy or antitrust concern, but instead should be viewed as the, unfortunately temperamental and overpowered, child born from a lack of proper regulation from both privacy law and antitrust law. Accordingly, the only proper way to curtail Big Tech's power is the same as the best way to parent a child: A proper dose of discipline from both parents. To demonstrate this point, the paper will be broken up into five sections. This section serves as an introduction to the two-part strategy in curtailing Big Tech overreach. Section II will provide background on how Big Data came to be and led to the creation of privacy law. Section III will illustrate some of the concerns created by Big Tech, and how these concerns are necessarily related between privacy and antitrust. Section IV will discuss the state of the laws in curtailing Big Tech's use of Big Data and what laws should be implemented to more completely promote consumer wellbeing. Lastly, Section V will serve as a conclusion to this article. While this article will aim to provide an applicable and well-balanced discussion of possible methods to handle Big Tech, it is in no way a fully comprehensive discussion of all issues Big Tech has caused for privacy and antitrust advocates and regulators.

II. THE RISE AND USE OF BIG DATA IN THE MARKETPLACE

A. *Development of Big Data*

All members of the Big Tech group and most, if not all, of the big corporations in the U.S. today make use of Big Data. Big Data is a term that originated at the start of the 21st century after the advent of the internet.¹⁶ Before the year 2000, over 75% of data, including personal data, was stored on paper, only available to another if they had access to the physical copy and/or made copies of the original.¹⁷ This meant that in 2000, less than 25% of all data in the world was digitalized. By 2014, that number had increased to just over 98%.¹⁸ While paper copies of some forms of data are still available, virtually all of a person's personal data can be acquired by digital means.¹⁹ The world has evolved and come to rely so much on the

15. *See generally id.*

16. Kenneth Cukier & Viktor Mayer-Schoenberger, *The Rise of Big Data: How It's Changing the Way We Think About the World*, 92 FOREIGN AFFS. 28 (2013).

17. *Id.*

18. *Id.*

19. *Id.*

digitalization of data that multiple foreign government agencies request that certain forms, such as taxes, be filled out strictly online instead of on paper.²⁰ While Big Data refers to the size of data digitalization, it also refers to the type of data that can be digitalized.²¹ The earliest technological advances dealing with data could only store analytical measurements like numbers and mathematical equations.²² And yet, the technology of today can acquire data much more varied from that.²³ While information, such as location and information on certain places, is an obvious form of data, technology has allowed inroads into consumer data, which is data about consumers that companies can collect in order to better predict how their product will fair in the marketplace.²⁴ From information such as who liked a post on Facebook to how long an individual lingered on a website, this information has now been turned into data and is the driving force behind a large number of Big Tech companies.²⁵ Post monitoring and time spent on websites are examples of consumer data that can provide a free-to-use platform, such as Google and Twitter, with the means to turn a completely free product into billion dollar enterprises.

B. How Big Data Is Turned into Revenue

While the sheer amount of data available by digital means is astounding, its availability isn't what makes this data profitable. By itself, the data has very little value to any business attempting to legally make money. However, once the data can be tied to an individual, the company will start seeing monetary benefits.²⁶ By making use of and constructing software that is able to trace a user's movements on the internet, companies owning this software are able to group all of the actions taken by a certain consumer together.²⁷ Once this data has been centralized, or aggregated, the company is able to either sell it to another company or keep it for itself, at which point the company is able to make use of modern marketing and statistical analysis to determine what the consumer likes to buy and how the consumer typically interacts in the marketplace.²⁸ The company then uses the information to target specific ads at the consumer, such as targeting wedding dress ads at someone who recently got engaged.²⁹ Tech companies can also make use of internet protocol (IP) addresses, which are on every device with internet access, to

20. *Filing Information Returns Electronically (FIRE)*, IRS, (Nov. 8, 2022), <https://www.irs.gov/e-file-providers/filing-information-returns-electronically-fire>.

21. *See supra* note 16.

22. *Id.*

23. *See infra* note 24.

24. Peter Segrist, *How the Rise of Big Data and Predictive Analytics Are Changing the Attorney's Duty of Competence*, 16 N.C. J.L. & TECH. 527 (2015).

25. *Id.*

26. *See supra* note 16.

27. *See supra* note 24.

28. *Id.*

29. *Id.*

track where a device user spends their time.³⁰ While IP addresses can be fairly broad and have multiple contributors of information, these companies, through computer algorithms, are able to narrow down on a single user by analyzing the device's web traffic.³¹ These analyses allow for very targeted data collection, which the company, as stated before, either keeps for their own use or sells to other companies to use, all while the average consumer is unaware that their personal information has passed through the hands of multiple businesses.³² Posting engagement photos on social media are quite possibly an announcement to the whole world you're taken.

C. Growth and Overdominance of Big Data

Companies that engaged in the trade and sale of consumer data went unregulated and unchecked for a while.³³ The various methods of collecting data these companies used were instrumental in creating the data mining industry.³⁴ In 2003, the industry already consisted of over 3,000 companies dealing in data.³⁵ By 2012, the Big Data industry, in which Big Tech companies were major contributors, rose to a production of \$300 billion per year.³⁶ However, with the start of a new decade came new concerns about the realities Big Data presented. Many people raised concern over the possible invasion into people's privacy, which reflected a nationwide trend for consumers starting after the passing of the Privacy Act in 1974.³⁷

In the early 2010s, issues such as data breaches and identity theft were beginning to expose just how much data was being collected and shared with others, often without the knowledge of the consumers, or the data providers.³⁸ These issues also highlighted how collection of consumer data created serious concerns about consumer privacy online. Acxiom Corporation, a company that deals in consumer data, has reported having consumer data on over 500 million individuals, with the consumer data being so comprehensive as to include information such as age, height, education level, politics, health concerns, and more.³⁹ While some of the data collected had no real importance, other data brokers had extensive data on individuals that related to medical diagnoses, such as cancer and diabetes.⁴⁰ Even hospitals started engaging in the Big Data market, selling information on patients to data-

30. *Id.*

31. *Id.*

32. Catherine E. Tucker, *Social Networks, Personalized Advertising, and Privacy Controls*, 51 J. MKTG. RSCH., 546 (2013).

33. Viktoria H.S.E. Robertson, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, 57 COMMON MKT. L. REV. 161 (2020).

34. *See generally id.*

35. *See supra* note 24.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

collection companies with consent.⁴¹ While the information sold by hospitals was and is currently stripped of identifying information to come into compliance with the Health Insurance Portability and Accountability Act (HIPAA), other data collectors have the full collection of data on a person typically barred by HIPAA.⁴² This is possible because brokers obtain data points, or different parts of a consumer's data, through various deals with various companies, in order to have a more comprehensive portfolio for persons looking for consumer data.⁴³ While sidestepping HIPAA is a major concern, companies using Big Data have also been able to circumnavigate other privacy legislation, such as the Fair Credit Reporting Act (FCRA) in order to create more consumer profiles to sell for marketing campaigns, among other uses.⁴⁴

While a lot of consumer data was collected through online components and deals, technological innovations have allowed Big Tech and other Big Data companies to obtain consumer data through other means. On the outset, Google glasses were programmed to have facial recognition technology in order to make the glasses only usable by the owner.⁴⁵ However, the data that the glasses collected could also be added to the consumer's data profile that Google had already collected on an individual through use of various Google products such as the Google search engine and information provided on Google accounts.⁴⁶

Parties concerned about Big Data's impact on privacy rights often fail to recognize how these companies' methods of procuring consumer data are also closely related to issues stemming from antitrust law facilitators to stop these companies from dominating the marketplace.⁴⁷ The purpose of antitrust law is to "promote" competition in the marketplace by eliminating business practices that could be construed as fraud or anti-competition from the marketplace.⁴⁸ Failure to stop transactions of Big Data as well as a seeming inability to halt Big Tech's growth contributed to these issues.⁴⁹ Eventually, Big Data has allowed companies in the marketplace to start using one's personal information in a destructive manner to the free marketplace; however, in direct controversy to the purpose of antitrust laws.⁵⁰ Companies have used the data they have obtained to determine the fiscal capabilities of individuals

41. *Id.*

42. *Id.*

43. Stacy-Ann Elvy, *Commodifying Consumer Data in the Era of the Internet of Things*, 59 B.C. L. REV., 423, 433 (2018).

44. *See* Segrist, *supra* note 24.

45. *Id.*

46. *Id.*

47. *See infra* note 50.

48. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKLEY BUS. L.J. 39 (2019).

49. *Id.*

50. *Id.*

and offer different prices for the same product depending on that fiscal capability.⁵¹ Companies have also moved to purchase other companies in a different sector solely for the purpose of obtaining more user data, which can be added to the company's personal bank of data.⁵²

All these issues have resulted in action to try to provide regulation for the aggregation of consumer data. Congress has passed the Electronic Communications Privacy Act (ECPA), one of the earliest pieces of legislation dealing with privacy protection online.⁵³ The DOJ and the FTC have also recently made efforts to curtail the use of consumer data from an antitrust standpoint.⁵⁴ However, many of the issues with privacy and antitrust are still persistent and have overcome much of the previous legislation. The best way to demonstrate how privacy and a free marketplace are jointly affected by Big Tech's actions is through a detailed analysis of two major consequences of Big Tech's use of Big Data.

III. BIG TECH'S USE OF BIG DATA CAUSES SERIOUS CONCERNS

Big Tech's development of new ways of collecting data have led to massive strides in various industries across the marketplace, such as the marketing industry and Big Data as an industry itself. However, while Big Tech's user models and formats have led to great advancements, Big Tech's methods have also led to the rise of problems for consumers in the realm of privacy protection and marketplace dominance curtailed by antitrust enforcement. Below are two major frameworks Big Tech uses that causes issues on the privacy and antitrust front.

A. Big Tech's Use of Very Cheap Payment Models Result in Privacy Issues and Anti-competitiveness.

While not every Big Tech company attracts and charges customers in the same way, most of the companies operate on a free-to-use or low monthly subscription payment model.⁵⁵ Instead of charging high prices to make use of their products, these companies simply request access to the user's data instead.⁵⁶ While at first glance it may seem like Big Tech's use of these kinds of models are good for consumers, the truth is that such models have an immensely negative impact on consumers' privacy and the competitiveness of the marketplace.

In terms of privacy, the major issues with these payment models is in how these companies structure privacy agreements. The forms are so long

51. See Segrist, *supra* note 24.

52. Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61 (2019).

53. See Segrist, *supra* note 24.

54. D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129 (2016).

55. See Day & Stemler, *supra* note 52.

56. See Segrist, *supra* note 24.

that the average consumer, signing up for the service, decides not to take the time to read them. For those who do, the language is so difficult that a fair number do not understand what they're agreeing to. For the individuals who do make it through the whole form and understand the text, they still wouldn't know what information will/can be shared or will/can be tracked. In 2015, Google's Terms of Service read that "Google 'may share aggregated, non-personally identifiable information publicly and with [its] partners[;]'"[and] that Google 'will share personal information with companies, organizations, or individuals outside of Google if it has a good-faith belief that access, use, preservation or disclosure of the information is reasonably necessary to' comply with any legal process...".⁵⁷ Facebook's data use policy states that they collect and share data about you, while multiple other players in the industry have some reiteration of the same policy, claiming that one's data may be shared and distributed to multiple other companies or partners.⁵⁸ The policies are vague, leaving companies the ability to interpret the policies as allowing them to share and use almost all of the data that can be taken from a consumer's interactions on the site.⁵⁹ While the use of data may not seem overly alarming at first —many consumers perform several confidential actions online,—yet might not realize that Big Tech's privacy agreements allow them access to those confidential actions. Backlash from the public and the government has prompted these companies to create more clear guidelines and decrease the amount of data the companies will take from consumers. However, these technology giants are still mostly self-governed and regulated.⁶⁰ The only federal legislation which addresses privacy as a whole is the U.S. Privacy Act of 1974, a bill that only applies to government agencies and government actors.⁶¹ Furthermore, all existing legislation that more closely regulates private actors is specific to certain information, such as health information, but can still be used by Big Data as long as the identifying information is stripped. However, with the industry's ability to collect hundreds, if not thousands, of data points on a single individual, such information can quickly be gathered from website searches and other digital uses.⁶² As such, companies are able to create portfolios for consumers that contains the consumer's income bracket, probable health situations, and more.⁶³

These payment models have also caused major concerns in the DOJ's Antitrust Department. The government first passed antitrust legislation when Congress passed the Sherman Act.⁶⁴ The purpose of such laws is to protect

57. *Id.*

58. *Id.*

59. *Id.*

60. *See Day & Stemler, supra* note 52.

61. *Id.*

62. *See Cukier & Mayer-Schoenberger, supra* note 16.

63. *Id.*

64. William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

consumers in the marketplace from falling into a situation where a single company, or a handful of companies, controlled the vast majority of an industry. This would subsequently, allows the company or companies to raise prices or demands as the companies saw fit, knowing consumers had no other options.⁶⁵ On first glance, a free-to-use payment model would seem to work within the purpose of antitrust laws. Even the companies that require a low payment would seem to be operating within antitrust standards. However, the true issue arises out of the fact that, while these companies are not extorting high prices out of consumers, the companies are instead extorting large amounts of data out of consumers. This data is then used to target ads at the consumers or sold to companies that will house the data for other such purposes.⁶⁶ It also holds true that Big Tech companies hold the vast majority of market share in the technology industry, which means that their request for consumer data cannot be easily denied or overcome by the consumers.⁶⁷ This issue was acknowledged in 2002 by FTC commissioner Pamela Jones Harbour, who showed concern that "... the network effects from combining the parties' data would risk depriving consumers of meaningful privacy choices".⁶⁸ Advocates of treating privacy as a commodity have argued that the vast amount of data collected would prove to lower quality services for consumers that prefer to be highly private.⁶⁹ While these ideas and many others stand for including privacy in terms of determining the anticompetitive nature of a company, the truth is that there is no legal framework for doing so, leaving antitrust facilitators with the task of controlling Big Tech within the legal schemes currently in use.⁷⁰ While such concerns could possibly be remedied through the emergence of other companies in the technology market, current efforts of such competitors have been seriously impaired by Big Tech companies, again leaving antitrust facilitators to carry the burden.

B. Data Collection Has Led to Data Manipulation and Greater Barriers of Entry into The Tech Space

One of the major issues brought about by Big Data and large-scale data-aggregation is the creation of data manipulation and sharing scandals, especially when a user does not know that information is being shared. Data manipulation is a broad term that includes any kind of situation that could lead to stored data being compromised, although today the term is mainly used when discussing data that is stored electronically.⁷¹ The most talked about and most reported kind of data manipulations are data breaches. At the outset

65. *Id.*

66. *See* Tucker, *supra* note 32.

67. *See* Robertson, *supra* note 33.

68. *See* Srinivasan, *supra* note 48.

69. *Id.*

70. *Id.*

71. *See* Day & Stemler, *supra* note 52.

of Big Data, when more and more data was being stored electronically, issues with housing so much data in a single place became a problem.⁷² Data breaches have been occurring for a long time on varying scales, but they became increasingly larger and more publicly acknowledged starting in the 1980s.⁷³ However, data breaches of a large scale where possibly millions of people were affected didn't really become prominent until after 2005.⁷⁴ These data breaches differ in how they affect individuals, said breaches may manifest as phishing, ransomware, malware, spyware, and denial-of-service(dos).⁷⁵ All of these types of data breaches are either completely unique to or have evolved to take place mostly on technology and can have a wide range of impact.⁷⁶ In September of 2021, Apple found itself subject to a Spyware attack, where technology was used on an unknown number of Apple users which allowed the perpetrators to record everything from calls and messages to video even off the user's device, even when the camera was not on.⁷⁷ While such data breaches are fairly well publicized, breaches slightly less publicized —yet becoming more and more frequent— are ransomware breaches. , These breaches have impacted where whole companies and have their data has been effectively kidnapped and held for ransom.⁷⁸ These breaches have become more prominent with the advancement of technology, which means that greater effort needs to be exerted to curtail them.

In terms of privacy, while these data breaches, where companies have very little control, are an issue, perhaps the even greater issue is that other forms of data manipulation exist where data-aggregating companies have either actively engaged in the data leak or failed to properly safe-guard against it. A very important example is the Cambridge Analytica Case.⁷⁹ While Professor Aleksandr Kogan initially started an academic study on personality with the permission of roughly 300,000 Facebook users, Kogan was able to also gather the data of any friends of the users, in which Kogan proceeded to collect personalized data on over 70 million Americans, later selling the data.⁸⁰ While Facebook was not the chief instigator in this data manipulation event, Facebook has itself been proven to actively participate in data

72. *Id.*

73. Robin Kurzer, *The story of data: How did we get here?*, MARTeCH, (May 8, 2018), <https://martech.org/the-story-of-data-how-did-we-get-here/>.

74. *Id.*

75. *The 7 Most Common Types of Data Breaches and How They Affect Your Business*, VERITAS, <https://www.hubstor.net/blog/7-common-types-data-breaches-affect-business/> (last visited Jan. 20, 2023).

76. *Id.*

77. Nicole Perlroth, *Apple Issues Emergency Security Updates to Close a Spyware Flaw*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/09/13/technology/apple-software-update-spyware-nso-group.html>.

78. *See* Kurzer, *supra* note 73.

79. *See* Day & Stemler, *supra* note 52.

80. *Id.*

manipulation.⁸¹ Facebook's CEO Mark Zuckerberg released statements stating that Facebook has tracked users and collected user data when the user is not even on their Facebook page, even going as far as tracking data from non-Facebook users.⁸² Facebook has also been accused of actively promoting practices which coerce a user to offer up more personalized data than is required by Facebook's privacy agreements in order to interact with different parts of the platform.⁸³ Some phone apps, such as Uber, actually continue to collect data on an individual once an app has been deleted.⁸⁴ Also unbeknownst or rarely realized by the average consumer is the fact that these Big Tech platforms often trade the user data they have collected to other companies and applications, who may or may not have the same skillset in creating strong protection from the various forms of data breaches mentioned above.⁸⁵ Consumers might also be unaware that different companies could have collected different parts of a consumers data, but the vast amount of data sharing can result in very thorough portfolios of consumers being created.⁸⁶ Essentially, the amount of Big Data is so large and so often shared that any form of data breach could potentially effect anyone, even people who personally have no relation with the company that suffered the data breach.

At first glance, the issue of data manipulation by Big Tech companies does not appear to be an antitrust issue. However, antitrust agencies are tasked with eliminating business practices that harm consumers.⁸⁷ Data manipulation can be seen as a business practice that harms consumers' privacy, so antitrust agencies should have an interest in how such practices can still be acceptable. One such reason that these practices are accepted is due to the lack of competition within the sector Big Tech inhabits. There is a very high barrier to entry into the technology sector.⁸⁸ This is, in large part, due to the number of mergers Big Tech companies engage in.⁸⁹ Many of these mergers arise out of Big Tech's attempts to acquire more user data.⁹⁰ Regulating these mergers has proven hard for the DOJ and FTC, where some of these mergers have resulted in greater efficiency in the marketplace.⁹¹ And yet, many of these mergers have allowed Big Tech to become even bigger and make it harder for smaller companies to enter the market. Even when a company starts growing to decent profit, Big Tech still often does mergers to maintain market share. Mergers and Acquisitions that are less than \$92 million do not

81. *Id.*

82. *Id.*

83. *Id.*

84. Segrist, *supra* note 24.

85. *Id.*

86. *Id.*

87. Letwin, *supra* note 64.

88. *See* Day & Stemler, *supra* note 52.

89. *Id.*

90. *Id.*

91. *Id.*

need to be reported to the FTC.⁹² Just in 2021 alone, over 3,000 different merger plans of that magnitude have been proposed in the marketplace.⁹³ This means it is likely that even more mergers have taken place this year but have not needed to be reported. Big Tech companies are known for engaging in many such mergers.⁹⁴ Over the span of just under a decade, Big Tech companies have made 616 acquisition that did not need to be reported, as they fell under the \$92 million threshold. Many of these acquisitions were still worth around \$1 million.⁹⁵ Through these mergers and acquisitions, Big Tech has come to own most of the tech industry, whether known to consumers or not. Often, these acquisitions also bring along consumer data. Where Big Tech does not remove competition through mergers, Big Tech has, at multiple times, come under scrutiny for engaging in practices that are anti-competitive and result in barrier of entry or the inability to keep working in the sector.⁹⁶ This is often done by making agreements with the major players in the industry so newer companies can't get into the space. In 2012, the FTC sued Apple for allegedly engaging in anti-competitive practices in regards to e-books by creating a seeming "cartel" with five publishers to dominate the market.⁹⁷ While this suit was brought about due to a complaint issued by Amazon, another big company, the seeming partnership was detrimental to any trying to break into the space.⁹⁸ For Amazon, the issue was able to be resolved due to the availability of resources to request analysis from the FTC and the courts. However, for smaller companies without such resources, these practices are even more detrimental, as small companies usually don't have the ability to wait 4 years for the wrong to be resolved. Instead, there is a framework where Big Tech companies can fail to perform quality services regarding consumers' privacy because there is no major competition in the marketplace.

IV. THE LAW: WHAT STEPS SHOULD BE TAKEN

The Federal Government passed regulation for online privacy but has yet to address the issue of Big Tech's current free-to-use data collection format.⁹⁹ This is largely due to the fact that most of the Big Tech companies, such as Facebook and Google, along with their user model, only came into

92. Hartmut Schneider et al., *HSR Size of Transaction Threshold to Decrease to \$92 Million*, (Feb. 3, 2021) <https://www.wilmerhale.com/en/insights/client-alerts/20210203-hsr-size-of-transaction-threshold-to-decrease-to-92-million>.

93. Gerrit De Vynck & Cat Zakrzewski, *Tech Giants Quietly Buy Up Dozens of Companies a Year. Regulators Are Finally Noticing*, WASH. POST (Sept. 22, 2021), <https://www.washingtonpost.com/technology/2021/09/20/secret-tech-acquisitions-ftc/>.

94. *Id.*

95. *Id.*

96. Day & Stemler, *supra* note 52.

97. *Id.*

98. *Id.*

99. *Id.*

existence decades after government passed the ECPA.¹⁰⁰ While antitrust has been much more fortunate in being able to more proactively combat Big Tech's expansion due to the living nature of the DOJ and the FTC, antitrust applicators have yet to find a way to effectively combat Big Tech. To effectively curtail Big Tech's control in the average American's life, privacy legislation and antitrust legislation must be used in tandem. Since the federal government's privacy laws are outdated and do not yet have any methods to address the particular privacy issues Big Tech has created, this paper uses state laws that have been brought up or passed in order to show the current efforts to curtail Big Tech in the modern era.¹⁰¹ The DOJ has altered antitrust law on a federal level to deal with Big Tech's market dominance, so the case for antitrust's cooperative use alongside privacy can be made on the federal level.

A. Why Big Tech Needs to Be Regulated by Both Antitrust Agencies and Privacy Regulations

Since the understanding of data-aggregation's ability to collect extremely private and personal data became better understood, Big Tech companies have felt enormous pressure to at least attempt to present the appearance of reform in their privacy agreements.¹⁰² Facebook, a platform that has often emphasized a guaranteed respect for privacy and free usage at the commencement of the company, has repeatedly allowed greater and greater intrusive surveillance into the private data of its users.¹⁰³ Social Media has one of the lowest ratings by consumers for satisfaction among all of the industries that are indexed, and yet for years companies such as Facebook have continued to mine data; until recently when government probes into the company gave rise to massive campaigns for privacy protections.¹⁰⁴ Google, in response to pressure for privacy protections, announced a change to its search engine in which third-party cookies would no longer be allowed on the site.¹⁰⁵ While the extra pressure and seeming steps to self-regulation might seem like it works in favor of the consumer, the truth of the matter is that actions like Google's outline the company's anti-competitive nature instead of showing great concern for their users' privacy.¹⁰⁶ Google's attempts to restrict third-party cookies in the search engine would actually result in less competition, as companies that mine that data would be severely restricted

100. Segrist, *supra* note 24.

101. Todd Feathers, *Big Tech is Pushing States to Pass Privacy Laws, and Yes, You Should Be Suspicious*, THE MARKUP (April. 15, 2021), <https://themarkup.org/privacy/2021/04/15/big-tech-is-pushing-states-to-pass-privacy-laws-and-yes-you-should-be-suspicious>.

102. Day & Stemler, *supra* note 52.

103. *Id.*

104. *Id.*

105. Kelvin Chan, *Google Delays Phase Out of Tracking Tech by Nearly 2 Years*, USA TODAY (June 25, 2021), <https://www.usatoday.com/story/tech/2021/06/25/google-delays-removal-third-party-cookies-late-2023/5342641001>.

106. *Id.*

and lose a major amount of revenue.¹⁰⁷ In the meantime, Google would still be collecting the data being mined for itself, thereby still collecting user data with which Google has the autonomy to sell or use as it pleases. As shown by the section on antitrust issues above, Big Tech's use of data accumulation has also led to no viable competition for most of the companies in the marketplace. When Mark Zuckerberg was asked to name Facebook's major competitor in a senate hearing, Facebook's CEO could not produce an answer.¹⁰⁸ Facebook, along with Google and other Big Tech companies, has effectively eliminated all other competitors in the marketplace by purchasing any related competitors and making use of the data it was able to obtain.

There is a fair amount of literature that argues using antitrust law to combat the growing issue of privacy would be ill-advised.¹⁰⁹ Some scholars argue that allowing regulation on Big Tech's data acquisitions would be a violation of the First Amendment's protection of the freedom of speech, as data collection for targeted advertising is targeted speech which, in theory, presents no harm to consumers.¹¹⁰ Some potential opponents to using antitrust law for Big Tech regulation might find it to be an ill-suited avenue because allowing intervention from an antitrust standpoint would result in antitrust officials stepping in and making business decisions, instead of just promoting the interests of the consumer.¹¹¹ While these concerns hold some merit, ultimately, antitrust law needs to be a prong by which use of consumer data is monitored. While a corporation's speech and ability to target speech is important, use of consumer data which ultimately results in significantly decreased competition in the marketplace is harmful for consumers, as well as misleading. Facebook has software that enables the platform to tie in user identification with cookies, which allows the company to perform more intrusive surveillance of customer information to be traded at will.¹¹² Big Tech's collection of data on its users is so large that the government has been able to effectively spy on individual citizens through Big Tech's data network.¹¹³ While businesses have a right to free speech, that right is curtailed if it is misleading or false.¹¹⁴ Furthermore, even if that speech is not misleading, there could hardly be a government interest where the speech constitutes

107. *Id.*

108. Day & Stemler, *supra* note 52.

109. James C. Cooper, *Privacy and Antitrust: Underpants Gnomes, the First Amendment, and Subjectivity*, 20 GEO. MASON L. REV. 1129 (2013) (Finding that antitrust might not be the best method available for combating privacy issues); Jacob Beaupre, *Big Is Not Always Bad: The Misuse of Antitrust Law to Break up Big Tech Companies*, 18 DEPAUL BUS. & COMM'N. L. J. 25 (2020); Jenny Lee, *The Google-DoubleClick Merger: Lessons From the Federal Trade Commission's Limitations on Protecting Privacy*, 25 COMM'N L. & POL'Y 77 (2020).

110. *Id.* (Discussing protecting a company's right to free speech).

111. Beaupre, *supra* note 109.

112. Segrist, *supra* note 24.

113. Day & Stemler, *supra* note 52.

114. *Central Hudson Gas and Electric Corp. v. Public Service Comm'n*, 447 U.S. 557 (1980).

a real harm to consumers and their rights.¹¹⁵ Also, while the DOJ, FTC, and other antitrust enforcers don't want to make business decisions for these companies, careful analysis of how the companies are making use of user data is also necessary to stop the companies from having complete control over user data, as well as keeping competitors out of the marketplace in an anticompetitive nature, which is one of the purposes of antitrust enforcing entities.¹¹⁶

The need for antitrust laws and privacy laws to be used in tandem when tackling Big Tech can be shown through the States' efforts to pass privacy laws. As mentioned above, this paper analyzes multiple states' efforts to pass privacy laws to curtail Big Tech's advancement. This is largely because of multiple congress sessions that have also been held to address the issue of Big Tech's access to personal information.¹¹⁷ From these efforts, no law has been developed that gives significant assistance in limiting Big Tech's access to data. Instead, the paper provides analysis on the state-wide scale, where most of the privacy regulations that have been passed are actually backed in one way or another by members of Big Tech.¹¹⁸ In March of 2021, Virginia passed a consumer data privacy law that was largely written by Amazon and Microsoft.¹¹⁹ Of the 20 state privacy bills across the U.S. that are currently in effect, 14 of them have a similar framework to Virginia's.¹²⁰ Most of the privacy bills adhere to two key demands from the industry, namely that consumers have to opt out of data tracking technology instead of opting in to it, and that companies can't be sued for violations of the act.¹²¹ Any bill that has tried to be more strict against Big Tech in their privacy legislation has ultimately been met with enough resistance that the bill did not make it pass discussion in governmental bodies.¹²² The strongest privacy law in use today comes out of California, which allows internet users to download browser extensions that will automatically opt the user out of any use of their data by any website, and also requiring all websites to respect the browser extensions.¹²³ Big Tech and their associated lobbying groups have been actively fighting state governments that are making efforts to enact privacy laws closer in line with California's, which are more strict on the companies than anything passed by Big Tech backing.¹²⁴ While a strict federal law for privacy would be the most beneficial for protecting privacy, the legislation has to be backed by antitrust regulation in order to effectively

115. *Id.*

116. Strinivasan, *supra* note 48.

117. Day & Stemler, *supra* note 52.

118. Feathers, *supra* note 101.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

protect consumers and the marketplace from Big Tech dominance through data collection.

B. A Two Prong Method for Ensuring Privacy Would be Most Effective

Again, the most effective method to stop Big Tech control over consumer data would be to enact a federal regulation restricting the use of private information and data tracking as well as expanding antitrust powers to regulate anti-competitive blowback from privacy regulation.

1. Federal Privacy Bill

Firstly, government should pass a bill that will regulate Big Tech's use of personal information. The bill would be a simple, three step process for the companies. The bill should require all companies 1) that make use of data collection and data tracking software to ask a consumer if they wish to allow data tracking from the website. Afterwards, the company would 2) be required to ask the consumer for which purposes the company is allowed to use their data. Lastly, the company would 3) also be required to erase all the user's data if the user ever deletes their account with the site or its associated application. Step three could also be replaced with the company asking the individual for permission to retain the data after account deletion at the beginning of account set up. While this is a rather progressive bill, the legislation would best support the preferred set up of consumers concerned about data. Step one would best support consumers who would prefer that they are given the option to either opt in to data tracking and sharing rather than have to find out how to opt out.¹²⁵ Consumers also prefer to be given options as to how their data can be used if they choose to opt in.¹²⁶ Consumers tend to be less educated or aware of what happens to their data if they ever decide to remove their account from any of the Big Tech companies, so the first version of step three would be preferable in order to best support consumers. Because most individuals are unaware of the fact that companies can retain your data after app or account deletion, companies are able to make use of that data without as much concern. (dd) As such, the last step would also most likely be the step to receive the most dissent from Big Tech, as well as other Big Data companies. However, adopting the last step would be in the best interest of the consumer. Big Tech companies, like Facebook, continued use of a consumer's data upon termination of their account with the company not only would appear to be an invasion of privacy, it also shows a lack of fair consideration towards the consumer, since the company would be able to keep using the consumer's data without their permission for as long as they wanted. To be fair to consumers, the bill would also have a provision that would allow individuals and the federal government to bring suit against these companies for privacy violations. However, if the sheer volume of

125. *Id.*

126. *Id.*

private actions would be outrageous, the federal government could amend the bill to require only class action lawsuits or require the consumer or the government to show the company intentionally acted against the suing party's request.

2. *Privacy Law Accompanied by Antitrust regulation*

While the suggested law above would significantly limit privacy violations that concern consumers, the bill must be supported by antitrust regulation to prevent unfair treatment of consumers who decide they do not want to allow Big Data companies to collect their data. There could be issues of retaliation against consumers, or peer pressure of consumers.. For example, a Big Tech company might survey its current users to determine what percentage would opt for the pay-to-use option over the current options which allow for free use in exchange for data. If the survey shows that a significant percentage of users would choose the pay-to-use version, the company must analyze how the switch will affect their profits lost from the lost ability of sharing consumer data. Then, the company could set a very high price, such as \$99/month, in order to use their services. For most of these Big Tech companies, there is no comparable competitor in the space, so the individual would be forced to determine if paying \$99 a month is worth protecting their private data. The lack of competition in the tech space would quite possibly be enough for the Big Tech companies to successfully pressure consumers into opting for free-to-use methods that then acquire their data. To combat such a problem, antitrust law needs to be able to preserve the competition of the marketplace. Forcing Big Tech companies to only charge a certain amount for monthly subscriptions would be government overreach and unconstitutional. Instead, what would be in the best interest of the consumers and the antitrust agencies would be to amend current antitrust legislation that has allowed companies like Amazon, Google, Microsoft, Facebook, and Apple to grow so big and dominate the marketplace to the point of excluding competitors. One place where such changes could occur is within the mergers and acquisitions review process. Instead of only reviewing mergers that occur at a value of \$92 million, the FTC and the DOJ could instead amend the merger review process to apply to any party that has a value of \$100 million or more. This would allow the governing government agencies to analyze all mergers that Big Tech companies propose for any likelihood to cause anti-competitive practices in the industry. However, it would also allow companies that are making efforts to grow to continue to work with each other and enter mergers that would help them grow to larger levels and more freely participate in the marketplace. Stopping mergers that help Big Tech companies maintain dominance in the marketplace would allow smaller companies the opportunity to become major players in the marketplace. That way, if Big Tech companies ever attempt to pressure consumers into data sharing through high pay-to-use prices, a competitor would be able to step in and offer a lower rate for the consumer. Another avenue that could be explored is the offering of grants to companies in the tech sector that could

prove they can offer competition to Big Tech companies. One reason the issue of privacy has been able to become such an issue in today's landscape is because there are no competitors in the marketplace that are able to provide an alternative to Big Tech companies, especially the likes of Google, Facebook, and Amazon. Grants given to companies that have the intent to actually compete in the marketplace would help bring competition back. In line with those grants, the grantors could request that companies asking use of the grant abide by stricter privacy requirements and only use certain data tracking and/or data sharing mechanisms, to offer consumers more options to protect their privacy. By implementing these changes in antitrust law to combat any negative retaliation by the Big Tech Companies against consumers due to the general federal privacy law, the two-prong system will better protect consumer data from being exploited and help return competition to a sector of the marketplace that has fallen victim to control by a handful of companies.

V. CONCLUSION

Big Tech has been making use of Big Data as one of their primary sources of revenue since the turn of the millennia. While Big Tech's use of data mining and data aggregation has allowed consumers to have free access to a lot of information and platforms, it has come at a cost that most consumers were not aware of until recent investigation. More analysis of how Big Data works has shown that a limited number of companies have access to and engage in sharing personal information that users did not even know was available online. Data breaches that affected millions and use of private information that was obtained without the individual's knowledge became more prevalent. Big Tech's use of Big Data also proved to be a concern for the marketplace, where the constant drive to acquire more data resulted in Big Tech companies having almost complete control of the technology sector. As government entities and the general populace became aware of these issues, laws regarding privacy online and attempts to promote privacy as an aspect of competition in the marketplace arose. While companies seemed willing to make changes to come more in line with the demands of the public, deeper analysis showed that these companies changed very little, and the companies failed on multiple fronts to provide clarity as to how a consumers' information was used. These companies also failed to act in a way that was anticompetitive for the marketplace. As a result, multiple states have tried to enact laws to suppress the amount of information Big Tech has been able to collect from consumers, while the DOJ and the FTC have struggled to find ground on which to stop the rapid expansion of Big Tech companies, despite consumer disapproval of these companies. However, the laws that have been produced to promote privacy have been weak and seemingly ineffective against the technology sector, while the DOJ has still witnessed countless mergers and acquisitions happen in the name of collecting data. Marketplace freedom is important, as is personal privacy and being able to protect it in a world that seems more and more greedy for it. As such, it is necessary for

federal regulation to be passed to help stop Big Tech's seeming overreach into personal data and the marketplace and provide an alternative to consumers. While laws promoting privacy are good, the laws won't be able to stand without the use of antitrust laws and agencies to restore competition to the marketplace. As private data has become a commodity, regulation of that commodity naturally falls into the jurisdiction of competition promoting entities. Where Big Tech's focus in collecting more and more data has led to a reduction of competition in the tech sector, antitrust agencies must expand their vision to include not only more regulation of privacy as a commodity, but also promotion of competition and respect for privacy through promotion of entering the marketplace. Only through this combined framework will Big Tech be held accountable to consumers.