NOTE

The *Facebook* Two-Step: Reinvigorating Merger Enforcement Through a Practical Analysis of Intent Evidence

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ABSTRACT

The Clayton Act's vague mandate contemplates a substantial role for courts to determine which acquisitions may substantially lessen competition or tend to create a monopoly. However, following the General Dynamics *ruling in 1975, the Supreme Court has been silent on merger doctrine altogether. This hiatus has allowed lower courts to dramatically depart from the Court's 1960s and 70s jurisprudence, leading to a merger doctrine that has shifted from promoting a market of many small firms to focusing on price effects and market share. As a result of this change in goals, courts and regulators have allowed large technology firms with high market shares to purchase small competitors, leading to increased market concentration. An intent-based test would bridge the chasm between jurisprudence with a focus on market share and nascent competitors with little or no market share. Specifically, this Note recommends that courts adopt a three-part analysis it calls the* Facebook *Two-Step, which involves a factual inquiry into whether a merger is a nascent competitor acquisition, followed by a dispositive examination of the acquirer's intent and, only if that is inconclusive, continuing onto the traditional market share analysis. This fact-based test would closely scrutinize, and give deference to, the subjec-*

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tive intent of the acquirer when reviewing acquisitions of dominant firms' nascent competitors. An intent-based test would prevent the continued dominance and predatory tactics of today's large technology firms and provide courts and regulators with an avenue to bypass the burdensome market definition issues that have become the hallmark of antitrust litigation.

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INTRODUCTION

On June 3, 2019, the House of Representatives Judiciary Subcommittee on Antitrust, Commercial and Administrative Law ("Subcommittee") announced a bipartisan investigation into competition in digital markets.[1] Following its investigation, the House Subcommittee found that the markets for services like social networking, general search, and online advertising were highly concentrated.[2] Just one or two firms dominate these markets—Google in the general search market, Facebook and Twitter in social networking, Apple in personal computing software, and Amazon in online shopping.[3] The Subcommittee found that these large digital firms maintained their dominance through anticompetitive acquisitions of potential threats.[4]

With the recent spotlight on Big Tech's anticompetitive business practices, lawmakers from both parties, agencies, scholars, and the general public are asking how America's antitrust framework allowed these companies to control the U.S. economy.[5] In the early days of

1 *See* Press Release, H. Comm. on the Judiciary, House Judiciary Committee Launches Bipartisan Investigation into Competition in Digital Markets (June 3, 2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2051 [https://perma.cc/7NLQ-ZHT7].

2 *See generally* STAFF OF H. SUBCOMM. ON ANTITRUST, COM. & ADMIN. L., COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 11 (Comm. Print 2020) [hereinafter HOUSE REPORT].

3 *See generally id.* (the Subcommittee's investigation and subsequent report focused on the dominance of these four major technology firms).

4 *See id.* at 392 (noting that large technology companies have made more than 500 acquisitions of smaller firms since the rise of big tech); *see also* Herbert Hovenkamp, *Prophylactic Merger Policy*, 70 HASTINGS L.J. 45, 49 (2018).

5 *See* Robert Hart, *'Break Up Facebook'—Antitrust Lawsuit Enjoys Broad Bipartisan Support*, FORBES (Dec. 10, 2020, 9:36 AM), https://www.forbes.com/sites/roberthart/2020/12/10/break-up-facebook---antitrust-lawsuit-enjoys-broad-bipartisan-support/?sh=70588de12df0

antitrust enforcement, courts and regulators were aggressive about policing mergers that led to even marginal increases in competition.[6] As merger doctrine evolved, however, it began to focus primarily on the merging parties' market share, beginning with the structural presumption.[7] The structural presumption provides the government with a rebuttable presumption that a merger is anticompetitive when the market is trending toward concentration and the parties would have a combined market share above a certain threshold.[8] Scholars have argued that this over-reliance on market share shields dominant firm acquisitions of nascent competitors from scrutiny because the fractional or nonexistent market share of the target company would not change the dominant firm's share of the market.[9] The Facebook/Instagram merger illustrates this trend.[10] Instagram was a "modest and glitchy app" when Facebook purchased it in 2012.[11] More importantly, the fledgling Instagram had virtually no market share in Facebook's key revenue stream: online advertising.[12] Facebook's acquisition of Instagram likely did not change its online advertising market share at all

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[https://perma.cc/BZ8L-963E]. This spotlight is likely to intensify now that President Joe Biden has nominated Lina Khan, a progressive antitrust reformer and leader of the House Subcommittee's investigation in competition in digital markets, as Commissioner for the Federal Trade Commission. *See* Press Release, FTC, Lina Khan Sworn in as Chair of the FTC (June 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/06/lina-khan-sworn-chair-ftc [https://perma.cc/W5X5-ZX2K].

6 *See infra* Section II.A.

7 *See infra* Section II.A.

8 *See infra* Section I.B.

9 *See infra* notes 34–35 and accompanying text; *see also* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. Pa. L. Rev. 1879, 1893–94 (2020) (noting that the structural presumption framework may be sufficient where a target has already begun to compete in the acquirer's market, but it is more complex where the target offers only the possibility of future competition because those acquisitions do not fit into the presumption of illegality framework centered around participants currently in the market).

10 *See* Hemphill & Wu, *supra* note 9, at 1887–88.

11 Sam Dorman, *Facebook Encounters Bipartisan Backlash as AOC Supports Trump Administration's Lawsuit*, Fox News (Dec. 9, 2020), https://www.foxnews.com/politics/facebook-encounters-bipartisan-backlash-as-aoc-supports-trump-administrations-lawsuit [https://perma.cc/3BD9-WSZK]; *see* Letter from April J. Tabor, Acting Sec'y, FTC, to Thomas O. Barnett, Counsel for Facebook (Aug. 22, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822barnettfacebookcltr.pdf [https://perma.cc/CPJ7-FRR5]; Letter from April J. Tabor, Acting Sec'y, FTC, to Patricia R. Zeigler, Counsel for Instagram (Aug. 22, 2012), https://www.ftc.gov/sites/default/files/documents/closing_letters/facebook-inc./instagram-inc./120822zeiglerinstagramcltr.pdf [https://perma.cc/SNB2-W23Z].

12 *See* Elena Argentesi, Paolo Buccirossi, Emilio Calvano, Tomaso Duso, Alessia Marrazzo & Salvatore Nava, *Merger Policy in Digital Markets: An* Ex-Post *Assessment* 20 (CESifo Working Paper, Paper No. 7985, 2019) (finding that advertisers had limited interest in photo-sharing apps, like Instagram, at the time of the Facebook/Instagram merger); Brian O'Connell, *How Does Facebook Make Money? Six Primary Revenue Streams*, TheStreet (Oct. 23, 2018,

and, therefore, that market was not trending toward high concentration.[13] Because the market was not trending toward high levels of concentration, the structural presumption was not triggered, and so the Federal Trade Commission ("FTC") cleared the merger without further comment.[14]

A close examination of intent evidence could prevent potential anticompetitive acquisitions.[15] This Note argues for what it calls the *Facebook*[16] Two-Step, a two-part *Chevron*[17]-like test for courts and agencies to use when analyzing nascent competitor acquisitions.[18] Beginning at Step Zero, the court or agency should determine whether the merger is a nascent competitor acquisition by viewing the market share of the target, business plans of the acquirer, and the landscape of the industry.[19] If the merger is a nascent competitor acquisition, then the *Facebook* Two-Step framework applies, and the factfinder

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4:29 PM), https://www.thestreet.com/technology/how-does-facebook-make-money-14754098 [https://perma.cc/S69G-6XPH].

13 *See* Argentesi et al., *supra* note 12; Stephen King, *We Allowed Facebook to Grow Big by Worrying About the Wrong Thing*, CONVERSATION (Feb. 8, 2021, 2:07 PM), https://theconversation.com/we-allowed-facebook-to-grow-big-by-worrying-about-the-wrong-thing-152190 [https://perma.cc/2TYA-UGUV]. It is worth noting, however, that market definition is a huge focal point of antitrust analysis, yet the FTC's analysis of mergers is secret, so there is no way to know how the regulators defined the market in this scenario. FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1051 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("As in many antitrust cases, the analysis comes down to one issue: market definition."); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 774 (2018). In the public lawsuit, Facebook and the FTC have spent considerable time arguing over the proper way to define Facebook's market share, whether through daily active users, monthly active users, advertising revenue, etc. *See* Daniel Liss, *Today's Real Story: The Facebook Monopoly*, TECHCRUNCH (Aug. 19, 2021, 5:48 PM), https://techcrunch.com/2021/08/19/todays-real-story-the-facebook-monopoly/ [https://perma.cc/BN98-3PUH].

14 *See* Letter from April J. Tabor to Thomas O. Barnett, *supra* note 11; Letter from April J. Tabor to Patricia R. Ziegler, *supra* note 11. However, the public cannot know the exact cause of the FTC's clearance of the Facebook/Instagram merger because the agency does not release its rationale. *See* Christina C. Ma, *Into the Amazon: Clarity and Transparency in FTC Section 5 Merger Doctrine*, 87 ST. JOHN'S L. REV. 953, 955 (2013).

15 *See generally* Hemphill & Wu, *supra* note 9 (advocating for increased scrutiny of acquirer's intent to distinguish harmful from harmless acquisitions).

16 FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. substitute amended complaint filed Sept. 8, 2021).

17 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

18 Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (explaining *Chevron*'s two-step inquiry for courts' review of agency interpretations). The *Facebook* Two-Step is stylized to mimic the *Chevron* Two-Step and takes its name from the FTC's attempt to revisit the Facebook/Instagram merger. *See generally* Substitute Amended Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Sept. 8, 2021) [hereinafter Facebook Complaint].

19 *See infra* Section IV.A.1.

should proceed to Step One. At Step One, the court or agency should examine whether the acquirer has spoken about its intent by analyzing both firms' internal documents about the transaction, future business plans, and potential weaknesses and threats.[20] The Step One inquiry involves a close review of written communications, including emails, memoranda, instant messages, and text messages to reveal the subjective intent of key decisionmakers in the transaction.[21] If Step One is inconclusive, then Step Two begins the traditional market share analysis.[22] The *Facebook* Two-Step will allow courts and agencies to return to the goals of antitrust through protecting competition in its "incipiency."[23]

Part I will discuss antitrust law's myopic focus on price and market share, with Part II addressing the evolution of antitrust doctrine over time. Part III summarizes the Facebook/Instagram merger itself, while Part IV proposes a solution in the form of an analytical framework for courts to use when examining nascent competitor acquisitions that prioritizes intent evidence and bypasses burdensome market share inquiries where possible. Part V concludes and offers a path forward through the practical and focused inquiry detailed in Part IV—what this Note calls the *Facebook* Two-Step.

I. Antitrust Enforcement Focuses on Price and Market Share

Congress passed the Clayton Antitrust Act of 1914 ("Clayton Act")[24] to police mergers.[25] The Clayton Act proscribes any merger or acquisition whose "effect . . . may be substantially to lessen competi-

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20 *See infra* Section IV.A.2.

21 *See infra* Section IV.A.2.

22 *See infra* Section IV.A.3; *see also* U.S. Dep't of Just. & FTC, Horizontal Merger Guidelines 7 (2010), https://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf [https://perma.cc/897D-AQ57] (describing traditional market share analysis). In a typical merger case, the antitrust enforcement agencies measure the merging parties' market shares and the level of market concentration to determine whether the merger will have likely anticompetitive effects. *See id.* The traditional market share analysis typically has no role for intent evidence, or, if there is a role for intent evidence, it is limited to aid in understanding only the "likely effect of the monopolist's conduct." William J. Kolasky, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., What is Competition? (Oct. 28, 2002), https://www.justice.gov/atr/speech/what-competition [https://perma.cc/JE9S-UJSG].

23 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).

24 Pub. L. No. 63–212, 38 Stat. 730 (codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53).

25 *Id.* As a side note, from a competition law perspective, mergers may either be horizontal or vertical. This Note focuses on horizontal mergers, but its principles are broadly applicable to both.

tion, or to tend to create a monopoly."[26] A merger that results in a consolidation of large companies becomes a target for antitrust enforcement when the merger is likely to facilitate either unilateral or coordinated effects.[27] The market experiences the unilateral effect of a merger when two companies that produce close substitutes in a given market merge and thereby eliminate competition between the merging parties.[28] This elimination of competition can raise prices, reduce consumer choice or variety, diminish innovation or quality, or decrease output.[29] In contrast, the market perceives coordinated effects of a merger when the merger shrinks the number of competitors in the market, resulting in a market susceptible to anticompetitive collusion or conscious parallelism.[30] Conscious parallelism is a company's awareness of its competitors in the market and modification of its behavior accordingly, without actually agreeing or colluding.[31]

Large mergers among dominant firms have always attracted special antitrust attention because their prominent position in the market presumes likely anticompetitive effects.[32] However, in recent years, dominant firms' acquisitions of smaller companies have garnered significant interest.[33] Occasionally, dominant firms will acquire a nascent competitor—an up-and-coming new business that threatens the incumbent—to eliminate that competitor as a threat or to ensure the dominant firm's existing market position.[34] These acquisitions can slip through the enforcement cracks due to an overfocus on market share because that focus fails to account for the economic impact of disruptive competitors with little or no market share.[35]

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26 15 U.S.C. § 18; *see* 15 U.S.C. § 13.

27 U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 2.

28 *Id.*

29 *Id.* at 20.

30 *Id.* at 2.

31 *Id.*

32 *See, e.g.*, United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 92 (D.D.C. 2011) (enjoining merger that would result in only two digital do-it-yourself tax preparation services: H & R Block and TurboTax); FTC v. H.J. Heinz Co., 246 F.3d 708, 716–17 (D.D.C. 2001) (enjoining merger between two of the three dominant firms in the baby food market because of dangerous consolidation); FTC v. Staples, Inc., 970 F. Supp. 1066, 1093 (D.D.C. 1997) (enjoining Staples's acquisition of one of only two remaining office supply superstores in the country).

33 The House Report itself exemplifies the degree to which these acquisitions have garnered legislative attention. *See* HOUSE REPORT, *supra* note 2, at 11.

34 *Id.* These acquisitions are distinct from "killer acquisitions," which aim to acquire a nascent competitor in order to shut the competitor down completely by acquiring it in order to extinguish its business or product line. *Id.*

35 *See* Wu, *supra* note 13, at 793–94 (arguing that antitrust does not adequately address leading technology and media firms because they do not compete on price they compete for attention); Hemphill & Wu, *supra* note 9, at 1881.

Evidence of an acquirer's anticompetitive plan is instructive here, because this evidence may illuminate an exclusionary or anticompetitive motive.[36] An analysis of intent evidence would return to the goals of antitrust law[37] and is uniquely positioned to help enforcers reign in big tech because the anticompetitive effects of a merger where one of the parties has a small market share may be more visible to the industry than to the antitrust agencies.[38]

This Note will focus on enforcement from the perspective of the antitrust agencies: the Department of Justice Antitrust Division and the FTC. Although Congress also granted private parties the right to bring cases under the Clayton Act, enforcement agencies have the power to consciously shape antitrust policy and the Clayton Act contemplated the agencies' constant conversation with the courts to update the antitrust laws.[39]

A. The Hart-Scott-Rodino Act Forces Plaintiffs to Contrive a But-For World

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act")[40] is the starting point of most merger jurisprudence in the United States because the Act requires merging parties to obtain clearance from the government before consummating a transaction.[41] Under the HSR Act, the merger clearance process involves submitting an initial form to the government, which will sometimes make an additional request for more information known as a "Second Request."[42] While occasionally large mergers will result in the Department of Justice filing an injunction or the FTC bringing an administrative suit or filing an injunction, most decisions to bring a suit "occur behind an administrative curtain [and so] are relatively non-public."[43]

Additionally, during the premerger notification period, courts and regulators evaluate the potential transaction through a counterfactual lens—a "but-for" world in which the merger did not

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36 *See id.* at 1902.

37 *See* Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918) ("[I]ntent may help the court to interpret facts and to predict consequences.").

38 *See infra* Section IV.B; *infra* note 132 and accompanying text; *infra* Section II.C (describing Microsoft's understanding of Netscape's role within the larger operating system industry).

39 *See* HOUSE REPORT, *supra* note 2; Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 9 (1966).

40 15 U.S.C. § 18a.

41 *See* Ma, *supra* note 14, at 955; *see also* 15 U.S.C. § 18a.

42 *See* Ma, *supra* note 14, at 959.

43 *See id.* at 955.

ever happen—leading to a complicated analysis obscured from public view.[44] At their most public, merger review leads to a battle of the experts who attempt to convince the jury of their competing conception of the "but-for" world and the hypothetical level of competition therein.[45]

The Horizontal Merger Guidelines state that the agencies and courts are free to consider "any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition."[46] And, while antitrust enforcers may consider the disruptive role of a merging party with regards to innovation or price discipline, most often, the agency factfinders and litigation battles focus on economic testimony regarding market definition, instead of the role of nascent competitors.[47]

B. The Structural Presumption Facilitates Antitrust's Myopic Market Share Focus

Most merger enforcement analyses come down to economic and market effects because of the structural presumption. The structural presumption, first announced in *United States v. Philadelphia National Bank*,[48] and since codified in the Merger Guidelines, states that mergers that cause a "significant increase in concentration and result in highly concentrated markets are presumed to be likely to enhance market power."[49] Although the Court in *Philadelphia National Bank* avoided demarcating an exact threshold for this impermissible level of concentration, it stated that the merging parties' bank, set to control thirty percent of the financial services market in Philadelphia, surpassed an anticompetitive level of market concentration.[50] Subsequent jurisprudence has shown that the structural presumption alone, with

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44 *See id.*; Hemphill & Wu, *supra* note 9, at 1894.

45 *See id.*

46 U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 2. The Horizontal Merger Guidelines outline the enforcement policies and practices of the antitrust agencies regarding mergers involving actual or potential competitors. *See id.* at 1–2.

47 *See id.* at 3; FTC v. Whole Foods Mkt. Inc., 548 F.3d 1028, 1051 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

48 374 U.S. 321, 364 (1963).

49 U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 3; *see also Phila. Nat'l Bank*, 374 U.S. at 364.

50 *See Phila. Nat'l Bank*, 374 U.S. at 364. *Philadelphia National Bank*'s structural presumption remains controlling precedent. *See* FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001) (reaffirming structural presumption from *Philadelphia National Bank* and finding it is especially important when market concentration is very high); United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990) (reaffirming structural presumption remains controlling but emphasizes ways to rebut).

its commensurate focus on market share, fails to address increasing concentration in the technology sector.

II. The Evolution of Merger Doctrine

Early antitrust jurisprudence recognized that "unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; [and] that the spur of constant stress is necessary" to drive innovation.[51] A central theme of early antitrust policy was that "competitors, versed in the craft as no consumer can be, will be quick to detect opportunities for saving and new shifts in production, and be eager to profit by them."[52]

A. 1962–1974: "The Government Always Wins"

Antitrust doctrine and courts' interpretation of the Clayton Act centered around tamping "a rising tide of economic concentration in the American economy."[53] Congress amended the Clayton Act in response to increasing fears about clusters of extreme wealth and their impact on our political system.[54] For this reason, Congress, agencies, and courts interpreted mergers that caused even slight increases in economic concentration to be unlawful under the Clayton Act.[55]

Brown Shoe Co. v. United States[56] illustrates the Supreme Court's early merger jurisprudence through its no-tolerance approach and emphasis on market share.[57] The Court held that the merger at issue was unlawful because it resulted in a 5.6% to 7.2% increase in Brown Shoe's share of the market for men's, women's, and children's shoes.[58] Although the Court in *Brown Shoe* remarked that Congress was particularly interested in nascent competitor acquisitions with small market shares by "arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipi-

51 United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 427 (2d Cir. 1945).

52 *Id.*; *see* Brown Shoe Co. v. United States, 370 U.S. 294, 315 (1962) (explaining rationale for Clayton Act was to stem "rising tide of economic concentration").

53 *Brown Shoe*, 370 U.S. at 315 (discussing legislative history of Clayton Act and its focus on dangers of mergers to local economic control).

54 *See id.* at 315–16.

55 *See, e.g.*, *id.* at 345–46 (7.2% market share); United States v. Pabst Brewing Co., 384 U.S. 546, 550 (1966) (4.49% market share); United States v. Von's Grocery Co., 384 U.S. 270, 272 (1966) (7.5% market share).

56 370 U.S. 294 (1962).

57 *See id.* at 315–16, 326.

58 *Brown Shoe*, 370 U.S. at 345 (noting that Brown controlled 7.2% of America's "shoe stores" post-merger).

ency," a focus on the merging parties' combined market share remained prevalent.[59] For example, other cases at the time enjoined post-acquisition market shares as low as 4.5% through a rebuttable presumption of illegality.[60] In fact, the most recent Supreme Court merger case, *United States v. General Dynamics Corp.*,[61] focused entirely on assessing market shares to correctly apply the structural presumption.[62] This focus on market shares and the trend of strong enforcement led one dissenting justice at the time to remark in another case that "[t]he sole consistency" in the Court's merger jurisprudence is that "the Government always wins."[63]

B. 1974–Present: The Limited Application of the Potential Competitor Doctrine and a Continued Focus on Price and Market Share

Today, market share retains its importance; however, courts give little weight to the Clayton Act's original goal of protecting small and medium firms.[64] In 1974, the Supreme Court decided *United States v. Marine Bancorporation Inc.*,[65] one of its last merger decisions. *Marine Bancorporation* is the seminal case for the potential competitor doctrine, the legal framework applied to nascent competitor acquisitions when the target company does not yet compete with the acquirer.[66]

The potential competitor doctrine involves two distinct theories of anticompetitive harm.[67] The first is "perceived potential competition": the idea that a firm's perception that an acquirer may enter their market at some future point acts as a price-constraining force.[68]

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59 *See Brown Shoe*, 370 U.S. at 317; Hovenkamp, *supra* note 4, at 47.

60 *Pabst Brewing*, 384 U.S. at 550. The Government presented evidence that the tenth-largest brewer in America acquired the eighteenth-largest brewer in the nation, resulting in a combined brewing company with a 4.49% market share. The Court enjoined the merger due in part to this market share, combined with a trend toward concentration in the beer industry. *Id.* at 552–53.

61 415 U.S. 486 (1974).

62 *Id*. at 501 (explaining that, because of the unique features of the market for coal, past performance could not accurately represent future competitive power, and so the structural presumption could not apply in that market).

63 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

64 *Cf. Brown Shoe*, 370 U.S. at 315–16 (summarizing congressional fears surrounding the "rising tide of economic concentration" and the importance of antitrust law as it relates to protecting small, local businesses).

65 418 U.S. 602 (1974).

66 *See id.*; Hemphill & Wu, *supra* note 9, at 1893–96.

67 *See* Hemphill & Wu, *supra* note 9, at 1894.

68 *See* United States v. Aetna Inc., 240 F. Supp. 3d 1, 75 (D.D.C. 2017) (citing *Marine Bancorp.*, 418 U.S. at 624–25).

In this way, the in-market firm will refrain from raising prices so as not to make entry even more attractive to the out-of-market firm.[69] The second theory of harm in the potential competitor doctrine is "actual potential competition."[70] An actual potential competition theory of harm requires the government to show that, absent the merger, the firm outside of the market would have entered the market.[71] This theory of harm, which requires the plaintiff to show that the target "'probably' would have entered the market [and] its entry would have had pro-competitive effects," involves defining the but-for world with near-impossible certainty.[72]

Marine Bancorporation's requirement that the plaintiff show either that the potential entrant constrains prices in the market or a "reasonable probability" that the target would have expanded on its own absent the merger has stunted potential competition doctrine's application to nascent competitor acquisitions.[73] In fact, it has reduced the potential competition doctrine to "a never-embraced theory for antitrust liability."[74] In contrast, actual competition remains the conventional framework for analyzing Clayton Act § 7 merger claims.[75] Under this framework, economic evidence is used to calculate market definition,[76] which is frequently the most contentious issue in merger litigation.[77] Market definition is the linchpin for identifying transactions where "the effect of [the] acquisition may be substantially to lessen competition, or to tend to create a monopoly."[78]

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69 *See* Hemphill & Wu, *supra* note 9, at 1894.

70 *See Aetna*, 240 F. Supp. 3d at 75 (citing *Marine Bancorp.*, 418 U.S. at 625).

71 *See id.*

72 FTC v. Steris Corp., 133 F. Supp. 3d 962, 966, 978 (N.D. Ohio 2015); *see* Hemphill & Wu, *supra* note 9, at 1894.

73 *See* Hemphill & Wu, *supra* note 9, at 1893–96 (discussing potential competition doctrine's questionable applicability to nascent competitor acquisitions in part because the possible future entrant in potential competition doctrine is the well-established acquirer; whereas, in nascent competitor acquisitions, competition is generated by the target).

74 *Aetna*, 240 F. Supp. 3d at 74.

75 *Id.*

76 *See* Hovenkamp, *supra* note 4, at 56. When a hypothetical monopolist would be able to raise prices to a certain level, known as the small but significant nontransitory increase in price ("SSNIP"), the government intervenes. *See* U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 9–10 (describing how agencies use and calculate a SSNIPs for different industries and markets).

77 FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1051 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) ("As in many antitrust cases, the analysis comes down to one issue: market definition.").

78 *See* Hovenkamp, *supra* note 4, at 56 (quoting 15 U.S.C. § 18); *Whole Foods Mkt.*, 548 F.3d at 1051 (Kavanaugh, J., dissenting).

Although market share remains a defining feature of merger jurisprudence, the agencies recently cleared a merger with an extremely high level of market concentration.[79] In July 2019, the Antitrust Division cleared the T-Mobile/Sprint merger, pending certain divestitures, even though the telecommunications services market was already highly concentrated.[80] The approval of this merger between two of the four largest competitors resulted in a highly concentrated market and contradicted the agencies' own guidance, which had previously presumed that mergers reducing the number of participants in a market from four to three were anticompetitive.[81]

Before 1974, courts acknowledged that effectuating Congress's goal to protect competition in its incipiency may sometimes lead to higher prices for consumers.[82] Now, however, consumer cost savings are key to courts' analysis of a proposed merger.[83] This current price-centric analysis makes technology mergers particularly vexing for courts and regulators—most tech firms offer free products to consumers and only charge merchants for advertising.[84]

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79 *See* Melody Wang & Fiona Scott Morton, *The Real Dish on the T-Mobile/Sprint Merger: A Disastrous Deal from the Start*, PROMARKET (Apr. 23, 2021), https://promarket.org/2021/04/23/dish-t-mobile-sprint-merger-disastrous-deal-lessons/ [https://perma.cc/SZ76-QC5G].

80 Press Release, U.S. Dep't of Justice, Court Enters Final Judgment in T-Mobile/Sprint Transaction (Apr. 1, 2020), https://www.justice.gov/opa/pr/court-enters-final-judgment-t-mobiles-print-transaction [https://perma.cc/TQA6-J7A5]; Brian X. Chen, *T-Mobile and Sprint are Merging. What Does That Mean for You?*, N.Y. TIMES (July 26, 2019), https://www.nytimes.com/2019/07/26/technology/personaltech/t-mobile-sprint-merger.html [https://perma.cc/PV3F-8VXX]. The only two other major competitors in the market for telecommunications services are now Verizon and AT&T. Note that competitive issues can be resolved by negotiation and settlement, as was the case here, where the merging parties agreed to sell off Sprint's prepaid wireless business.

81 Ernesto Falcon, *The T-Mobile and Sprint Merger Is Blatantly Anticompetitive*, ELEC. FRONTIER FOUND. (July 31, 2019), https://www.eff.org/deeplinks/2019/07/t-mobile-and-sprint-merger-blatantly-anticompetitive [https://perma.cc/NQX7-JUP8]; *see Ex Parte* Submission of the United States Department of Justice at 15, *In the Matter of Economic Issues in Broadband Competition: A National Broadband Plan for Our Future*, FCC No. 09-51, https://www.justice.gov/sites/default/files/atr/legacy/2010/01/04/253393.pdf [https://perma.cc/6H6S-5XFR] (commenting that mergers that reduce the number of participants in the market from four to three are presumed anticompetitive).

82 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

83 *See* FTC v. Staples, Inc., 970 F. Supp. 1066, 1075–76 (D.D.C. 1997) (granting Commission's injunction to prevent the merger of Staples and Office Depot in part because Staples' prices were thirteen percent higher in markets where they did not compete with either Office Depot or Office Max, suggesting that higher prices to consumers are now a key consideration of antitrust law); United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 79 (D.D.C. 2011) (enjoining H&R Block's absorption of TaxACT because TaxACT's unconventional pricing strategy played an important role in keeping prices in the digital do-it-yourself tax software market low).

84 *See* Wu, *supra* note 13, at 772 (highlighting that regulators and courts may be perplexed by free products and suggesting an alternative framework for assessing small but significant non-transitory increases in attention, not price).

C. Applying 20th Century Law to a 21st Century Problem

When the Supreme Court last reviewed a merger case, the internet was still in its infancy.[85] On the day that the Supreme Court decided *United States v. General Dynamics Corp.*,[86] email was available to a select few individuals at the U.S. Department of Defense, and no one else.[87] Today, the internet is an essential feature of every facet of American life—from shopping and socializing to working and political speech.[88]

Antitrust law dealt with the horizon of the internet when the U.S. District Court for the District of Columbia employed executive intent to punish Microsoft's anticompetitive conduct in *United States v. Microsoft Corp*.[89] Bill Gates, then–Chief Executive Officer ("CEO") and Chairman of Microsoft, wrote a memo to his employees forecasting the next twenty years in the technology industry, and "assign[ing] the Internet the highest level of importance."[90] This memo, known as the Internet Tidal Wave Memo, perfectly predicted the technological advancements of the next two decades, and how nascent competitors, particularly Netscape, would use the internet to gradually overtake

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85 Gil Press, *A Very Short History of the Internet and the Web*, FORBES (Jan. 2, 2015, 10:48 AM), https://www.forbes.com/sites/gilpress/2015/01/02/a-very-short-history-of-the-internet-and-the-web-2/?sh=5713df9b7a4e [https://perma.cc/BT5B-ZFRZ].

86 United States v. General Dynamics Corp., 415 U.S. 486, 501–03 (1974).

87 Press, *supra* note 85.

88 *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 755 (2017) (noting big tech's ecommerce dominance); Wolf Richter, *Nothing Can Stop the Shift to Online Shopping*, BUS. INSIDER (Nov. 20, 2017, 6:00 PM), https://www.businessinsider.com/nothing-can-stop-the-shift-to-online-shopping-2017-11 [https://perma.cc/7BXA-74L9] (describing internet's role in online retail prior to COVID); Jessica Elgot, *From Relationships to Revolutions: Seven Ways Facebook Has Changed the World*, GUARDIAN (Aug. 28, 2015, 10:26 PM), https://www.theguardian.com/technology/2015/aug/28/from-relationships-to-revolutions-seven-ways-facebook-has-changed-the-world [https://perma.cc/P989-7T5L]; Philippa Fogarty et al., *Coronavirus: How the World of Work May Change Forever*, BBC: WORKLIFE, https://www.bbc.com/worklife/article/20201023-coronavirus-how-will-the-pandemic-change-the-way-we-work [https://perma.cc/5PH2-UX78] (describing the internet's influence over workplace changes during the COVID-19 pandemic and probable influence in the time following the pandemic); Jaclyn Diaz, *Jack Dorsey Says Trump's Twitter Ban Was 'Right Decision' but Worries About Precedent*, NPR (Jan. 14, 2021, 1:27 AM), https://www.npr.org/2021/01/14/956664893/twitter-ceo-tweets-about-banning-trump-from-site [https://perma.cc/D9DJ-NP4U] (describing internet's influence over political speech).

89 United States v. Microsoft Corp. (*Microsoft I*), 87 F. Supp. 2d 30 (D.D.C. 2000), *aff'd in part*, *rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

90 Memorandum from Bill Gates, Chief Exec. Officer, Microsoft, to Executive Staff and Direct Reports 1 (May 26, 1995) [hereinafter Internet Tidal Wave Memo], https://www.justice.gov/sites/default/files/atr/legacy/2006/03/03/20.pdf [https://perma.cc/SE8T-U9KU]; *see* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 29 (D.D.C. 1999) (order stating findings of fact).

Microsoft's products.[91] In the Internet Tidal Wave Memo, Gates wrote that Microsoft needed to improve its products and services, but that "this alone won't get people to switch away from Netscape" and back to Microsoft.[92] When the Justice Department sued Microsoft over anticompetitive conduct related to Netscape, the district court considered the statements of Gates's intent in the Internet Tidal Wave Memo.[93] This Memo provided a framework for analyzing Microsoft's own perception of the threat to their products, even if Netscape at the time was a substitute for Microsoft's Windows Operating System.[94] Therefore, the court in *Microsoft* used information from inside the market—those who best understood the competitive significance of Netscape—in the form of subjective acquirer intent, to assist in its ultimate finding of anticompetitive conduct.[95]

"Identifying anticompetitive conduct is a familiar and pervasive problem in antitrust . . . ."[96] While intent evidence plays a role in solving this problem in antitrust conspiracy[97] and monopolization cases,[98] scholars have begun to call for the use of intent evidence, or contemporaneous statements documenting the acquirer's subjective state of mind in consummating the transaction, in nascent competitor acquisitions.[99] This call rings loudest in the technology sphere because one new product or idea can suddenly reshape the landscape, displacing an incumbent firm altogether.[100] Antitrust has failed to protect growth and innovation by nascent technology firms[101] because the actual potential competition framework is too rigorous or the target has not yet entered the acquirer's market.[102] Although intent currently plays little if any role when analyzing the effect of a merger between two firms,[103]

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91 *See Microsoft*, 84 F. Supp. 2d at 29.

92 *See id.* at 43 (quoting Internet Tidal Wave Memo).

93 *See id.*; *Microsoft I*, 87 F. Supp. 2d at 45.

94 *See* Hemphill & Wu, *supra* note 9, at 1883–84.

95 *See id.*; *Microsoft I*, 87 F. Supp. 2d at 45.

96 *See* Hemphill & Wu, *supra* note 9, at 1882.

97 15 U.S.C. § 1; *see also* Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 658–59 (2001).

98 15 U.S.C. § 2; *see also* Cass & Hylton, *supra* note 97, at 658–59; United States v. Microsoft Corp. (*Microsoft II*), 253 F.3d 34, 59 (D.C. Cir. 2001).

99 *See generally* Hemphill & Wu, *supra* note 9 (advocating for the use of evidence, including internal communications, to determine whether a transaction is anticompetitive).

100 *See id.* at 1886–87; HOUSE REPORT, *supra* note 2, at 394.

101 *See* Wu, *supra* note 13, at 773 n.11 (describing antitrust's lack of emphasis on lack of innovation as a harm in favor of price- and money-related harms).

102 *See* Hemphill & Wu, *supra* note 9, at 1895.

103 *See* Kolasky, *supra* note 22 (explaining minimal and cautious use of intent evidence in antitrust).

the district court's use of intent in *Microsoft* to analyze single-firm conduct shows that courts are capable of analyzing subjective acquirer intent in a merger review.[104]

III. The Facebook/Instagram Merger Exemplifies the Failure of Nascent Competitor Jurisprudence

Facebook's acquisition of Instagram captured national attention because it epitomized the shortcomings of nascent competitor jurisprudence.[105] In 2012, when Facebook purchased Instagram, the fledgling photo-sharing application had a mere thirteen employees.[106] While the general public viewed Instagram as a means of posting heavily filtered photos,[107] Facebook identified Instagram as a competitive threat to its dominance.[108] In fact, internal documents from Facebook at the time show that executives acquired Instagram in part to neutralize a competitor.[109] Facebook's strategy regarding emerging competitors, like Instagram, was to "spend 5-10% of [their] market cap every couple years" as a "land grab" "to 'shore up' [their] position,"[110] because, to the company, "it is better to buy than compete."[111]

If Facebook's motives were so clear from their internal documents, then why was the merger allowed through the HSR Act approval process?[112] While the FTC keeps their merger analysis secret,[113]

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104 *See Microsoft I*, 87 F. Supp. 2d 30, 45 (D.D.C. 2000).

105 *See* Nicholas Carlson, *Facebook Buys Instagram for $1 Billion*, Bus. Insider (Apr. 9, 2012, 1:02 PM), https://www.businessinsider.com/facebook-buys-instagram-2012-4 [https://perma.cc/65U4-M397]; *see generally* Facebook Complaint, *supra* note 18. The Facebook Complaint also addresses the social network's allegedly anticompetitive acquisition of WhatsApp. *See id.* at 35–42; Parmy Olson, *Facebook Closes $19 Billion WhatsApp Deal*, Forbes (Oct. 6, 2014, 1:25 PM), https://www.forbes.com/sites/parmyolson/2014/10/06/facebook-closes-19-billion-whatsapp-deal/?sh=1e7ec7245c66 [https://perma.cc/M8TU-3VU2].

106 *See* Carlson, *supra* note 105.

107 B. Heater, *Instagram Goes 2.0, Gets Even More Filter-Happy*, Engadget (Sept. 20, 2011), https://www.engadget.com/2011-09-20-instagram-goes-2-0-gets-even-more-filter-happy.html [https://perma.cc/8U52-F6ZA].

108 *See id.*

109 *See* Email from Mark Zuckerberg, Chief Exec. Officer, Facebook (Apr. 9, 2012, 10:09 AM), https://judiciary.house.gov/uploadedfiles/0006760000067601.pdf [https://perma.cc/HH5Z-PX3T]; *see also* House Report, *supra* note 2, at 12–13 (describing Facebook's anticompetitive acquisition of Instagram as a "threat" to Facebook).

110 House Report, *supra* note 2, at 12–13 & n.11 (quoting statement of a Facebook senior executive).

111 Facebook Complaint, *supra* note 18, at 1.

112 Alexei Oreskovic, *FTC Clears Facebook's Acquisition of Instagram*, Reuters (Aug. 22, 2012, 8:40 PM), https://www.reuters.com/article/us-facebook-instagram/ftc-clears-facebooks-acquisition-of-instagram-idUSBRE87L14W20120823 [https://perma.cc/94RW-SCLT]; Letter from

metrics of antitrust harm—higher prices, reduced output, and other monetary harms—are poorly suited to technology companies.[114] Because Facebook and Instagram are free services, the FTC likely believed that the merger would not adversely affect the consumer through higher prices or reduced output.[115] Perhaps, as a result, the merger was able to slip through the cracks in the antitrust enforcement regime.[116] An alternative possibility is that because Instagram's competitive significance was unclear at the time of the merger, regulators were unsure how its acquisition would affect the market.[117] Whatever the cause, commentators across political parties have long viewed the FTC's clearance of the Facebook/Instagram merger as a costly misstep, even before the FTC filed its complaint.[118]

As a result of the Instagram merger, Facebook's economic power is unchallenged.[119] The platform languishes, as early antitrust scholars predicted, high on the narcotic of immunity from competition and leaving users worse off.[120] Since acquiring Instagram in 2012, Facebook has exposed the personally identifiable information of up to

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April J. Tabor to Thomas O. Barnett, *supra* note 11; *see* Peter Thiel, *Competition Is for Losers*, WALL ST. J. (Sept. 12, 2014, 11:25 AM), https://www.wsj.com/articles/peter-thiel-competition-is-for-losers-1410535536 [https://perma.cc/U9PJ-GC7N].

113 *See* Wu, *supra* note 13, at 774.

114 *See id.* at 775.

115 *See id.* at 774, 775 n.21; U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 4 (explaining that antitrust agencies look to evidence that the "merging parties intend to raise prices [or] reduce output" to evaluate the potential effects of a merger).

116 *See* Wu, *supra* note 13, at 775 n.21 (suggesting an alternative explanation that Instagram's lack of advertising revenue led regulators to clear the merger).

117 *See* Hemphill & Wu, *supra* note 9, at 1880–81, 1907 (explaining enforcement inadequacies when there is little or no direct competition because the target has such a small market share).

118 John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49, 109 (2016); Hart, *supra* note 5.

119 *See* Wu, *supra* note 13, at 794 (explaining that, in 2017, the average American spent 1,250 minutes per month on Facebook/Instagram, but spent 250 minutes per month on Snapchat and less than 200 minutes on Twitter). Facebook and the FTC have spent considerable time arguing over the proper way define Facebook's market share: daily active users, monthly active users, advertising revenue, etc. *See* Daniel Liss, *Today's Real Story: The Facebook Monopoly*, TECHCRUNCH (Aug. 19, 2021, 5:48 PM), https://techcrunch.com/2021/08/19/todays-real-story-the-facebook-monopoly/ [https://perma.cc/Q4EB-5JEB] (arguing that the correct metric to assess Facebook's market share is daily active users multiplied by average revenue per user, which would give Facebook a market share of over ninety percent); *see also Alcoa*, 148 F.2d 416, 427 (2d Cir. 1945) (warning of unchallenged economic power's effect on innovation).

120 *Alcoa*, 148 F.2d at 427; Mark MacCarthy, *Do Not Expect Too Much from the Facebook Antitrust Complaints*, BROOKINGS (Feb. 3, 2021), https://www.brookings.edu/blog/techtank/2021/02/03/do-not-expect-too-much-from-the-facebook-antitrust-complaints/ [https://perma.cc/B7XP-N3TS] (theorizing that restored competition through the FTC's lawsuit against Facebook will lead to improved user experiences).

eighty-seven million of its users,[121] seen a spike in false and misleading information,[122] and served as a vector for foreign governments to influence American elections.[123] By allowing Facebook to "land grab" in order to "shore up" their position in the market for social networking,[124] the antitrust regime abdicated its role as a guardian of consumer welfare.[125] Today, proponents of the FTC's lawsuit are optimistic that restoring competition will rectify these issues,[126] but most scholarship is focused on what could have been done to prevent the Instagram acquisition and resulting loss of competition.[127]

IV. A *CHEVRON* FRAMEWORK FOR ANTITRUST: THE *FACEBOOK* TWO-STEP FOR NASCENT COMPETITOR ACQUISITIONS ALLOWS FOR A TARGETED INTENT FOCUS WHILE RETAINING THE IMPORTANCE OF MARKET SHARE

One of the goals of antitrust policy is to facilitate a market of many small firms because competition breeds innovation.[128] In order to protect consumers in the attention economy and return to the ideals of antitrust law, courts and regulators should shift their focus to the intent of a merger.[129] Courts should prioritize intent by adopting a two-part test when analyzing nascent competitor acquisitions. First,

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121 Dan Patterson, *Facebook Data Privacy Scandal: A Cheat Sheet*, TECH REPUBLIC (July 30, 2020, 11:37 AM), https://www.techrepublic.com/article/facebook-data-privacy-scandal-a-cheat-sheet/ [https://perma.cc/B2TY-L9SU]; *see also* HOUSE REPORT, *supra* note 2, at 14 ("In the absence of competition, Facebook's quality has deteriorated over time, resulting in worse privacy protections for its users . . . .").

122 Davey Alba, *On Facebook, Misinformation Is More Popular Now than in 2016*, N.Y. TIMES (Oct. 12, 2020, 6:00 AM), https://www.nytimes.com/2020/10/12/technology/on-facebook-misinformation-is-more-popular-now-than-in-2016.html [https://perma.cc/G2VS-39MS].

123 Mike Isaac & Daisuke Wakabayashi, *Russian Influence Reached 126 Million Through Facebook Alone*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/technology/facebook-google-russia.html [https://perma.cc/3R7T-3ZPX].

124 HOUSE REPORT, *supra* note 2, at 12–13.

125 *See* Kolasky, *supra* note 22, at 8 n.7.

126 MacCarthy, *supra* note 120.

127 *See, e.g.*, Wu, *supra* note 13, at 774; Hemphill & Wu, *supra* note 9, at 1882; Tim Wu, *The Case for Breaking Up Facebook and Instagram*, WASH. POST (Sept. 28, 2018, 1:11 PM), https://www.washingtonpost.com/outlook/2018/09/28/case-breaking-up-facebook-instagram/ [https://perma.cc/EPD8-V89T]. Significant scholarship is dedicated to the social media market as competing on attention, not price metrics. *See* Newman, *supra* note 118, at 109; *see* O'Connell, *supra* note 12.

128 *See* Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U. MICH. J.L. REFORM 1, 45, 116 (2015) (arguing that the Sherman Act "was principally about protecting small business from big business" and that easy mergers stifle innovation by large companies when they can buy tiny innovators).

129 *See* Hemphill & Wu, *supra* note 9, at 1882; *see generally* Wu, *supra* note 13, at 771–72

the factfinder should examine all the acquirer's internal documents regarding current and prospective competitors, business strategy, and the target company—from the date that the nascent competitor was founded until the date of the proposed merger. Only after completing this first pass review should the factfinder engage in the typical market share analysis.

This way, when deciding whether to clear a merger, the antitrust regime can use intent to pull back the curtain to review what is often clear to business analysts—the acquirer's anticompetitive motives for the merger.[130] During the Instagram acquisition, the business community readily identified Facebook's motivation for purchasing its miniscule rival: to stifle Instagram's disruptive threat in mobile photo sharing.[131] If courts and regulators had adopted the two-part test outlined above, the FTC would likely not have cleared the Facebook/Instagram merger and consumers would benefit from increased competition in social networking.[132]

This Part provides a framework to assist regulators and courts in evaluating nascent competitor transactions where the purpose and likely effect of the acquisition is obvious to the industry but a mystery to enforcers because of a small target company market share.[133] First, Section IV.A describes what this Note calls the *Facebook* Two-Step, a two-part test focusing on intent evidence, modeled after the famous *Chevron* Two-Step. Next, Section IV.B explains that an application of the *Facebook* Two-Step would have allowed regulators to enjoin the Facebook/Instagram merger because the dispositive role of intent evidence in the *Facebook* Two-Step would reveal that Facebook purchased Instagram "to 'shore up' [their] position."[134] Section IV.C outlines how the *Facebook* Two-Step effectuates the goal of antitrust to protect competition in its "incipiency"[135] and will allow courts and regulators to utilize industry knowledge as part of the competitive ef-

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(explaining that the attention economy may stunt antitrust enforcement against technology firms because those firms do not compete on price metrics).

130 *See* Wu, *supra* note 13, at 774; Om Malik, *Here Is Why Facebook Bought Instagram*, GIGAOM (Apr. 9, 2012), https://gigaom.com/2012/04/09/here-is-why-did-facebook-bought-instagram/ [https://perma.cc/Z673-3NJ8].

131 *See* Wu, *supra* note 13, at 775 (citing Malik, *supra* note 130).

132 MacCarthy, *supra* note 120 (explaining *Facebook* lawsuit plaintiff's hope that the platform would improve its privacy standards in the presence of increased competition).

133 *Facebook Buys Instagram for $1 Billion, Turns Budding Rival into Its Standalone Photo App*, TECHCRUNCH (Apr. 9, 2012, 1:06 PM), https://techcrunch.com/2012/04/09/facebook-to-acquire-instagram-for-1-billion/ [https://perma.cc/24JY-GJW6].

134 *See* HOUSE REPORT, *supra* note 2, at 12–13.

135 Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1952, 2040

fects analysis. Finally, Section IV.D summarizes competing proposals and explains how the *Facebook* Two-Step's departure from a market share analysis, with a fact-specific inquiry, will allow district courts to be better informed without overburdening the judicial system.

A. The Facebook *Two-Step*

The *Facebook* Two-Step would function as a bifurcated legal framework for examining nascent competitor acquisitions, based on the well-known *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[136] framework for analyzing agency decisions.[137] Although it is known as the *Chevron* Two-Step, the *Chevron* framework involves an initial characterization step, followed by two analysis steps.[138] When reviewing agency decisions at Step Zero, the factfinder conducts an initial inquiry into whether the *Chevron* test applies.[139] At Step One, the court determines whether Congress has spoken to the issue at hand and whether their intent is "clear" and "unambiguously expressed."[140] If Congress's intent is not clear, the court continues to Step Two; at this step the court determines whether the agency's reasonable interpretation deserves deference.[141]

The *Facebook* Two-Step is a parallel framework for analyzing dominant firm purchases of smaller innovators by determining whether the merger is a nascent competitor acquisition, analyzing the intent of the merging parties and, only if the intent analysis is inconclusive, examining market share data. Beginning at Step Zero, the court or agency should decide if the merger is a nascent competitor acquisition by evaluating the market share of the target, the business plans of the acquirer, and the landscape of the industry. If the merger is a nascent competitor acquisition, then the *Facebook* Two-Step framework applies, and the factfinder should proceed to Step One. At Step One, the court or agency should examine whether the acquirer has demonstrated an anticompetitive intent by analyzing both firms' internal documents about the transaction, future business plans, po-

(2021); *see* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); Hovenkamp, *supra* note 4, at 51–55 (explaining the "incipiency" standard).

136 467 U.S. 837, 842–45 (1984).

137 The *Facebook* Two-Step is stylized to mimic the *Chevron* Two-Step and takes its name from the FTC's case to rectify the Facebook/Instagram merger, FTC v. Facebook, Inc., No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021).

138 Catherine M. Sharkey, *Cutting in on the Chevron Two-Step*, 86 FORDHAM L. REV. 2359, 2362 (2018).

139 *See* Sunstein, *supra* note 18, at 191.

140 *Chevron*, 467 U.S. at 842–43; *see* Sunstein, *supra* note 18, at 190–91.

141 Sharkey, *supra* note 138, at 2362; *Chevron*, 467 U.S. at 865–66.

tential market weaknesses, and competitive threats. If the factfinder is unable to discern an anticompetitive intent behind the transaction during the Step One review, the factfinder should begin the traditional market share analysis at Step Two.[142] The *Facebook* Two-Step will allow courts and agencies to return to the goals of antitrust by protecting competition in its "incipiency."[143]

1. Step Zero: Does the Facebook *Two-Step Framework Apply?*

Because the *Facebook* Two-Step would apply only to nascent competitor acquisitions, the framework calls for an initial characterization step. To determine if a merger involves a nascent competitor acquisition, the court or agency factfinder should determine whether the target firm (1) is planning to or could theoretically enter a dominant acquiring firm's market[144] and (2) has a market share insignificant enough to fall below the structural presumption threshold.[145] The uncertainty surrounding a nascent competitor's significance underscores the importance of a robust inquiry at the characterization phrase.[146] Because a nascent competitor's small market share allows it to slip through the structural presumption undetected during an acquisition, correctly identifying nascent competitors at the outset will preserve a fact-intensive intent analysis for only those acquisitions poorly suited to a traditional market share analysis.[147]

During the Step Zero inquiry, the factfinder should review and evaluate facts including the respective market positions of the target and acquiring firms, the target's future business plan, the acquirer's

142 *See* U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 7 (describing traditional market share analysis). In a typical merger case, the antitrust enforcement agencies measure the merging parties market shares and the level of market concentration in order to determine, whether the merger will have likely anticompetitive effects. *See id.* The traditional market share analysis typically has no role for intent evidence, or, if there is a role for intent evidence, it is limited to aid in understanding only the "likely effect of the monopolist's conduct." *See* Kolasky, *supra* note 22.

143 *See* Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).

144 HOUSE REPORT, *supra* note 2, at 394.

145 *See* Wu, *supra* note 13, at 793–94 (explaining that the structural presumption and focus on market share results in an antitrust blind spot); Hemphill & Wu, *supra* note 9, at 1907 (highlighting that in nascent competitor acquisitions, there is little or no direct competition when the merger is consummated because the target has such a small market share).

146 *See* Hemphill & Wu, *supra* note 9, at 1887.

147 *See id.* at 1907. A comprehensive analysis at the characterization stage will address a major critique of intent evidence—that "[t]raipsing through the warehouses of business in search of misleading evidence both increases the cost of litigation and reduces the accuracy of decisions"—by ensuring that only nascent competitor acquisitions will undergo a time-consuming intent inquiry. *Cf.* Cass & Hylton, *supra* note 97, at 732 n.198 (quoting A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989)).

perception of the target's future potential, as well as industry publications.[148] A careful inquiry is particularly essential in digital markets, where the pace of innovation can make potential competitors difficult to identify, and where nascent competitors play a special role in displacing incumbents.[149] Because of the role of smaller startups, technology firms are particularly aggressive in surveilling and neutralizing nascent competitors, even when the target firm appears years or decades away from meaningful competition with the incumbent.[150]

Suppose that Microsoft in the 1990s, rather than attempting to drive Netscape out of the market by self-preferencing their own browser, had attempted to purchase Netscape.[151] The *Facebook* Two-Step framework would apply to this acquisition because (1) Microsoft believed that Netscape could theoretically and disruptively enter the operating system market through its browser,[152] and (2) Netscape was not in the operating system market.[153] Because of this, the acquisition would not trigger the structural presumption.[154] Therefore, the *Facebook* Two-Step would apply to Microsoft's hypothetical purchase as Netscape was a nascent competitor, and the factfinder would proceed to Step One of the analysis.

2. *Step One: What Was the Subjective Intent of the Merging Parties?*

Incorporating an automatic intent evidence analysis into Clayton Act § 7 jurisprudence in Step One of the *Facebook* Two-Step would allow agencies and courts to prevent anticompetitive acquisitions of nascent competitors with little or no market share, while reigning in big tech's anticompetitive mergers and resolving the uncertain place of intent evidence in merger doctrine.[155] The *Microsoft* case illustrates the types of intent evidence courts should consider because the court

148 *See id.* at 1883–89 (describing what makes a competitor "nascent").

149 HOUSE REPORT, *supra* note 2, at 394.

150 *Id.*; *see also* Internet Tidal Wave Memo, *supra* note 90 (acknowledging that nascent competitors would disrupt Microsoft's business "over the next several years").

151 *See* Hemphill & Wu, *supra* note 9, at 1883.

152 *See id.* at 1884; *see also* United States v. Microsoft Corp., 84 F. Supp. 2d 9, 29 (D.D.C. 1999) (summarizing Microsoft's fears about Netscape, originally outlined in the Internet Tidal Wave Memo); *Microsoft II*, 253 F.3d 34, 60 (D.C. Cir. 2001) (explaining disruptive potential for browsers like Netscape to enable users to download applications from the Internet and rendering operating systems, like Microsoft's Windows, irrelevant or obsolete).

153 *Microsoft II*, 253 F.3d at 60.

154 *Id.*

155 *See generally* Hemphill & Wu, *supra* note 9.

used a memorandum from a high-ranking Microsoft official.[156] As discussed below, Step One provides a framework for discerning a company's anticompetitive intent in a fast-paced technological environment.[157] Cementing intent evidence as dispositive at Step One of a Two-Step inquiry will clarify the uncertain place of intent in merger doctrine, while preventing a costly and unnecessary battle of the experts surrounding market definition.[158]

Determining the subjective intent of the merging companies is a difficult but not impossible task.[159] Courts are capable of discerning intent and, although the use of intent evidence is controversial in antitrust, the court famously used intent evidence in *United States v. Microsoft* to determine whether single-firm conduct was anticompetitive.[160] At Step One of the *Facebook* Two-Step, courts should conduct an intent analysis by examining an acquirer's "internal corporate memoranda and comments by officers of the firm" to uncover its subjective intent in purchasing the target.[161] The factfinder should examine the acquirer's internal documents regarding current and prospective competitors, business strategy, and the target company from the date that the nascent competitor was founded until the date of the proposed merger.

Consideration of intent evidence at Step One would assist courts in understanding the likely effect of the acquiring firm's conduct.[162] If the factfinder uncovers anticompetitive intent during the Step One inquiry, the merger should be enjoined. This dispositive inquiry will allow courts, regulators, and merging parties to avoid a lengthy and expensive battle over the proper market definition where the subjective intent of the merging parties is clearly anticompetitive.[163]

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156 *See Microsoft*, 84 F. Supp. 2d at 29; FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1045 (D.C. Cir. 2008) (considering an email from Whole Foods CEO to the board of directors stating that Whole Foods needed to purchase Wild Oats to "[e]liminat[e]" them).

157 *See id.*; *see also* Hemphill & Wu, *supra* note 9, at 1895 (explaining the particular importance of disruptive nascent competitive in technology spheres, where a new entrant could render a former dominant firm's technology completely obsolete).

158 *See* U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 3; *Whole Foods Mkt.*, 548 F.3d at 1051 (Kavanaugh, J., dissenting); Hemphill & Wu, *supra* note 9, at 1894.

159 *See* Hemphill & Wu, *supra* note 9, at 1882.

160 *See* Cass & Hylton, *supra* note 97, at 658; *Microsoft II*, 253 F.3d 34, 34 (D.C. Cir. 2001).

161 Cass & Hylton, *supra* note 97, at 658; *Microsoft II*, 253 F.3d at 77 ("Microsoft's internal documents . . . confirm both the anticompetitive effect and intent of its actions.").

162 *See Microsoft II*, 253 F.3d at 59 (discussing application of the intent analysis in a single-firm context under section two of the Sherman Act).

163 *See* U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 3; *Whole Foods Mkt.*, 548 F.3d at 1051 (Kavanaugh, J., dissenting); Hemphill & Wu, *supra* note 9, at 1894.

The most well-known judicial use of intent evidence to clarify potential anticompetitive behavior was in *United States v. Microsoft* with Bill Gates's "Internet Tidal Wave" memo.[164] In *United States v. Microsoft*, the district court was able to impute intent from the Internet Tidal Wave memo onto Microsoft as a company for two reasons, both of which would be relevant to a Step One intent inquiry if courts adopt the *Facebook* Two-Step: the authority of the author and the thoughtfulness of the communication.[165]

During the Step One inquiry, courts should consider the intent of CEOs, key decisionmakers, and other C-Suite executives to alleviate potential defendants' concern that an anticompetitive chatroom message from a sales representative could drag the entire company into expensive litigation.[166] For example, Bill Gates, Microsoft's founder and leader at the time, authored the Internet Tidal Wave memo. Confining relevant evidence to statements by individuals at the company with influence over the decision-making process and business strategy ensures that the intent analysis only considers the mindset of those with the *power* to acquire a nascent competitor.[167]

During a Step One inquiry, courts should consider only thoughtful and sober business deliberations. This also keeps out hot-headed comments by executives that did not actually drive the motivation for the acquisition.[168] For example, the Internet Tidal Wave memo was well thought out, long, and carefully drafted.[169] Therefore, the memo

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164 *Microsoft II*, 253 F.3d at 59; Internet Tidal Wave Memo, *supra* note 90.

165 Conversation with William Kovacic, Glob. Competition Professor of L. and Pol'y, Professor of L., Dir. of Competition L. Ctr., The George Washington Univ. L. Sch. (Jan. 24, 2021).

166 *See generally* HOUSE REPORT, *supra* note 2, at 25 ("[Requesting] all communications from *high-level executives* . . . relating to a number of Facebook's key acquisitions and potentially anticompetitive conduct . . . ." (emphasis added)).

167 *See generally id.* The House Report contains the kind of intent evidence that courts should be analyzing in the request for preliminary injunction to enjoin a merger. *Id.* at 25. The request for information also "asked for communications, including, but not limited to, discussions relating to the deal rationale and any competitive threat posed by the acquired company for" certain key acquisitions, including Facebook and Instagram. *See id.*; Letter from H. Comm. on the Judiciary, to Mark Zuckerberg, Chief Exec. Officer, Facebook, Inc. (Sept. 13, 2019), https://judiciary.house.gov/sites/democrats.judiciary.house.gov/files/documents/facebook%20rfi%20-%20signed.pdf [https://perma.cc/YQZ6-D9DG].

168 *Whole Foods Mkt.*, 548 F.3d at 1057 (Kavanaugh, J., dissenting). This was then-Judge Kavanaugh's dissenting argument in the Whole Foods/Wild Oats merger case. *See id.* There, the Whole Foods CEO stated that the company intended to acquire Wild Oats to "[e]liminat[e] them." *Id.* at 1049. Writing in dissent, then-Judge Kavanaugh argued that "a CEO's bravado" and "boasts" are irrelevant. *Id.* at 1057. While now-Justice Kavanaugh's argument did not carry the day, his caution deserves attention due to the enormous financial cost and illogical outcome of being dragged into antitrust litigation over a braggadocious remark or offhand joke.

169 Internet Tidal Wave Memo, *supra* note 90. The memo was nine pages, single spaced and

could be used to impute intent on Microsoft's anticompetitive behavior regarding Netscape because it reflected an actual policy of Microsoft that drove its business strategy.[170]

The *Microsoft* case also illustrates that intent evidence is particularly helpful and relevant to reining in big tech. The technology industry innovates quicky, and a particularly successful nascent competitor could displace an entire line of business at an incumbent firm.[171] However, at the same time, the antitrust framework is poorly suited to this rapid innovation.[172] *Microsoft* shows that perspectives from inside the industry can help regulators because the companies themselves understand their market best.[173] For example, the relationship between Microsoft's anticompetitive conduct with respect to its browser, Internet Explorer, and the perceived threat to its operating system software from Netscape, a rival browser, is difficult to understand.[174] However, the Internet Tidal Wave memo explained the relationship in a way that was digestible for courts and regulators and "ultimately provided a road map to the antitrust case against the firm."[175] Companies' internal documents can provide a window for courts and regulators into the complex, fast-moving technology industry in order to prevent companies like Facebook from believing that "it is better to buy than compete."[176] The *Microsoft* case shows that courts and regu-

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addressed to "Executive Staff and direct reports." *See id.* The memo was also well-researched and included a hyperlinked appendix. *See id.* All these facts indicate that the memo was the result of thoughtful deliberation, and the memo's "Next Steps" section did actually guide the company's decisions. *See id.*

170 *See id.*

171 HOUSE REPORT, *supra* note 2, at 394; Facebook Complaint, *supra* note 18, at 14–15 (describing Facebook's own displacement of early rival MySpace).

172 *See, e.g.*, Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 ANTITRUST L.J. 1, 2 (2007) ("Merger policy faces a perplexing problem in industries marked by ongoing technological innovation: a problem related, in part, to the uncertain fit between the market conditions that produce innovation and the market conditions to which antitrust policy generally aspires, and, in part, to uncertainty about how innovation might affect market structure and performance."). This is the central idea of the House Report, and an area of study for many antitrust scholars. *See generally* HOUSE REPORT, *supra* note 2; Khan, *supra* note 88; Bogus, *supra* note 128; Daniel A. Crane, *Fascism and Monopoly*, 118 MICH. L. REV. 1315 (2020).

173 *See* Internet Tidal Wave Memo, *supra* note 90 (explaining complicated nuances of the internet's potential future impact on the operating system market); *see also* Wu, *supra* note 13, at 775 (noting that business and tech analysts thought that it was "obvious at the time" that Facebook purchased Instagram to insulate itself from competition); Malik, *supra* note 130.

174 *Microsoft II*, 253 F.3d 34, 60 (D.C. Cir. 2001) (explaining the relationship between the browser market and the operating system market as "complex").

175 *See* Hemphill & Wu, *supra* note 9, at 1883.

176 Facebook Complaint, *supra* note 18, at 21.

lators are not only capable of using intent to discern anticompetitive behavior, but that it is especially helpful in the technology sphere.[177]

Not only is the *Facebook* Two-Step sufficiently tailored to address anticompetitive acquisitions in big tech, but the formulaic structure of the test will clarify the murky role of intent evidence in merger doctrine.[178] Although jurists from Judge Learned Hand[179] to now-Justice Brett Kavanaugh[180] seem to be confused about the role of intent evidence in merger doctrine, the Supreme Court is clear: "evidence indicating the purpose of the merging parties . . . is an aid in predicting . . . the probable effects of the merger."[181] The disagreement among the D.C. Circuit's appellate panel in *FTC v. Whole Foods Market, Inc.*[182] illustrates the uncertainty around the role of subjective intent evidence in mergers. In that case, Whole Foods CEO John Mackey emailed his board and explained that Whole Foods' acquisition of Wild Oats would "[e]liminat[e] them," along with the threat of new entry into the organic groceries market.[183] While Judge Tatel found this evidence persuasive in his concurrence,[184] then-Judge Kavanaugh dismissed it as nearly irrelevant to the anticompetitive inquiry and "not an element of a § 7 claim."[185] The *Facebook* Two-Step would settle this debate with a clear charge to consider the merging parties' subjective intent before analyzing the market structure.

Companies will likely adopt mitigation strategies to account for the use of intent evidence in merger review, including compliance programs, the use of code words, and other protective means of masking their true intent.[186] However, a telling sign of anticompetitive intent

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177 *See* Internet Tidal Wave Memo, *supra* note 90; *see also* Wu, *supra* note 13, at 775.

178 *Compare Microsoft II*, 253 F.3d at 59 ("[I]ntent may help the court to interpret facts and to predict consequences . . . ." (quoting Bd. of Trade of Chicago v. United States, 246 U.S. 231, 238 (1918))), *with* Kolasky, *supra* note 22 ("In the United States, we believe that intent is an unreliable guide for deciding the lawfulness of single firm conduct, especially in the heads of a jury.").

179 Cass & Hylton, *supra* note 97, at 658 (describing Judge Hand's attempt to foreclose an intent analysis in antitrust jurisprudence).

180 FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1057 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (proclaiming that CEO's boastful emails revealing intent to crush rival were not relevant to addressing the anticompetitive nature of the merger because "intent is not an element of a [Clayton Act] § 7 claim").

181 *See id.* at 1047 (Tatel, J., concurring) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 329 n.48 (1962)).

182 548 F.3d 1028 (D.C. Cir. 2008).

183 *See id.* at 1045 (Tatel, J., concurring).

184 *See id.*

185 *See id.* at 1057 (Kavanaugh, J., dissenting).

186 *See infra* notes 191–93 and accompanying text.

will remain: acquirers with a large market share will frequently pay exorbitant prices for nascent competitors with nonexistent market shares.[187] One example of this is Facebook's purchase of Instagram for $1 billion.[188] Facebook had to somehow justify the high purchase price of a thirteen-employee company to its board.[189] The review of these decisions highlights certain best practices for firms, including that the rationale for the purchase should be in writing.[190] Some commentators suggest that subjective intent will only catch novices, with firms gaining "a large payoff for legal sophistication."[191] However, these commentators ignore the realities of corporate governance: executives cannot unilaterally decide to merge while concealing their rationale.[192] Standard corporate practices, such as presentations to the board and meeting minutes, will reveal the true motivation behind a merger.[193]

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187 Complaint at 5, United States v. Visa Inc., No. 20-cv-07810 (N.D. Ca. Nov. 5, 2020) (using Visa executives' need to justify their purchase of Plaid, even though Plaid was not a competitor at the time, in order to prevent risk to its U.S. business).

188 *See* Carlson, *supra* note 105.

189 *See id.*; *see generally* Facebook Complaint, *supra* note 18. Facebook CEO Mark Zuckerberg alludes to convincing his own board of directors of the strategic value of the Instagram acquisition when he suggested that "spend[ing] 5-10% of our market cap every couple years to shore up our position . . . is the best convincing argument and we should own that." HOUSE REPORT, *supra* note 2, at 12–13 n.11 (quoting statement of a Facebook senior executive).

190 Facebook's acquisition of Instagram confirms this, where Mark Zuckerberg wrote that he had "been thinking about . . . how much [Facebook] should be willing to pay to acquire mobile app companies like Instagram . . . that are building networks that are competitive with [their] own." *See* Email from Mark Zuckerberg, Chief Exec. Officer, Facebook, to David Ebersman, Chief Fin. Officer, Facebook (Feb. 27, 2012, 11:41 PM) (on file with FTC). Zuckerberg apparently concluded that it should be a lot because "if [Instagram] gr[e]w to a large scale [it] could be very disruptive to [Facebook]." *Id.* Additionally, Facebook's Chief Technology Officer stated that "not losing strategic position in photos is worth a lot of money." *See* Email from Mike Schroepfer, Chief Tech. Officer, Facebook, to Mark Zuckerberg, Chief Exec. Officer, Facebook (Mar. 9, 2012, 10:44 AM), https://judiciary.house.gov/uploadedfiles/0006318000063197.pdf [https://perma.cc/5W2G-6UKC].

191 Cass & Hylton, *supra* note 97, at 732 (arguing against a subjective intent analysis).

192 Jonathan R. Macey, Smith v. Van Gorkom*: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. REV. 607, 609–10 (2002) (explaining board of directors' approval process required by law for mergers negotiated by a CEO); *see* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009).

193 Complaint at 5, United States v. Visa Inc., No. 20-cv-07810 (N.D. Cal. Nov. 5, 2020) (using Visa executives' presentations to the board of directors to illustrate that Visa purchased Plaid in order to prevent risk to its U.S. business). The merger was soon abandoned. *See* Press Release, U.S. Dep't of Just., Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block (Jan. 12, 2021), https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block [https://perma.cc/K9DW-NE8S]. The commentators' argument also ignores the reality that legal sophistication, through corporate compliance programs, plays an integral role in the criminal enforcement landscape today, and could expand to civil enforcement. *See* U.S. DEP'T OF JUST., ANTITRUST DIV., EVALUATION OF CORPORATE COMPLIANCE

At Step One of the *Facebook* Two-Step, the factfinder should conduct a robust inquiry into the motivations behind the merger by examining thoughtful and deliberative communications among high-ranking firm officials. The use of intent evidence would provide regulators and courts insight into the fast-paced and complex world often found in nascent competitor acquisitions in the technology sector, while clarifying the uncertain role of intent evidence in Clayton Act § 7 jurisprudence.

3. Step Two: A Typical Market Share Analysis

The *Facebook* Two-Step provides a path for courts and regulators to bypass this burdensome inquiry, should the merging parties' documents reveal an anticompetitive intent.[194] If Step One does not reveal the acquirer's anticompetitive intent or if intent is inconclusive, the factfinder should continue on to conduct a standard market structure analysis under traditional Clayton Act § 7 jurisprudence.[195] This involves an inquiry into market definition, the structure of the relevant market, and a hypothetical level of competition in the relevant market were the regulators clear the merger.[196]

B. Regulators Could Have Enjoined the Instagram Acquisition by Applying the Facebook *Two-Step*

Mobile photo sharing is now ubiquitous and Facebook's productions to the Senate reveal just how much the media had it right—and how much regulators had it wrong.[197] Because Instagram "allow[ed] people to do what they like to do on Facebook easier and faster," Facebook viewed Instagram as a competitor at the time of the acquisi-

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PROGRAMS IN CRIMINAL ANTITRUST INVESTIGATIONS (2019), https://www.justice.gov/atr/page/file/1182001/download [https://perma.cc/9NJ6-CKKG].

194 *See Whole Foods Mkt.*, 548 F.3d at 1051 (Kavanaugh, J., dissenting) (noting that the Whole Foods/Wild Oats merger, like many other antitrust cases, rests solely on market share and involves expert testimony and "a lengthy evidentiary hearing").

195 *See generally* United States v. H & R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (describing market definition and hypothetical monopolist test typical of § 7 cases).

196 *See* U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 7; *Whole Foods Mkt.*, 548 F.3d at 1036 (explaining that Clayton Act § 7 cases primarily rely on defining a market and proving high concentration in that market).

197 *Compare* Malik, *supra* note 130 (stating that Facebook bought Instagram "at twice the valuation that professional venture investors were putting on it" because "Facebook was scared shitless and knew that for first time in its life it arguably had a competitor that could . . . destroy its future prospects"), *with* Letter from April J. Tabor to Thomas O. Barnett, *supra* note 11 ("Upon further review of this matter, it now appears that no further action is warranted by the [FTC] at this time.").

tion.[198] Instead of recognizing this and enjoining the merger, enforcement agencies allowed it to proceed without comment.[199] Although there is no way to know why regulators cleared that merger, it may have been because an injunction for the Instagram acquisition was unlikely to succeed given current jurisprudence's reliance on market share.[200] At the time of the acquisition, Instagram had a relatively small market share in terms of advertising, so that factor viewed in isolation would not have raised red flags.[201] However, a Step Zero inquiry into whether the acquisition at issue involves a nascent competitor, followed by a Step One inquiry into intent evidence, would have looked past the focus on market share and instead turned to anticompetitive intent to enjoin the merger.

A Step Zero inquiry would have indicated that Instagram was a nascent competitor because (1) Instagram was currently in the social media market, but (2) had a very small market share. Around the time of the Instagram acquisition, Facebook had a market share of around ninety-five percent in the social media market in the United States, and therefore was a dominant firm.[202] Instagram, on the other hand, was growing extremely quickly.[203] The small company, however, was not yet profitable.[204] Scholars have suggested that Instagram's lack of advertising revenue was a key feature that allowed the merger to proceed.[205] Instagram was a significant force in the social media market, especially in mobile photo-sharing, where Facebook was weak.[206] An-

198 Wu, *supra* note 127 (quoting Nicholas Carlson, *Instagram was Facebook's Biggest Threat*, BUS. INSIDER (Apr. 9, 2012, 1:33 PM), https://www.businessinsider.com/instagram-was-facebooks-biggest-threat-2012-4 [https://perma.cc/9ME2-CLTW]).

199 Letter from April J. Tabor to Thomas O. Barnett, *supra* note 11; Letter from April J. Tabor to Patricia R. Ziegler, *supra* note 11.

200 *See supra* note 115 and accompanying text.

201 *See* Wu, *supra* note 13, at 775 n.21 (citing Josh Constine, *Why the OFT and FTC Let Facebook Buy Instagram: FB Camera Is Tiny, IG Makes No Money, and Google*, TECHCRUNCH (Aug. 22, 2012, 9:15 PM), https://techcrunch.com/2012/08/22/ftc-facebook-instagram [https://perma.cc/GUW3-LKLR] (noting that commentators speculated that Instagram's scant ad revenue leading up to the acquisition, and consequent low market share, allowed the merger to clear)).

202 *See* Presentation of Sheryl Sandberg, Chief Operating Officer, Facebook, to Vodafone Board of Directors 2 (Jan. 30, 2012), https://judiciary.house.gov/uploadedfiles/00057113_picture.pdf [https://perma.cc/322D-3AUP].

203 Matt Burns, *Instagram's User Count Now at 40 Million, Saw 10 Million New Users in Last 10 Days*, TECHCRUNCH (Apr. 13, 2012, 10:45 AM), https://techcrunch.com/2012/04/13/instagrams-user-count-now-at-40-million-saw-10-million-new-users-in-last-10-days/ [https://perma.cc/ZY9H-MHUS].

204 Constine, *supra* note 201.

205 *See id.*

206 *See* Wu, *supra* note 13, at 775, n.21.

titrust's "price-centric" market definition and market power, however, would have likely left Instagram below the structural presumption threshold due to its lack of revenue.[207] Therefore, because Instagram was a nascent competitor acquired by a dominant firm, the factfinder would have continued onto Step One.

If a regulator or court had undertaken a Step One analysis of Facebook executives' communications around the time of the Instagram merger, that evidence likely would have revealed the acquirer's anticompetitive intent and foreshadowed the future market dominance of the resulting entity. In Silicon Valley, angel investors and garage start-ups know which nascent competitors are potential acquisition targets based on their threat to an incumbent firm's market power.[208] The House Report concluded Facebook's internal memos and emails show that the social networking giant bought smaller companies it viewed as competitive threats to ensure and further grow its dominance in that market.[209] A Step One inquiry would have revealed Facebook's flippant attitude and its view that it could buy any startup that began to look competitive, including Instagram.[210] In particular, the Cunningham Memo, created by a senior economist at Facebook, parallels the Microsoft Internet Tidal Wave Memo.[211] Both memos were created by high-ranking officials to direct the growth strategy for their companies.[212] According to Facebook insiders, after the acquisition, the Cunningham Memo ensured that Facebook and Instagram would not compete with each other and instead would "shore each other up."[213] This clear anticompetitive intent, similar to what the court found persuasive in *United States v. Microsoft*,[214] would have resulted in the injunction of the Facebook/Instagram merger at Step One, avoiding a costly and fruitless market share inquiry.

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207 *See id.* at 793.

208 *See* Hemphill & Wu, *supra* note 9, at 1892 (explaining the importance of acquisition to startup investors, who strategize their investments with this exit route in mind); *Facebook Buys Instagram For $1 Billion, Turns Budding Rival Into Its Standalone Photo App*, *supra* note 133 (remarking at the time that "it seems Facebook would rather buy Instagram . . . while simultaneously squashing a threat to its dominance in photo sharing.").

209 HOUSE REPORT, *supra* note 2, at 149–50.

210 Email from Mark Zuckerberg, *supra* note 109.

211 *See* HOUSE REPORT, *supra* note 2, at 13.

212 *Compare id.*, *with* Internet Tidal Wave Memo, *supra* note 90.

213 HOUSE REPORT, *supra* note 2, 13–14.

214 *Microsoft II*, 253 F.3d 34, 77 (D.C. Cir. 2001).

C. *The* Facebook *Two-Step Will Effectuate Antitrust Doctrine's Goal to Protect Competition in Its "Incipiency" and Is Consistent with § 7 of the Clayton Act*

Courts should clarify the use of intent evidence in Clayton Act § 7 jurisprudence using the *Facebook* Two-Step because, although the Clayton Act was designed to protect mergers in their "incipiency,"[215] the lower courts have significantly narrowed its interpretation.[216] The Horizontal Merger Guidelines exemplify this divergence by proscribing mergers where the merging parties have been or likely would have become substantial head-to-head competitors or that lead to a "significant increase in concentration," instead of just when a trend toward lessening competition is "still in its incipiency."[217]

Lower courts' narrowing of the Clayton Act has resulted in increasing levels of concentration in technology markets, including the clearance of controversial mergers, particularly in the area of nascent competitor acquisitions.[218] Incorporating the *Facebook* Two-Step into the competitive effects analysis will correct for these mergers.[219] Consistent with the letter and spirit of the Clayton Act, this test allows for a tailored and fact-specific inquiry that properly accounts for the role of acquirer intent in evaluating the potential anticompetitive impact of a merger.[220]

The *Facebook* Two-Step would also avoid illogical outcomes where a company purchases a smaller firm to neutralize a competitive threat, but the market structure forecloses the possibility of enforce-

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215 *See* Hovenkamp, *supra* note 135, at 2040; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485 (1977); Hovenkamp, *supra* note 4, at 51–55 (explaining the "incipiency" standard).

216 *See* discussion *supra* Part III; Hovenkamp, *supra* note 135, at 2040–41; *see, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981 (D.C. Cir. 1990). The broad mandate of the Clayton Act contemplates a central role for courts to develop evolving common law standards for mergers whose "effect . . . may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18; Bork, *supra* note 39, at 7, 9 (explaining that Congress "delegated to the courts the duty of fixing the standard for each case.").

217 *See* Hemphill & Wu, *supra* note 9, at 1894 n.62. *Compare* Hovenkamp, *supra* note 4, at 46 (explaining *Brown Shoe*'s charge that courts "arrest[] mergers at a time when the trend to a lessening of competition in a line of commerce [is] still in its incipiency" (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962))), *with* U.S. DEP'T OF JUST. & FTC, *supra* note 22, at 3 (explaining that agencies evaluate "whether the merging firms have been, or likely will become absent the merger, substantial head-to-head competitors" or will "cause a significant increase in concentration and result in highly concentrated markets").

218 *See* HOUSE REPORT, *supra* note 2, at 11.

219 *See* Hemphill & Wu, *supra* note 9, at 1903.

220 *See id.* at 1892 (discussing bias against all nascent competitor acquisitions would ruin a lot of small companies whose whole business model is to be bought out by a bigger tech company); Hovenkamp, *supra* note 135, at 2049; 15 U.S.C. § 7.

ment. For example, "[i]f [Facebook's CEO] holds the considered view that, but for its purchase, [Instagram] would pose a future competitive threat, why should the government be required to prove that the threat was even clearer and stronger than [Facebook] believed?"[221] The *Facebook* Two-Step would also prioritize innovation over price by placing the intent inquiry before the econometric analysis.[222] This will avoid the issue that scholars have identified in nascent competitor acquisition enforcement where the market share of an innovative start-up is near zero and their probability of actually growing large enough to compete with the incumbent is speculative at best.[223] The *Facebook* Two-Step will also allow for a more logical analysis of nascent competitor acquisitions that focuses on the intent of the acquirer, including when that intent is to neutralize a competitive threat.[224]

D. The Facebook *Two-Step Is Superior to Legislative Proposals Because It Is a Measured Solution that Addresses Potential Competitors with Fractional Market Shares and Does Not Burden the Economy*

Although any branch of government could update antitrust laws, the presence or absence of judicial statutory interpretation is especially important in antitrust law because both the Sherman Act and the Clayton Act contain vague mandates.[225] A judicial test like the *Facebook* Two-Step is consistent with the letter and spirit of the antitrust laws, especially in light of the fact that Congress contemplated a central role for courts in updating the antitrust framework to keep up

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221 *See* Hemphill & Wu, *supra* note 9, at 1891.

222 *See id.* at 1902 (explaining that current nascent competitor legal framework overlooks innovation in favor of price).

223 Hovenkamp, *supra* note 135, at 2042.

224 *See* Hemphill & Wu, *supra* note 9, at 1902.

225 15 U.S.C. §§ 1–38; 15 U.S.C. §§ 12–27; Bork, *supra* note 39, at 7, 9 (arguing that, because the Sherman Act is "vaguely phrased," Congress "delegated to the courts the duty of fixing the standard for each case" (quoting United States v. Associated Press, 52 F. Supp. 362, 370 (S.D.N.Y. 1943))). Congress could update antitrust laws through a legislative solution, and the executive branch could update with agency interpretations like the merger guidelines or administrative/enforcement actions. It is worth noting the extremely unusual trajectory of merger enforcement as compared to other areas of antitrust law. The Supreme Court has not heard a merger case in almost fifty years; however, the Court has spent the better part of this century revolutionizing other areas of antitrust law, including pleading standards, collusive group boycotts, allocations of customers and markets, and the intersection of antitrust and intellectual property. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); FTC v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411 (1990); Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990); FTC v. Actavis, Inc., 570 U.S. 136 (2013).

with "changing standards of the common law."[226] Congress's delegation to the courts to update antitrust laws is especially salient today, with increasing legislative proposals clamoring for attention after new Democratic majorities in the House and Senate. These proposals are contrary to the spirit of the Clayton Act because, while Congress has the power to update its own laws, the almost-constitutional quality of the Clayton Act provides flexibility meant for the courts to adjust the framework as needed and allow antitrust to retain its fact-specific approach and prevent unnecessary economic burdens.[227] Aside from failing to maintain courts' traditional role in interpreting the vague text of the Clayton Act, current legislative proposals either retain antitrust's myopic market share focus—thereby missing nascent competitors completely[228]—or sweep too broadly.

1. The Facebook *Two-Step Efficiently Targets Competitors with Little to No Market Share that Current Proposals Overlook*

Antitrust reform is a popular topic in light of the dominance of big tech.[229] Legislative proposals have included changing the language of the Clayton Act to lessen the plaintiff's burden of proof,[230] shifting the burden of proof to the merging parties to show that their merger

226 Bork, *supra* note 39, at 9 (quoting *Associated Press*, 52 F. Supp. at 370).

227 *Id.* at 35 (remarking that the Sherman Act's broad delegation to the courts' discretion is similar to the Constitution's delegation to the courts to create a framework based on a broad meaning of robust competition); Hemphill & Wu, *supra* note 9, at 1892 (explaining that bans on nascent competitor acquisitions or mergers by dominant firms would unduly curb the startup acquisition lifecycle, resulting in loss of innovation and synergies); Hovenkamp, *supra* note 135, at 2049–50 (explaining benefits of antitrust litigation's fact-driven approach).

228 Hovenkamp, *supra* note 135, at 2042.

229 *See* Hart, *supra* note 5.

230 Press Release, Amy Klobuchar, U.S. Senator, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021), https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement [https://perma.cc/9ECX-WTFG]. Senator Amy Klobuchar (D-MN) is the Chair of the Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights. Subcommittee on Competition Policy, Antitrust, and Consumer Rights, SENATE COMM. ON THE JUDICIARY, https://www.judiciary.senate.gov/about/subcommittees/subcommittee-on-antitrust-competition-policy-and-consumer-rights [https://perma.cc/4UDU-CBR6]. This bill proposes changing the language of the Clayton Act from prohibiting deals that "substantially lessen competition" to proscribe deals that "create an appreciable risk of materially lessening competition," and thereby easing the plaintiff's burden of proof. Press Release, Amy Klobuchar, *supra*.

will not have an anticompetitive effect,[231] or codifying the structural presumption.[232]

These legislative proposals, however, fail to address the gaping hole in merger review through their myopic focus on market structure. These proposals do not sufficiently address nascent competitor acquisitions because, even if the plaintiffs had a lower burden of proof, or even if the merging parties carried the burden, nascent competitors with zero market share would be cleared to merge with dominant firms because the merger would not change the market structure.[233] In contrast, addressing the intent of the dominant firm through the *Facebook* Two-Step before dealing with market structure would provide an avenue to enjoin anticompetitive nascent competitor acquisitions, even with a small target market share.[234] Although there are potential concerns regarding the subjectivity of an acquirer-intent analysis, especially as compared with the purported objectivity of the structural presumption, an acquirer-intent analysis nonetheless captures mergers in which market share data does not tell the whole story.[235]

2. *The* Facebook *Two-Step Avoids Ham-Handed Solutions and Allows Courts to be Better Informed*

The House Report also suggests codifying a presumption against acquisitions of startups by dominant firms[236] or presuming that all acquisitions by dominant platforms are anticompetitive.[237] Although the *Facebook* Two-Step would enjoin anticompetitive nascent competitor

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231 S. 3426, 116th Cong. (2020); HOUSE REPORT, *supra* note 2, at 393–94; *see also* Press Release, Amy Klobuchar, *supra* note 230 (proposing a bill that would shift the burden onto the merging parties to show that their transaction would not violate the law when a dominant firm seeks to acquire a competitor, including nascent competitors).

232 HOUSE REPORT, *supra* note 2, at 396. The House Report also recommends codifying the structural presumption through a statute outlining "that a market share of 30% or more constitutes a rebuttable presumption of dominance by a seller," whereas "a market share of 25% or more constitute[s]" one by a buyer. *See id.* at 396. The House Report also remarks: "Although some courts still follow the structural presumption adopted by the Supreme Court in *Philadelphia National Bank*, it is not universally followed, especially given the D.C. Circuit's decision in *United States v. Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990)." *Id.* at 393 n.2482 (referencing United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963)).

233 Hovenkamp, *supra* note 135, at 2042.

234 *See id.*

235 *See* Cass & Hylton, *supra* note 97, at 676 (criticizing subjective intent in antitrust); *see also* Hemphill & Wu, *supra* note 9, at 1881–82 (explaining that, even where the competitive significance of the target firm is unclear, intent evidence is relevant to distinguishing anticompetitive from procompetitive behavior).

236 HOUSE REPORT, *supra* note 2, at 394.

237 *Id.* at 388.

acquisitions, its fact-specific inquiry would clear procompetitive mergers and allow startups to chart their destiny.[238] This feature of the *Facebook* Two-Step acknowledges an issue scholars have identified in nascent competitor enforcement: aggressive policing of startup acquisitions can stifle growth and discourage investment in startups.[239] An approach that takes acquirer intent into account, however, will account for this and only enjoin acquisitions with a clear anticompetitive motivation.[240]

The *Facebook* Two-Step's fact-specific inquiry into acquirer intent is superior to the House Report's suggestion that courts and regulators should look "unfavorably" on incumbents acquiring small, yet innovative, startups and codifying a presumption against nascent competitor acquisitions.[241] The House Report's approach would sweep too broadly and enjoin procompetitive or neutral acquisitions and burden the startup lifecycle.[242]

The *Facebook* Two-Step also clarifies and expands the House Report's recommendations that "proving harm on potential competition or nascent competition grounds does not require proving that the potential or nascent competitor would have been a successful entrant in a but-for world" and to overrule *Marine Bancorporation* as unfavorable to potential competitor theories of harm.[243] Although these approaches target the enforcement gap in nascent competitor acquisitions, they do not supply courts and regulators with a new framework for analyzing these mergers beyond diluting the Clayton Act.[244] The *Facebook* Two-Step provides a framework for analyzing nascent competitor acquisitions with a primary focus on acquirer intent and a secondary focus on market share. The *Facebook* Two-Step's initial characterization inquiry at Step Zero, to prevent the rule from sweeping too broadly, in addition to a fact-specific intent examination

238 *See* Hemphill & Wu, *supra* note 9, at 1879.

239 *See id.* at 1879, 1892 (explaining that overenforcement in nascent competitor acquisitions could foreclose a meaningful exit route for angel investors). "Exit strategy," the way funders and founders can cash out their investment, is a key component of investment in startups. *See* Mark A. Lemley & Andrew McCreary, *Exit Strategy* 1, 87–88 (Stan. L. & Econ. Olin Working Paper No. 542, 2020), https://ssrn.com/abstract=3506919 [https://perma.cc/V6BR-NG4C] (suggesting presumptive ban on startup acquisitions by dominant firms and addressing valid concerns regarding the risk to venture capitalists' exit strategy under this proposal).

240 *See* Hemphill & Wu, *supra* note 9, at 1892.

241 HOUSE REPORT, *supra* note 2, 394; Hovenkamp, *supra* note 135, at 2049 (arguing that fact-specific litigation approach is superior to categorical ban because of costly false negatives).

242 *See* Hemphill & Wu, *supra* note 9, at 1892.

243 HOUSE REPORT, *supra* note 2, at 394.

244 *See id.*; *supra* note 230.

at Step One, will allow courts to better tailor their competitive effects analyses. The *Facebook* Two-Step provides an administrable framework for district courts to evaluate anticompetitive conduct using intent evidence and allows them to continue to incorporate typical economic and market share analysis when necessary.

Conclusion

The antitrust regime's focus on market share allows nascent competitor acquisitions, such as the Facebook/Instagram merger, to clear agencies' review process.[245] These mergers lead to dramatic concentration in the technology sphere, causing limited choices that leave consumers worse off.[246] The *Facebook* Two-Step addresses the gap in antitrust enforcement around nascent competitor acquisitions by creating a tailored framework for assessing anticompetitive effects around potential competitors, and allowing for a fact-specific inquiry into the subjective intent of the acquiring firm. The initial characterization phase, at Step Zero, prevents the *Facebook* Two-Step from sweeping all mergers into a burdensome and labor-intensive search for documents. The intent inquiry at Step One provides a focused, fact-specific analysis into the motivations of that particular acquirer, without regard to the market structure or objective threat of entry from an external perspective. Finally, the *Facebook* Two-Step retains a role for a traditional market share inquiry at Step Two. This framework will address the acquisitions of nascent competitors with little or no market share to promote competition, particularly in the technology sector, without unduly burdening the economy.

245 *See* Wu, *supra* note 13, at 793–94 (explaining that the structural presumption and focus on market share results in an antitrust blind spot); Hemphill & Wu, *supra* note 9, at 1907 (highlighting that in nascent competitor acquisitions, there is little or no direct competition when the merger is consummated because the target has such a small market share); Hovenkamp, *supra* note 135, at 2042.

246 *See supra* notes 120–23 and accompanying text.