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Big Tech in a Small Pond: How the Internet Economy Became So Concentrated and What Sector-Specific Regulation Can Do to Reel It In

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Big Tech in a Small Pond: How the Internet Economy Became So Concentrated and What Sector-Specific Regulation Can Do to Reel It In

Cover Page Footnote

J.D. Candidate, 2022, University of Georgia School of Law. B.A., 2018, University of South Carolina Honors College. I'm grateful to Professors Joseph Miller and Christian Turner for their guidance, insights, and helpful feedback on this Note.

**BIG TECH IN A SMALL POND: HOW THE
INTERNET ECONOMY BECAME SO
CONCENTRATED AND WHAT SECTOR-SPECIFIC
REGULATION CAN DO TO REEL IT IN**

*Andy Wilson**

* J.D. Candidate, 2022, University of Georgia School of Law. B.A., 2018, University of South Carolina Honors College. I'm grateful to Professors Joseph Miller and Christian Turner for their guidance, insights, and helpful feedback on this Note.

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I. INTRODUCTION

In its early days, many people perceived the internet as a new space in which human autonomy, creativity, and productivity could flourish, freed from physical restrictions and government control.¹ Typical of this freethinking spirit was John Perry Barlow's 1996 "A Declaration of the Independence of Cyberspace," which celebrated the newfound autonomy enabled by the internet's radical decentralization and warned institutional authorities to keep out.² Twenty-five years later, his characterization of the internet as "an act of nature . . . grow[ing] itself through our collective actions"³ rings increasingly false as a mere handful of firms dominate their respective corners of the internet.⁴

The early optimism about the internet has given way to widespread concern about tech sector concentration, reaching across even starkly drawn political lines.⁵ The population at large appears to be souring toward the big internet companies⁶ even as their major rally in the face of the COVID-19 pandemic propped up the sagging economy and powered them to a record share of the S&P 500.⁷ On the academic front, a new movement calling for more vigorous antitrust enforcement to promote competition has gained prominence and

¹ See John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence>.

² *Id.*; see also Mike Masnick, *Protocols, Not Platforms: A Technological Approach to Free Speech*, KNIGHT FIRST AMENDMENT INST., 5-6 (2019), <https://s3.amazonaws.com/kfai-documents/documents/e3288c9457/MasnickPublish.pdf> ("The early internet involved many different protocols—instructions and standards that anyone could then use to build a compatible interface.").

³ Barlow, *supra* note 1.

⁴ John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497, 1503 (2019) (describing high concentration in search engine, e-commerce, social networking, and digital advertising markets).

⁵ Brooke Auxier, *How Americans See U.S. Tech Companies as Government Scrutiny Increases*, PEW RSCH. CTR. (Oct. 27, 2020), <https://www.pewresearch.org/fact-tank/2020/10/27/how-americans-see-u-s-tech-companies-as-government-scrutiny-increases/> (showing almost identical levels of support between right- and left-leaning voters for regulating big tech companies, 48% vs. 46%).

⁶ Scott Rosenberg, *Facebook's Reputation Is Sinking Fast*, AXIOS (Mar. 6, 2019), <https://www.axios.com/facebook-reputation-drops-axios-harris-poll-0d6c406a-4c2e-463a-af98-1748d3e0ab9a.html>; Sara Fischer & Allison Snyder, *Executive Poll: America Sours on Social Media Giants*, AXIOS (Nov. 19, 2018), <https://www.axios.com/america-sours-on-social-media-giants-1542234046-c48fb55b-48d6-4c96-9ea9-a36e80ab5deb.html>.

⁷ Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights*, N.Y. TIMES (Aug. 19, 2020), <https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html> ("The stocks of Apple, Amazon, Alphabet, Microsoft and Facebook, the five largest publicly traded companies in America, rose 37 percent in the first seven months this year, while all the other stocks in the S&P 500 fell a combined 6 percent.").

traction.⁸ And politically, both state and federal governments are subjecting big tech to increasing scrutiny,⁹ most notably, with a series of antitrust suits against two of the biggest tech giants, Google and Facebook. The Trump Administration sued Google in October 2020 for monopolistic practices in its internet advertising and search engine services.¹⁰ It sued Facebook in December 2020 for anticompetitive conduct in acquiring Instagram and WhatsApp and selectively excluding developers from its application programming interfaces.¹¹ Dozens of state attorneys general joined forces in December to bring their own antitrust suits against Google and Facebook, with only a handful of states abstaining.¹² These suits are ongoing, but several have recently been dealt major setbacks.¹³

These developments signal not only widespread awareness that there is a problem with the state of the tech sector, but also state and federal governments' willingness to tackle it. In addition to these antitrust suits, Congress has recently considered legislative approaches addressing the problem of tech sector concentration, such as the "Augmenting Compatibility and Competition by Enabling Service Switching" (ACCESS) Act.¹⁴ Its sponsors intend for it to

⁸ See Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 132 (2018) (describing the origins, core ideas, and goals of the resurgent antimonopoly movement); Tim Wu, *The Utah Statement: Reviving Antimonopoly Traditions for the Era of Big Tech*, ONEZERO (Nov. 18, 2019), <https://onezero.medium.com/the-utah-statement-reviving-antimonopoly-traditions-for-the-era-of-big-tech-e6be198012d7> ("The simple premise of anti-monopoly revival is that concentrated private power has become a menace, a barrier to widespread prosperity, and an indefensible division of the spoils of progress and economic security that yields human flourishing.").

⁹ Darrell M. West, *Congressional Hearing Reveals That Tech Firms Will Face Greater Oversight*, BROOKINGS (July 29, 2020), <https://www.brookings.edu/blog/techtank/2020/07/29/congressional-hearing-reveals-that-tech-firms-will-face-greater-oversight/>; *infra* note 12.

¹⁰ Complaint at 2, United States v. Google LLC, 1:20-cv-03010 (D.D.C. Oct. 20, 2020), <https://www.justice.gov/atr/case-document/file/1329131/download>.

¹¹ Complaint at 3, Fed. Trade Comm'n v. Facebook, Inc., 1:20-cv-03590-JEB (D.D.C. Dec. 9, 2020), https://www.ftc.gov/system/files/documents/cases/051_2021.01.21_revised_partially_redacted_complaint.pdf [hereinafter Facebook Complaint].

¹² Leah Nylen, *More Than 30 States File Suit Demanding Breakup of Google*, POLITICO (Dec. 17, 2020, 12:57 PM), <https://www.politico.com/news/2020/12/17/3rd-antitrust-lawsuit-hits-google-447741>; Taylor Hatmaker, *Facebook Hit with Massive Antitrust Lawsuit from 46 States*, TECHCRUNCH (Dec. 9, 2020, 2:58 PM), <https://techcrunch.com/2020/12/09/facebook-antitrust-state-attorneys-general/>.

¹³ Cecilia Kang, *Judge Throws Out 2 Antitrust Cases Against Facebook*, N.Y. TIMES (Oct. 4, 2021), <https://www.nytimes.com/2021/06/28/technology/facebook-ftc-lawsuit.html>.

¹⁴ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. (2019).

restore competition to the concentrated digital economy,¹⁵ thereby giving Americans more choice and control of their online presence.¹⁶

Given that antitrust enforcers are now vigorously attempting to rein in big tech firms' anticompetitive practices,¹⁷ the question naturally arises whether sector-specific regulation such as the ACCESS Act is necessary. After all, regulators already possess an established legal framework for remedying harmful market concentration in the form of antitrust law.¹⁸ The first section of this Note will explore the inadequacy of current antitrust law to deal with competitive harms in the internet economy, showing that sector-specific regulation is necessary. The second section will consider the ACCESS Act as an example of sector-specific regulation that, although flawed, contains key elements that address the underlying structural problems of the internet economy.

II. ANTITRUST TOOLS ARE LIKELY INADEQUATE TO REMEDY INTERNET ECONOMY CONCENTRATION

Antitrust law aims to restrain business practices deemed to harm competition and, indirectly, consumers.¹⁹ The antitrust laws on the books prohibit unreasonable restraints on trade, such as monopolization or attempt to monopolize, mergers and acquisitions tending to lessen competition, and unfair

¹⁵ Press Release, Mark Warner, Senator, Senators Introduce Bipartisan Bill to Encourage Competition in Social Media (Oct. 22, 2019) <https://www.warner.senate.gov/public/index.cfm/pressreleases?ID=3F2AA8B6-36F8-453B-9B59-FC886871CEB9>. This Note will discuss the ACCESS Act of 2019, not the bill of the same name that passed the House Judiciary Committee in June 2021. Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021, H. 3849, 117th Cong. (2021). Lauren Feiner, *House Committee Passes Sweeping Tech Antitrust Reforms, But Their Future Remains Murky*, CNBC (June 24, 2021), <https://www.cnbc.com/2021/06/24/house-committee-passes-broad-tech-antitrust-reforms.html>. Despite recent developments on the 2021 bill, the author believes that the 2019 bill offers more effective tools for addressing the internet's concentration problem. While similar in many respects to the 2019 bill, the 2021 bill entirely omits 'delegability,' a key provision discussed below, and alters the 'interoperability' provision in a way that may continue to expose user data to exploitation rather than giving users more control over it. Bennet Cyphers et al., *The New ACCESS Act Is a Good Start. Here's How to Make Sure It Delivers*, ELEC. FRONTIER FOUND. (June 21, 2021), <https://www.eff.org/deeplinks/2021/06/new-access-act-good-start-heres-how-make-sure-it-delivers>.

¹⁶ Mark Warner (@MarkWarner), TWITTER (Oct. 22, 2019, 10:12 AM), <https://twitter.com/MarkWarner/status/1186646482813902848>.

¹⁷ See *supra*, notes 10-12 and accompanying text (discussing the recent state and federal antitrust lawsuits against Google and Facebook).

¹⁸ *Infra* notes 19-21.

¹⁹ *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Nov. 2, 2021).

methods of competition.²⁰ Congress passed the Sherman, Clayton, and FTC Acts between 1890 and 1914 with the aim of “protect[ing] the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.”²¹ These principal antitrust laws presumptively form the first line of defense against harm to consumers from internet sector concentration. Faced with the increasing concentration of wealth and power in a handful of internet firms, legal academia has divided into roughly three camps. First are those who either see no problem with the current state of affairs or think that if there is an imbalance, it will inevitably be corrected by disruptive innovation.²² Either way, to this laissez-faire group, intervention beyond what is already being done is unnecessary.²³ Next, some scholars believe that the current antitrust framework provides adequate tools to rein the technology sector and just needs to be enforced more consistently.²⁴ Finally, others believe antitrust is not sufficient to address competition harms in the digital economy and call for a new set of regulatory tools.²⁵ This Note argues that the third group is correct and that new regulatory tools would be more successful in correcting the imbalances of the tech sector.

A. ANTITRUST HAS BEEN WEAKENED BY COMMON LAW DEVELOPMENTS

Although the legislation establishing antitrust law in the U.S. provided its framework and goals, antitrust doctrine has never “been precisely formulated as a comprehensive whole.”²⁶ Instead, antitrust developed largely through the common law process, influenced by a succession of different prevailing

²⁰ Janice E. Rubin, *General Overview of United States Antitrust Law*, CONG. RSCH. SERV., 1-3, 5 (June 18, 2001), <https://28xeuf2otxva18q7lx1uemec-wpengine.netdna-ssl.com/wp-content/uploads/assets/crs/RL31026.pdf>.

²¹ *The Antitrust Laws*, *supra* note 19.

²² See Elyse Dorsey, *Anything You Can Do, I Can Do Better-Except in Big Tech?: Antitrust's New Inhospitality Tradition*, 68 U. KAN. L. REV. 975, 996 (2020).

²³ Rob Frieden, *Challenges to the Conventional Wisdom About Mergers and Consumer Welfare in a Converging Internet Marketplace*, 65 VILL. L. REV. 479, 492 (2020) (“Proponents of the status quo see no reason to abandon adherence to the doctrine of limited government intervention in markets.”).

²⁴ John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 SANTA CLARA L. REV. 743, 765 (2020) (“[T]he antitrust enterprise does not lack the requisite tools to oversee attention-based markets.”).

²⁵ HAROLD FELD, ROOSEVELT INSTITUTE, *THE CASE FOR THE DIGITAL PLATFORM ACT*, 20 (May 8, 2019), <https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Case-for-the-Digital-Platform-Act-201905.pdf>; see also Jenny Paquette, Comment, *Old Is Not Always Wise: The Inapplicability of the Sherman Act in the Age of the Internet*, 89 TEMP. L. REV. ONLINE 1, 30 (2017) (calling for a statutory update of the current antitrust regime).

²⁶ Thomas E. Kauper, *The Goals of United States Antitrust Policy - The Current Debate*, 136 J. INSTITUTIONAL & THEORETICAL ECON. 408, 410 (1980), <http://www.jstor.com/stable/40750242>.

ideologies.²⁷ Since the late 1970s, antitrust has morphed from incorporating societal values about concentration and promoting competition to focusing narrowly on economic efficiency and consumer welfare.²⁸ As a result, as the economy faces a new and likely more entrenched form of monopoly in the internet giants,²⁹ antitrust has lost much of its former power.³⁰ The same common-law development that gave judges flexibility in promoting antitrust's aims now binds judges via *stare decisis* with four decades' worth of restricting antitrust enforcement.³¹ The Supreme Court, under Chief Justice John Roberts, has increasingly favored large companies over public interest concerns, despite growing agitation in academia for stricter, revamped antitrust enforcement.³² Thus, the *laissez-faire* approach has carried the field for the last few decades and, in so doing, erected substantial barriers to more vigorous enforcement within the existing framework.³³ Further, the consensus view has been that "power in digital markets will be rare and fleeting, and that enforcement efforts would entail a prohibitively high risk of chilling innovation."³⁴ This view has led antitrust enforcers to take an especially hands-off approach in the internet economy.³⁵

As a result of U.S. antitrust's common-law development, the federal and state agencies bringing antitrust suits against large technology companies face steep obstacles. They must not only rely on doctrines developed long before the emergence of the internet economy and poorly suited to its dynamics, but must also overcome decades' worth of unfavorable precedent to meet their burdens of proof. Most saliently, federal court precedents and agency standards making consumer welfare the exclusive aim of antitrust have eroded its capacity to

²⁷ *Id.*

²⁸ Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 3 (Harv. Bus. Sch., Working Paper No. 19-110, 2019), https://www.hbs.edu/faculty/Publication%20Files/19-110_e21447ad-d98a-451f-8ef0-ba42209018e6.pdf; Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J.L. BUS. & FIN. 131, 176 (2020) ("The consumer welfare standard is not only a criterion of analysis, but it has legitimately become a prime—if not exclusive—antitrust objective.").

²⁹ Newman, *supra* note 4, at 1522 (pointing out that rather than "self-correcting, digital markets often facilitate [durable market] power").

³⁰ Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439, 1455-58 (2019) (describing how the Supreme Court "persistently narrowed the substantive scope of antitrust law, adopting procedural barriers, and dismantling doctrines associated with the fairness vision" over the last 40 years).

³¹ *Id.* at 1455-58.

³² *Id.* at 1455; Michael Wolfe, *Movements, Moments, and the Eroding Antitrust Consensus*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1157, 1162 (2020) (explaining the emerging Neo-Brandeisian antitrust movement).

³³ Orbach, *supra* note 30, at 1456 (listing a number of the ways the Supreme Court raised the bar for a successful antitrust suit).

³⁴ Newman, *supra* note 4, at 1500-01.

³⁵ *Id.* at 1502.

restrain big tech’s anticompetitive practices.³⁶ The currently-used measures of consumer welfare—higher price, lower quality, and stunted innovation—are more difficult to prove in digital markets.³⁷

Antitrust enforcers have adjusted to these changed conditions with measures such as scrutinizing firms’ degradation of consumer privacy in zero-price markets.³⁸ However, agencies adjusting their policies to more rigorously enforce antitrust law does not alter the underlying framework or the substantive burdens they must meet to win cases. Rather, that framework is mostly a common-law development that has moved away from a dynamic and flexible conception of antitrust’s goals.³⁹ Competition law needs both dynamism and flexibility to adapt to new features of the digital economy such as the threat to competition from non-horizontal acquisitions and the structural tendency of digital markets to tip toward concentration.

B. ANTITRUST FAILS TO PREVENT ANTICOMPETITIVE ACQUISITIONS BY DOMINANT INTERNET FIRMS

A characteristic of the digital economy which frustrates traditional antitrust analysis is that, for many proposed acquisitions, the targeted business seems to operate in a market only tangential to the acquiring company’s main operations, which deflects government scrutiny.⁴⁰ When given the pre-merger opportunity, U.S. regulators declined to challenge Facebook’s acquisitions of WhatsApp and Instagram⁴¹ and Google’s acquisitions in digital advertising, telecommunications,

³⁶ See Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766, 793-94 (2019) (describing how the Supreme Court led the charge to reorient antitrust exclusively around consumer welfare); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting ROBERT BORK, *THE ANTITRUST PARADOX* 66 (1978)) (“Congress designed the Sherman Act as a ‘consumer welfare prescription.’”).

³⁷ Thomas A. Lambert, *The Limits of Antitrust in the 21st Century*, 68 U. KAN. L. REV. 1097, 1111 (2020) (noting that with firms “which allow consumers to access their services for free, showing consumer harm poses a challenge”).

³⁸ Makan Delrahim, U.S. Assistant Att’y. Gen., Antitrust Division, “Blind[ing] Me With Science”: Antitrust, Data, and Digital Markets, Remarks at Harvard Law School & Competition Policy International Conference on “Challenges to Antitrust in a Changing Economy” (Nov. 8, 2019), <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-harvard-law-school-competition>.

³⁹ See *supra* text accompanying notes 28-30 (explaining how antitrust law came to narrowly focus on economic efficiency and consumer welfare).

⁴⁰ FELD, *supra* note 25, at 38.

⁴¹ Rebecca Heilweil, *Why the US Government Wants Facebook to Sell Off Instagram and WhatsApp*, VOX (Dec. 9, 2020, 7:04 PM), <https://www.vox.com/recode/22166437/facebook-instagram-ftc-attorneys-general-antitrust-monopoly-whatsapp> (noting that Facebook’s “acquisitions of WhatsApp and Instagram were approved by the FTC years ago”).

online video, and home and wearable electronics.⁴² In fact, the only intervention Assistant Attorney General Makan Delrahim could name in 2019 as evidence of the agency's willingness to flex its antitrust muscle in digital markets was unwinding Bazaarvoice's acquisition of PowerReviews, worth only a tiny fraction of any of the big internet players.⁴³ This transaction was a textbook horizontal merger and thus of the type most subject to scrutiny under current antitrust law.⁴⁴ It involved a firm that controlled over half the relevant market (internet product reviews) attempting to buy out its only substantial competitor.⁴⁵ Facebook and Google's record of unimpeded acquisitions shows that they have avoided such obviously anticompetitive transactions even as they have been able to massively expand and entrench themselves.⁴⁶ Digital law and policy expert Harold Feld⁴⁷ notes that the digital nature of the acquiring companies and their targets "reduce[s] the cost of integration and increase[s] the depth of service offered by the dominant platform," which can "delay or even prevent the emergence of future competitors."⁴⁸ In other words, the nature of the digital economy is such that incumbent tech companies can cement their dominance by acquiring seemingly unrelated companies.⁴⁹

⁴² David McLaughlin, *Big Tech Goes on Shopping Spree, Brushing Off Antitrust Scrutiny*, BLOOMBERG (July 27, 2020), <https://www.bloomberg.com/news/articles/2020-07-27/big-tech-goes-on-shopping-sprece-brushing-off-antitrust-scrutiny> (finding that out of hundreds of acquisitions by big tech firms in the last decade, only a single one was challenged); *Infographic: Google's Biggest Acquisitions*, CB INSIGHTS (Nov. 1, 2019), <https://www.cbinsights.com/research/google-biggest-acquisitions-infographic/> (detailing companies Google acquired).

⁴³ Delrahim, *supra* note 38; Anthony Ha, *After Antitrust Suit, Bazaarvoice Sells PowerReviews to Review Site Viewpoints for \$30M*, TECHCRUNCH (June 4, 2014, 5:41 PM), <https://techcrunch.com/2014/06/04/bazaarvoice-sells-powerreviews/> (assessing PowerReviews acquisition value at \$168 million); J. Clement, *Market Capitalization of the Largest Internet Companies Worldwide as of February 2021*, STATISTA (July 1, 2021), <https://www.statista.com/statistics/277483/market-value-of-the-largest-internet-companies-worldwide/> (showing that the size of the acquisition was only 0.02% of the \$759 billion market capitalization of the smallest of the big five tech companies, Facebook).

⁴⁴ JEFFREY L. KESSLER & SPENCER WEBER WALLER, § 3:2. HORIZONTAL MERGERS, INTERNATIONAL TRADE AND U.S. ANTITRUST LAW § 3:2 (2d ed. 2021).

⁴⁵ See generally Jay B. Sykes, *Antitrust Law: An Introduction*, CONG. RSCH. SERV. (May 29, 2019), <https://fas.org/sgp/crs/misc/IF11234.pdf>; James B. Stewart, *Antitrust Suit is Simple Calculus*, N.Y. TIMES (Sept. 9, 2011), <https://www.nytimes.com/2011/09/10/business/att-and-t-mobile-merger-is-a-textbook-case.html> (describing the proposed T-Mobile-AT&T merger as a classic subject of antitrust).

⁴⁶ Chris Alcantara et al., *How Big Tech got so big: Hundreds of acquisitions*, WASH. POST (Apr. 21, 2021), <https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/>.

⁴⁷ *Staff Harold Feld*, PUB. KNOWLEDGE <https://www.publicknowledge.org/about-us/staff/> (last visited Oct. 19, 2020).

⁴⁸ FELD, *supra* note 25, at 38.

⁴⁹ *Id.*

Facebook provides an excellent example of this phenomenon in its purchases of Onavo and WhatsApp. Facebook purchased the app analytics company Onavo in 2013, marketed it as free data protection, and used it to collect data on how people used non-Facebook apps.⁵⁰ Detailed user information from Onavo's data harvesting helped alert Facebook that WhatsApp was rapidly growing in user numbers and engagement relative to its own services,⁵¹ which led it to acquire WhatsApp for a whopping \$19 billion in 2014.⁵² According to internal Facebook communications, the strong network effects of a dominant social media firm make the most likely competitor a service with a different core mechanism (e.g. photo sharing or microblogging).⁵³ If the service is able to build a large user base, it can then "add[] additional features and functionalities" that overlap with the dominant firm's and cut into its market share.⁵⁴ The federal antitrust suit against Facebook alleges that by acquiring WhatsApp, Facebook intended to neutralize a potential competitor.⁵⁵ The antitrust doctrine of potential competition is predicated on the idea that acquiring companies, which are likely to enter concentrated markets, prevents beneficial competition or removes pressure for incumbent firms to keep prices low.⁵⁶ However, because of the doctrine's "substantial evidentiary hurdles for plaintiffs" and increasingly skeptical courts,⁵⁷ "there have been very few litigated merger cases involving potential competition claims" for the last several decades.⁵⁸ Antitrust law, as it now stands, is inadequately addressing anticompetitive behavior like Facebook's, especially given the changed dynamics of how companies interact, grow, and

⁵⁰ Deepa Seetharaman & Betsy Morris, *Facebook's Onavo Gives Social-Media Firm Inside Peek at Rivals' Users*, WALL ST. J. (Aug. 13, 2017, 7:00 AM), <https://www.wsj.com/articles/facebook-onavo-gives-social-media-firm-inside-peek-at-rivals-users-1502622003>; Sam Shead, *Facebook Owns the Four Most Downloaded Apps of the Decade*, BBC NEWS (Dec. 18, 2019), <https://www.bbc.com/news/technology-50838013> (showing that Facebook paid only \$1 billion for Instagram two years before).

⁵¹ Karissa Bell, *'Highly Confidential' Documents Reveal Facebook Used VPN App to Track Competitors*, MASHABLE (Dec. 5, 2018), <https://mashable.com/article/facebook-used-onavo-vpn-data-to-watch-snapchat-and-whatsapp/>; Facebook Complaint, *supra* note 11, at 34–35.

⁵² Facebook Complaint, *supra* note 11, at 37.

⁵³ *Id.* at 32.

⁵⁴ *Id.*

⁵⁵ *Id.* at 36.

⁵⁶ Darren Bush & Salvatore Massa, Note, *Rethinking the Potential Competition Doctrine*, 2004 WIS. L. REV. 1035, 1046 (2004).

⁵⁷ Darren S. Tucker, *Potential Competition Analysis Under the 2010 Merger Guidelines*, 12 SEDONA CONF. J. 273, 275-76 (2011); *see* United States v. Marine Bancorporation, Inc., 418 U.S. 602, 624–25 (1974) (listing characteristics that may render a merger unlawful).

⁵⁸ M. Sean Royall & Adam J. Di Vincenzo, *Evaluating Mergers Between Potential Competitors Under the New Horizontal Merger Guidelines*, ANTI-TRUST, Fall 2010, at 33, 35, <https://www.gibsondunn.com/wp-content/uploads/documents/publications/RoyallDiVincenzo-HorizontalMergerGuidelines.pdf>.

compete in the digital economy versus the industrial economy which birthed antitrust.

C. ANTITRUST FAILS TO ADDRESS STRUCTURAL FEATURES OF THE INTERNET ECONOMY THAT MAKES IT SUSCEPTIBLE TO CONCENTRATION

Because concentration in the internet economy stems, in part, from those changed dynamics, it is not reducible to behavior that falls afoul of traditional antitrust rules. Thus, harms to competition are not fully remediable by those rules. Present-day antitrust law regulates the behavior and ownership of firms⁵⁹ rather than addressing underlying structural features⁶⁰; it is precisely the structural features of many internet markets, however, that predispose them to concentration and consumer harm.⁶¹ A number of characteristics make internet monopoly more dominant and durable than in non-digital markets.⁶²

Digital markets are prone to tipping toward high concentration because of their high fixed costs, low marginal costs, large returns to scale, and strong network effects.⁶³ Once a firm makes an initial investment in a successful platform, its costs often do not rise in proportion to increasing scale.⁶⁴ Additionally, users and third-party sellers experience valuable network effects, and it can benefit from the virtuous cycle of increased data collection allowing it to improve the quality of its services and attract more users.⁶⁵ Conversely, would-be competitors face high costs in launching a platform, lack the quality-enhancing benefits of user data, and face an uphill battle in overcoming network

⁵⁹ Sykes, *supra* note 45, at 1 (“Contemporary antitrust doctrine is focused on preventing these harms by prohibiting anticompetitive conduct and mergers that enable firms to exercise market power.”).

⁶⁰ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 718–19 (2017).

⁶¹ Newman, *supra* note 4, at 1504; *see generally* Maurice E. Stucke, *Should We Be Concerned About Data-Oligopolies?*, 2 GEO. L. TECH. REV. 275, 285-96 (2018) (describing consumer harms from internet concentration).

⁶² Newman, *supra* note 4 at 1508, 1522; *infra* notes 63-66.

⁶³ LUIGI ZINGALES & FILIPPO MARIA LANCIERI, STIGLER COMMITTEE ON DIGITAL PLATFORMS FINAL REPORT 35 (2019), <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> (hereafter STIGLER REPORT); Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 YALE J. ON REG. 401, 451 (2014) (quoting Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 463 (2002)) (contending that companies in information markets can “‘appropriate the returns to creating information’ for economic advantage in the market in ways not seen in traditional commodities”).

⁶⁴ STIGLER REPORT, *supra* note 63, at 36-37.

⁶⁵ *Id.* at 37-38; *see also* United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001) (defining network effects as the phenomenon by which “‘the utility that a user derives from consumption of the good increases with the number of other agents consuming the good.’”); Stucke, *supra* note 61 at 320-23 (discussing the durability of digital monopolies).

effects, which form almost insurmountable barriers to entry.⁶⁶ Google's failure to create a popular social media platform despite its massive resources and troves of user data shows just how potent network effects are in blocking competitive entry.⁶⁷ These factors are particularly strong in social media markets; a would-be competitor faces high obstacles to entry because people already have "established personal social network[s]" on the incumbent platform.⁶⁸ Even if the entrant offers a superior product, users are reluctant to switch because doing so means losing their "collection of content and connections, and investment of effort in building each" in the incumbent's service.⁶⁹ Users unhappy with the way big tech companies collect and monetize their data don't switch away from them because they are 'locked in' by strong network effects,⁷⁰ or would-be competitors' lack of network effects make them less desirable than incumbents.⁷¹

Several popular online services exemplify why digital markets tend toward concentration. Location-logging Google Maps is more popular than privacy-focused Apple Maps among iPhone users because it has more users, and thus, more traffic information.⁷² Privacy-oriented Duck Duck Go has less effective searches than Google Search in part because it has vastly fewer users generating data.⁷³ Most social media users have an account with a Facebook platform but have never heard of Mastodon because not many people want to switch to a platform with such a small user base.⁷⁴ These network effects are powerful enough in some cases to overcome such seemingly axiomatic economic principles as the tendency for consumers to demand less of a good when its quality declines but its price remains constant.⁷⁵ Facebook epitomizes this surprising trend. It kept the 'price' for its service constant (at zero dollars) while

⁶⁶ STIGLER REPORT, *supra* note 63, at 36-38; Facebook Complaint, *supra* note 11, at 37.

⁶⁷ Sarah Perez, *Looking Back at Google+*, TECHCRUNCH, (Oct. 8, 2018), <https://techcrunch.com/2018/10/08/looking-back-at-google/>.

⁶⁸ Facebook Complaint, *supra* note 11, at 19.

⁶⁹ *Id.*

⁷⁰ *Id.*; Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 70-71 (2019).

⁷¹ *Infra* notes 72-74 and accompanying text.

⁷² Jackie Dove & Kevin Parrish, *Apple Maps vs. Google Maps: Which One Is Best for You?*, DIG. TRENDS (Mar. 9, 2021), <https://www.digitaltrends.com/mobile/apple-maps-vs-google-maps/>.

⁷³ Stucke, *supra* note 61, at 321; Sam Hollingsworth, *DuckDuckGo vs. Google: An In-Depth Search Engine Comparison*, SEARCH ENGINE J. (May 21, 2021), <https://www.searchenginejournal.com/google-vs-duckduckgo/301997/#close>.

DuckDuckGo reached its highest monthly share of the U.S. search market in January 2021 at just 2.6% of the total market compared to Google's 87.74%. *Search Engine Market Share United States Of America Oct 2020 - Oct 2021*, STATCOUNTER, <https://gs.statcounter.com/search-engine-market-share/all/united-states-of-america> (last visited Nov. 5, 2021).

⁷⁴ *Social Networking, Back in your Hands*, MASTODON, <https://joinmastodon.org> (last visited Oct. 10, 2020) (advertising the decentralized social network's 4.4 million users).

⁷⁵ Srinivasan, *supra* note 70, at 70.

degrading its quality by extracting and selling increasing amounts of users' data—and still added users.⁷⁶ These cases clearly display harms antitrust law seeks to ameliorate: curtailed consumer choice and lack of incentive for firms to improve their services.⁷⁷ At the same time, they do not necessarily represent violations of antitrust law. That means that the recent shift toward more vigorous antitrust enforcement, even if permanent, cannot address those harms that stem from the structural predisposition of digital markets toward concentration.⁷⁸

The crucial factor that underlies both the heightened ability of non-horizontal acquisition to threaten competition and the tendency of digital markets to tip toward concentration is the new centrality of data. The increasing amount, availability, and use of data distinguishes the modern digital economy from the 20th century industries antitrust law was set up to regulate.⁷⁹ To adapt to this new reality, the federal government needs tools designed to take into account and address the structural features of the digital economy.

⁷⁶ *Id.*; Casey Newton, *Facebook Usage and Revenue Continue to Grow as the Pandemic Rages On*, THE VERGE (July 30, 2020), <https://www.theverge.com/2020/7/30/21348308/facebook-earnings-q2-2020-pandemic-revenue-usage-growth> (documenting growth in monthly users of Facebook services to 3.14 billion). This trend is even stranger in light of Facebook's plummeting approval ratings. See Rosenberg, *supra* note 6 (putting Facebook's public reputation at 94th out of the 100 most visible U.S. companies).

⁷⁷ Cf. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987) ("Antitrust law is a pro-competition policy. The economic goal of such a policy is to promote consumer welfare through the efficient use and allocation of resources, the development of new and improved products, and the introduction of new production, distribution, and organizational techniques for putting economic resources to beneficial use.").

⁷⁸ European antitrust regulators are already vigorously prosecuting U.S. internet companies for anticompetitive practices, slapping them with multiple billion-dollar fines. While astonishingly large, these fines have resulted in little change—big tech companies are sufficiently "well-capitalized [to] . . . easily shrug off these hefty levies with little, if any, shareholder pushback." Mark Scott & Thibault Larger, *To Take on Big Tech, US Can Learn Antitrust Lessons from Europe*, POLITICO (Aug. 25, 2019), <https://www.politico.eu/article/europe-us-big-tech-competition-antitrust-apple-google-facebook-amazon/>; The EU's head antitrust enforcer, Margrethe Vestager, admitted that antitrust fines against U.S. tech companies were "not doing the trick . . . We have to consider remedies that are much more far-reaching." Valentina Pop, *She Fined Tech Giants Billions of Dollars. Now She Wants Sharper Tools.*, WALL ST. J. (Oct. 15, 2019), <https://www.wsj.com/articles/she-fined-tech-giants-billions-of-dollars-now-she-wants-sharper-tools-11571131520>.

⁷⁹ See generally Daniel McIntosh, *We Need to Talk About Data: How Digital Monopolies Arise and Why They Have Power and Influence*, 23 J. TECH. L. & POL'Y 185, 191-97 (2019) (documenting how data-driven network effects enable accumulation of monopoly power in the digital age).

D. SECTOR-SPECIFIC REGULATION, SUCH AS THE TELECOMMUNICATIONS ACT, IS AN ALTERNATIVE TO ANTITRUST THAT CAN ADDRESS STRUCTURAL FEATURES OF THE ECONOMY

Congress created antitrust to promote economic competition and protect consumers as a body of law applying to all companies.⁸⁰ At times, however, it has pursued those goals through legislation regulating individual industries, such as the food, banking, and telecommunications industries.⁸¹ The justifications for this type of legislation originate in common-law regulation of businesses “affected with a public interest,” which the Supreme Court extended to the then-new technology of grain elevators in *Munn v. People of the State of Illinois*.⁸² The Court ruled in that case that:

Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.⁸³

According to Feld, this case stands for the proposition that “common carriage obligations would apply to any new form of business which . . . [was] affected with the public interest.”⁸⁴ Twentieth-century U.S. lawmakers and bureaucrats applied this kind of sector-specific regulation to the providers of new technologies such as telephony, radio, and television.⁸⁵ The most salient, and important, recent example of sector-specific regulation was the Telecommunications Act of 1996 (hereafter the “Telecommunications Act”), which combined new structural regulations for the telecommunications sector with a rollback of existing behavioral regulations.⁸⁶ Congress intended the Telecommunications Act to alter the underlying market structure to promote

⁸⁰ FELD, *supra* note 25, at 48 (“By its nature as a law of general applicability, antitrust law does not focus specifically on any one industry. Even at its most aggressive, it is reactive rather than pro-active, generally operating via enforcement action.”).

⁸¹ *Id.* at 50, 59.

⁸² *Id.* at 49.

⁸³ *Munn v. Illinois*, 94 U.S. 113 (1876).

⁸⁴ FELD, *supra* note 25, at 50.

⁸⁵ UNDERSTANDING MEDIA AND CULTURE, 609-11 (Minn. Librs. Publishing ed. 2016), https://open.lib.umn.edu/mediaandculture/open/download?type=print_pdf.

⁸⁶ Nicholas Economides, *Telecommunications Regulation: An Introduction*, in THE LIMITS OF MARKET ORGANIZATION 48, 59 (Richard R. Nelson ed., 2005); Thomas W. Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, 58 FED. COMM’NS. L.J. 477, 478 (2006).

competition, which would correct for the market's imbalances and allow for it to continue sustainably with less need for governmental interference.⁸⁷ The Telecommunications Act, in particular its interconnection mandate designed to open up local telephone markets to competition, can serve as a guide for sector-specific regulation in the internet economy.

1. *Background and Structure of the Telecommunications Act*

Congress enacted the Telecommunications Act in the aftermath of the breakup of AT&T's telecommunications monopoly.⁸⁸ From the 1930s to the 80s, AT&T had "dominated all aspects of telecommunications in the United States . . . [with] approximately 90% market share of local access lines and over 90% of the long-distance revenue."⁸⁹ In 1984, AT&T settled a decade-long antitrust suit by spinning off its local telephone services into seven regional operating companies.⁹⁰ The long-distance telephone market proved amenable to competition, and AT&T's dominance of that market gradually declined.⁹¹ The local telephone markets, by contrast, remained dominated by the regional Bell Operating Companies (RBOCs) formed by the breakup,⁹² which were regulated as monopolies and prohibited from entering the long-distance market.⁹³

In order to promote competition in these concentrated local markets,⁹⁴ the Telecommunications Act included a mandatory unbundling provision requiring incumbent local telephone carriers to sell the use of disaggregated components of their networks to new entrants at wholesale price.⁹⁵ This effectively forced them to "'share' with their competitors the inherent economies of scale built into their ubiquitous local networks."⁹⁶ Prices were to be determined through either private negotiation, or failing that, set by the government.⁹⁷ The goal was to provide a "stepping stone [into local telephone markets] for new networks,

⁸⁷ FELD, *supra* note 25, at 22-23.

⁸⁸ Jon Reid, *AT&T Antitrust Fight Gives Lawmakers Road Map to Rein in Big Tech*, BLOOMBERG L. (Mar. 24, 2021), <https://news.bloomberglaw.com/tech-and-telecom-law/at-t-antitrust-fight-gives-lawmakers-road-map-to-rein-in-big-tech>.

⁸⁹ Economides, *supra* note 86, at 54.

⁹⁰ *Id.* at 55.

⁹¹ *Id.*

⁹² Hanlong Fu et al., *The Impact of the Telecommunications Act of 1996 in the Broadband Age*, in 8 ADVANCES IN COMM'NS & MEDIA RSCH. 117, 124-25 (Anthony V. Stavros ed., 2011).

⁹³ Economides, *supra* note 86, at 55, 57-58.

⁹⁴ Mark D. Schneider et al., *The USTA Decisions and the Rise and Fall of Telephone Competition*, 22 COMM'N. LAW. 1, 18 (2004).

⁹⁵ J. Gregory Sidak, *The Failure of Good Intentions: The WorldCom Fraud and the Collapse of American Telecommunications After Deregulation*, 20 YALE J. ON REG. 207, 214 (2003).

⁹⁶ George S. Ford & Lawrence J. Spiwak, *Lessons Learned from the U.S. Unbundling Experience*, 68 FED. COMM'N. L.J. 95, 123 (2016).

⁹⁷ Hazlett, *supra* note 86, at 478.

which would then have the economic ability and incentive to construct new facilities of their own.”⁹⁸

2. *Market Outcomes of the Telecommunications Act*

While network facility sharing was technically mandatory, the Telecommunications Act eschewed penalties for noncompliance in favor of the ‘carrot’ of entry into the long-distance market, which RBOCs remained prohibited from entering until they had complied with the mandate.⁹⁹ Given the lack of penalties for not complying with the unbundling mandate, RBOCs opted to “delay entry of their local networks to competition as long as possible, even if that would lead to delay of their entry into the long-distance service market.”¹⁰⁰ They simultaneously engaged in a lengthy legal battle against the Telecommunications Act’s interconnection provisions, which produced substantial uncertainty in pricing and implementation of network interconnection and depressed competitive entry into local telephone markets.¹⁰¹

Nonetheless, the immediate effect of the Telecommunications Act was a boom in telecommunications investment, which by 2004 had led to competing local carriers capturing “20% of the total market[] using unbundled elements made available by the rules implementing the 1996 Act.”¹⁰² As a result of competition from this network facility sharing, consumers paid less for phone service.¹⁰³ The facility sharing rules that fostered competition were issued by the Federal Communications Commission (FCC), the agency that oversees telecommunications regulation.¹⁰⁴ In 2004, however, the D.C. Circuit Court of Appeals overturned the facility sharing regime,¹⁰⁵ to which the FCC responded by effectively foreclosing facility sharing as the basis of a viable business plan.¹⁰⁶ As local telephone facility sharing rapidly phased out, the competition Congress hoped to catalyze came instead from the emergence of new technology: cell phones and voice services becoming available over broadband internet connections.¹⁰⁷

⁹⁸ *Id.*

⁹⁹ Schneider et al. *supra* note 94, at 18.

¹⁰⁰ Economides, *supra* note 86, at 66.

¹⁰¹ *Id.*; Hazlett, *supra* note 86, at 485 (quoting an unnamed analyst) (“This is an eight-year, claw-your-opponent’s-eye-out battle regulatorily, legally and politically.”).

¹⁰² Ford et al., *supra* note 96, at 99.

¹⁰³ Schneider et al. *supra* note 94, at 18 (explaining local telephone companies’ view that consumer savings stemmed from forced “unsustainable low wholesale pricing” that would eventually bankrupt them).

¹⁰⁴ UNDERSTANDING MEDIA AND CULTURE, *supra* note 91, at 611.

¹⁰⁵ Hazlett, *supra* note 86, at 485.

¹⁰⁶ Ford et al., *supra* note 96, at 99.

¹⁰⁷ *Id.* at 100 (stating that by 2016, once-dominant incumbent local telephone companies “serve[d] fewer than half of all access lines”).

In retrospect, the economics of facilities-based local telephone service provision were almost certainly insufficient to offer adequate returns on the capital needed to build out entirely separate infrastructure from that which already existed.¹⁰⁸ Thus, the Telecommunications Act's facility sharing mandate was probably never a reasonable stepping stone to competing wireline telephone providers building their own local facilities, but rather an opportunity for them to offer telecommunication services without such expensive investment.¹⁰⁹ The Telecommunications Act's enticement for RBOCs to share their facilities, access to the long-distance market, proved insufficient to overcome their natural reluctance to help competitors undercut their dominance.¹¹⁰ All told, the Telecommunications Act's central structural regulation failed to bring about the sustainable competition in local telephone markets its architects intended to create. That competition eventually arrived from entirely new technology, not as a result of the facility sharing mandate.¹¹¹ As this Note turns to sector-specific regulation of large internet firms, its analysis will be guided by the goals, policy tools, and outcomes of the Telecommunications Act.

III. THE ACCESS ACT IS A PROMISING STEP TOWARDS CORRECTING THE INTERNET ECONOMY'S STRUCTURAL PROBLEMS

This Note has expressed doubts about the effectiveness of current antitrust law to remedy competitive harms in the digital economy and explored the possibility of using non-antitrust legislation specific to that sector to regulate internet companies. Several such proposals have been put forward, including the ACCESS Act, which is a promising step toward correcting some of the digital economy's structural problems. Senators Mark Warner (D-VA), Richard Blumenthal (D-CT), and Josh Hawley (R-MO) introduced the ACCESS Act on October 22, 2019.¹¹² In a long tweet thread the same day, Sen. Warner pitched it as reinvigorating competition in the digital marketplace.¹¹³ According to Sen. Warner, the ACCESS Act's purpose is to "remove the current barriers to consumer choice and put Americans back in control of their data and their communications."¹¹⁴ The next section of this Note will provide an overview of the ACCESS Act and examine its three core policy proposals: data portability,

¹⁰⁸ *Id.* at 123-24.

¹⁰⁹ *Id.* at 123.

¹¹⁰ *Id.* at 124 ("[N]o firm will ever be enthusiastic about consciously going against its own self-interests by selling its rivals their key input of production . . .").

¹¹¹ Hazlett, *supra* note 86, at 480 ("[T]he transition to competitive networks anticipated in the 1996 Act has been largely achieved, albeit through the development of alternative telecommunications systems not aided by mandatory network sharing rules.").

¹¹² Warner, *supra* note 15, at 1.

¹¹³ Warner, *supra* note 16.

¹¹⁴ *Id.*

interoperability, and delegatability.¹¹⁵ Providing insight on these proposals will be Mike Masnick's¹¹⁶ article, *Protocols, Not Platforms: A Technological Approach to Free Speech*,¹¹⁷ and Harold Feld's book, *The Case for the Digital Platform Act*.¹¹⁸

A. CORE PROVISIONS OF THE ACCESS ACT

Before discussing the ACCESS Act's core provisions—portability, interoperability, and delegatability, it is important to note that it applies narrowly to “large communications platforms.”¹¹⁹ These are products or services of “consumer-facing communications and information services provider[s]” that: “(A) generate[] income, directly or indirectly, from the collection, processing, sale, or sharing of user data; and (B) ha[ve] more than 100,000,000 monthly active users in the United States.”¹²⁰ Popular platforms like Twitter, Snapchat, and Pinterest fall below this high threshold, leaving only a handful of the biggest: Facebook, Instagram (owned by Facebook), YouTube (owned by Google), Tik Tok, and LinkedIn (owned by Microsoft).¹²¹ Only those platforms with more than 100 million U.S. users would be subject to the ACCESS Act's portability, interoperability, and delegatability requirements.¹²²

¹¹⁵ *Id.*

¹¹⁶ Mike Masnick, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/mike-masnick> (last visited Oct. 19, 2020) (“Mike Masnick is the founder & editor of the popular Techdirt blog as well as the founder of the Silicon Valley think tank, the Copia Institute. In both roles, he explores the intersection of technology, innovation, policy, law, civil liberties, and economics.”).

¹¹⁷ Masnick, *supra* note 2.

¹¹⁸ FELD, *supra* note 25.

¹¹⁹ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. §§ 3-5 (2019).

¹²⁰ *Id.* § 2(7).

¹²¹ Adam Warner, *Which Social Media Platform Has the Most Users? (2021)*, WEBSITE PLANET, <https://www.websiteplanet.com/blog/social-media-platform-users/> (last accessed Nov. 6, 2021) (listing Facebook, Instagram, YouTube as having more than 100 million active monthly U.S. users); Brian Dean, *TikTok User Statistics (2021)*, BACKLINK (Oct. 11, 2021), <https://backlinko.com/tiktok-users> (over 100 million users); LinkedIn Statistics and Facts, MARKET.US (last visited Nov. 16, 2021), <https://market.us/statistics/social-media/linkedin/> (310 million users); Brian Dean, *How Many People Use Twitter in 2021?*, BACKLINK (Oct. 8, 2021), <https://backlinko.com/twitter-users#users-by-country> (73 million users); L. Ceci, *Number of Snapchat Users in the United States from 2018 to 2023*, STATISTA (Aug. 4, 2021), <https://www.statista.com/statistics/558227/number-of-snapchat-users-usa/> (87.3 million users); *Number of Monthly Active Pinterest Users from 1st quarter 2016 to 2nd quarter 2021, by Region*, STATISTA (Nov. 11, 2021), <https://www.statista.com/statistics/995071/pinterest-app-mau-region/> (91 million users).

¹²² *Id.* §§ 3-5.

1. Data Portability

Data portability means users are able to move the data they generated on one service to different services, including competing ones.¹²³ Many large internet firms have made it possible for users to download all their personal data.¹²⁴ An already-existing legal regime that requires data portability, the EU's General Data Protection Regulation (GDPR), goes further. It requires that they make that data available to users in a format that is both "structured, commonly used[,] and machine readable" and formatted in a way that an individual can make use of it.¹²⁵ The ACCESS Act adopts a version of GDPR's portability mandate, but additionally requires such transfers to be made upon a user's request to a "competing communications provider," which bypasses the onerous task of downloading and then uploading large amounts of data.¹²⁶

Big tech's response to GDPR's portability mandate is helpful for understanding the pitfalls the ACCESS Act will have to avoid being unsuccessful. For large internet firms, such as Facebook and Google, data is their key input, analogous to the infrastructure which the Telecommunications Act ordered incumbent local telephone companies to share with competitors.¹²⁷ Thus, companies that already hold significant amounts of user data should, in theory, be reluctant to share it in a way that will benefit competitors. It's true that many large tech companies are part of the Data Transfer Project, which allows people to move their data between participating platforms,¹²⁸ or have their own portability features.¹²⁹ But these existing examples of portability have not

¹²³ Allen St. John, *Europe's GDPR Brings Data Portability to U.S. Consumers*, CONSUMER REP. (May 25, 2018), <https://www.consumerreports.org/privacy/gdpr-brings-data-portability-to-us-consumers/>; see also Whitney Nixdorf, *Planting in A Walled Garden: Data Portability Policies to Inform Consumers How Much (If Any) of the Harvest Is Their Share*, 29 TRANSNAT'L L. & CONTEMP. PROBS. 135, 139 (2019) (discussing the legal implications of data portability).

¹²⁴ GDPR Chap. 3, Art. 20; Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, THE GUARDIAN (Mar. 30, 2018), <https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy>.

¹²⁵ *Right to Data Portability*, INFO. COMM'R'S OFFICE, <https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-data-portability/> (last visited Nov. 7, 2020) (listing formats "appropriate for data portability" under GDPR).

¹²⁶ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 3(a) (2019).

¹²⁷ *Supra* note 95-97 and accompanying text; McIntosh, *supra* note 79, at 201-02 (describing how it is control of vast troves of data that gives Google and Facebook such great power and innovative potential).

¹²⁸ Russell Brandom, *Apple Joins Google, Facebook, and Twitter in Data-Sharing Project*, THE VERGE (July 30, 2019), <https://www.theverge.com/2019/7/30/20746868/apple-data-transfer-project-google-microsoft-twitter>.

¹²⁹ Michael Grothaus, *Here's How to See the Data That Tech Giants Have About You*, FAST COMPANY (May 25, 2018), <https://www.fastcompany.com/40567706/heres-how-to-see-the>

provided small tech companies a foothold because they were designed for individual use¹³⁰ and are in some cases actually deliberately not useful for would-be competitors.¹³¹

For instance, while Facebook allowed users to download their data in a format accessible to app developers, a team of programmers at ProgrammableWeb found that the functionality of the provided data was limited.¹³² They discovered that the downloadable data was missing key information needed to allow a competitor to reconstruct a user's Facebook history in a format remotely similar to how it appeared on Facebook.¹³³ The team also ran into obstacles to porting their Facebook accounts' social graphs, a term that refers to the web of interconnections with other users.¹³⁴ Because social graphs contain other people's data, Facebook does not allow users to port this crucial portion of their data without getting the consent of those it belongs to.¹³⁵ The developers found that to be able to request that consent from other users, they would need Facebook approval for their app, but, perhaps not surprisingly, the company ignored their approval requests.¹³⁶ The team concluded that "Facebook imposes very real constraints on the data you can access, from the obfuscation of permissions and data relationships, intentional or not, to limiting access to your friends' information."¹³⁷

As this Note has shown, the technology for porting data already exists, and big tech companies are expanding data portability.¹³⁸ But without more rigorous

data-that-tech-giants-have-about-you (detailing large tech companies' user data download options).

¹³⁰ Craig Shank, *Microsoft, Facebook, Google and Twitter Introduce the Data Transfer Project: An Open Source Initiative for Consumer Data Portability*, MICROSOFT (July 20, 2018), <https://blogs.microsoft.com/eupolicy/2018/07/20/microsoft-facebook-google-and-twitter-introduce-the-data-transfer-project-an-open-source-initiative-for-consumer-data-portability/> (describing one of the project's standards as a "focus on data that has utility for the individual user" rather than "enterprise data").

¹³¹ Shelby Switzer, *I Tried Getting My Data Out of Facebook Before Quitting. I Even Wrote Code. It Didn't Go Well.*, PROGRAMMABLEWEB (July 2, 2019), <https://www.programmableweb.com/news/i-tried-getting-my-data-out-facebook-quitting-i-even-wrote-code-it-didnt-go-well/analysis/2019/07/02>.

¹³² *Id.* (stating that Facebook's provided format for data downloading made nearly impossible "even something as simple as uploading those photos along with their descriptions to a Google Photos album").

¹³³ *Id.*

¹³⁴ *Id.* (defining social graph as "the context behind, and relationships between, your photos, events, status updates, links, contacts, groups, and more."); *see also* Facebook Complaint, *supra* note 11, at 15.

¹³⁵ Switzer, *supra* note 131 ("[Y]ou can't get any information about your friends: their names, their contact info, or even the posts they've made on your wall unless those posts are public.").

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Supra* notes 128-30 and accompanying text.

portability requirements, large internet firms can do so in a way that prevents users from benefitting potential competitors like the team at ProgrammableWeb. Dominant platforms can generate positive publicity by promoting large-scale projects like the Data Transfer Project, while ensuring in more granular and technical ways that their portability options cannot facilitate a real exodus of users to a competing platform.¹³⁹

Meanwhile, existing U.S. legal precedent appears to conflict with a portability mandate, by affirming platforms' right to prevent their users from (1) posting content from a competitor¹⁴⁰ and (2) allowing another company to access their accounts.¹⁴¹ These rulings stem from the antitrust principle that there is no duty to deal with competitors, which is in tension with a data portability mandate.¹⁴² Incumbent tech firms have used this aspect of antitrust law to quash upstart competitors and cement their own dominance.¹⁴³ Accordingly, the ACCESS Act's data portability requirements could be a major step forward in promoting internet platform competition, but only if companies are made to comply with the Act's intent and not just its bare technical requirements.¹⁴⁴ As this section has discussed, data portability is unlikely to have much positive effect on internet users unless companies make data available in a form that has functionality when imported to a competing service.¹⁴⁵ The ACCESS Act's next core provision instantiates that concept—interoperability.

¹³⁹ See *supra* text accompanying notes 132-37 (detailing the obstacles that one such platform, Facebook, placed in the way of anyone trying to effectively port their data to a competing service).

¹⁴⁰ Nixdorf, *supra* note 123, at 144 (summarizing *LiveUniverse, Inc. v. MySpace, Inc.*, No. CV 06-6994 AHM (RZ.x), 2007 WL 6865852, at *1 (C.D. Cal. June 4, 2007), *aff'd*, 304 F. App'x 554 (9th Cir. 2008)) ("LiveUniverse, the operator of social networking site vidilife, sued MySpace for preventing users from incorporating content from vidilife in their MySpace profiles. The court held that MySpace had not engaged in exclusionary conduct . . .").

¹⁴¹ *Id.* at 144 (summarizing *Facebook, Inc. v. Power Ventures, Inc.*, No. C 08-05780 JW, 2010 WL 3291750, at *1, *13-14 (N.D. Cal. July 20, 2010), *aff'd* *Facebook, Inc. v. Power Ventures, Inc.*, 844 F.3d 1058 (9th Cir. 2016)) ("Facebook had not engaged in exclusionary conduct when it prevented social media aggregator Power Ventures from accessing Facebook user accounts, even though Power Ventures had users' permission . . .").

¹⁴² *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)) (holding that the Sherman Act generally "does not restrict the long recognized right of [a] trader or manufacturer . . . to exercise his own independent discretion as to parties with whom he will deal.").

¹⁴³ Chinmayi Sharma, *Concentrated Digital Markets, Restrictive APIs, and the Fight for Internet Interoperability*, 50 U. MEM. L. REV. 441, 473-74, 455-56 (2019).

¹⁴⁴ See, e.g., St. John, *supra* note 123 (quoting Justin Brookman, Consumers Union's Privacy and Technology Policy Director) ("If the data you get from a company is incomplete or difficult to use, the impact [of data portability] will be limited.").

¹⁴⁵ Nixdorf, *supra* note 123, at 151 ([I]data portability . . . does not solve the much-maligned "lock-in" problem because network effects persist, even with portability, in the absence of interoperability.").

2. Interoperability

This Note has examined how data portability, in isolation, has failed to counteract the lock-in effects of large platforms. In Sen. Warner's words: "[P]ortability isn't enough if there's nobody to share content or communicate with on a new network or service."¹⁴⁶ So the ACCESS Act requires large platforms to implement "[t]ransparent, third-party-accessible interfaces (including application programming interfaces) to facilitate and maintain technically compatible, interoperable communications with a user of a competing communications provider."¹⁴⁷

Interoperability relies on common application programming interfaces (APIs), which allow for "points of interconnection" and interactivity with platforms.¹⁴⁸ Such "open" APIs are often part of proprietary software that can be used subject to licensing terms.¹⁴⁹ These terms may make APIs "essentially unworkable for potential competitors," as with the cable industry's so-called open proprietary standards.¹⁵⁰ Licensing policies may also be deployed selectively to keep would-be competitors from gaining ground at the incumbent's expense.¹⁵¹ Facebook selectively barred access to one of its vital APIs, the Find Friends function, in order to stamp out numerous upstart competitors.¹⁵² It banned the use of Facebook APIs to "'replicate core functionality that Facebook already provides'" until December 2018, when it retracted the policy under pressure.¹⁵³ These examples from cable and social media demonstrate that interoperability must be robust and not subject to self-dealing by incumbent firms if it is to effectively promote competition.

The ACCESS Act would impose many requirements on large platforms pursuant to implementing interoperability, including: (1) setting reasonable usage expectations and thresholds for free access requests over which, with notice, they

¹⁴⁶ Warner, *supra* note 16.

¹⁴⁷ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 4(a) (2019).

¹⁴⁸ FELD, *supra* note 25, at 81.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Josh Constine, *Facebook Shouldn't Block You from Finding Friends on Competitors*, TECHCRUNCH (Apr. 13, 2018), <https://techcrunch.com/2018/04/13/free-the-social-graph/>.

¹⁵² *Id.* (detailing how Facebook's selective access restrictions torpedoed Voxel, MessageMe, Phhphoto, and Vine).

¹⁵³ Josh Constine, *Facebook Ends Platform Policy Banning Apps That Copy Its Features*, TECHCRUNCH (Dec. 4, 2018, 6:09 PM), <https://techcrunch.com/2018/12/04/facebook-allows-competitors/>; Facebook Complaint, *supra* note 11, at 8 (stating that Facebook suspended the ban "under the glare of international antitrust and regulatory scrutiny").

may charge reasonable fees;¹⁵⁴ (2) establishing security and privacy standards;¹⁵⁵ (3) refraining from changing the interoperability interface in a way that denies access or undermines interoperability;¹⁵⁶ and (4) providing “complete and accurate documentation describing access to the interoperability interface.”¹⁵⁷ An important non-commercialization provision applies to both the platform and its interoperating competitor equally; neither can “collect, use, or share user data” from the other except to protect their “privacy and security” and “maintain[] interoperability of services.”¹⁵⁸ That means the incumbent platform cannot monetize data obtained via interoperability from the competing platform and vice versa.¹⁵⁹ Instead, the interoperability functionality is aimed at helping upstart internet platforms overcome incumbents’ network effects and compete with them on a level playing field.¹⁶⁰

Such interoperability mandates are not unprecedented. The ACCESS Act’s requirement that incumbent internet platforms allow competitors to interconnect echoes the Telecommunications Act’s mandate for incumbent local telephone companies discussed above. This similarity makes the Telecommunications Act useful for assessing the wisdom and feasibility of the ACCESS Act’s interoperability mandate. For now, however, consider an example from the early internet economy.

In 2001, the FCC forced AOL to make its instant messaging platforms—most prominently, AOL Instant Messenger (AIM)—interoperable with competitors.¹⁶¹ At the time, AOL’s messaging services accounted for 90% of the instant messaging market.¹⁶² Making AIM compatible with rival messaging services allowed consumers to access their digital connections through different services.¹⁶³ This inrush of what turned out to be more innovative competition doomed AIM, which eventually shut down in 2017.¹⁶⁴ Depending on one’s outlook, the case of AIM could be viewed either as illegitimate government favoritism toward certain firms over another or the removal of a market barrier that inefficiently protected an established service from more innovative

¹⁵⁴ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. §§ 4(c)(2)(B)(i)-(iv) (2019).

¹⁵⁵ *Id.* § 4(c)(2)(B)(v).

¹⁵⁶ *Id.* § 4(c)(2)(C).

¹⁵⁷ *Id.* § 4(c)(4).

¹⁵⁸ *Id.* §§ 4(c)(6), (d).

¹⁵⁹ *Id.*

¹⁶⁰ Warner, *supra* note 15.

¹⁶¹ Louise Matsakis, *Regulate Facebook Like AIM*, VICE (Oct. 6, 2017, 2:51 PM), <https://www.vice.com/en/article/mb7n7v/aim-aol-instant-messenger-regulation-facebook-ending>.

¹⁶² *MS to AOL: End IM Stranglehold*, WIRED (June 8, 2000, 1:10 PM), <https://www.wired.com/2000/06/ms-to-aol-end-im-stranglehold/>.

¹⁶³ Matsakis, *supra* note 161.

¹⁶⁴ *Id.*

competitors. Naturally, the sponsors of the ACCESS Act believe it does the latter.¹⁶⁵ The final core mechanism they introduce toward removing the market barrier of network effects is delegatability.

3. *Delegatability*

The ACCESS Act's data possibility and interoperability provisions make delegatability possible. Delegatability means the ability of internet platform users to appoint a third-party service "to interact with the platform on their behalf."¹⁶⁶ It can fundamentally change users' relationship with internet platforms from the current model in which platforms both host and curate content for users. Delegatability can split the roles of host and curator and give users the choice of whether the same entity does both.¹⁶⁷ A robust form of delegatability would give potential competitors to Facebook or Twitter or YouTube the opportunity to compete for those already using those services by offering a "different, or better, interface to [them]" instead of trying to build their own equivalent, says Masnick.¹⁶⁸ But robust delegatability, in which third-party interfaces offer variations on content moderation and the overall user experience,¹⁶⁹ could raise concerns about expropriation and state-sponsored freeloading.¹⁷⁰ That is perhaps why the sponsors of the ACCESS Act opted to maintain delegatability by emphasizing its role in privacy management¹⁷¹ and limiting how firms to which users delegate access can monetize their services.¹⁷²

Delegatability under the ACCESS Act is limited to "custodial third-party agent[s] . . . authorized by a user to interact with a large communications platform provider on that user's behalf to manage the user's online interactions, content,

¹⁶⁵ Warner, *supra* note 15 (explaining that the ACCESS Act will loosen the "exclusive dominance of Facebook and Google," facilitating "meaningful competition" and "technological innovation").

¹⁶⁶ Bennett Cyphers & Cory Doctorow, *A Legislative Path to an Interoperable Internet*, ELEC. FRONTIER FOUND. (July 28, 2020), <https://www.eff.org/deeplinks/2020/07/legislative-path-interoperable-internet>.

¹⁶⁷ Masnick, *supra* note 2, at 18 (allowing "many different individuals and organizations . . . to tweak the system to their own levels of comfort and share them with others" rather than the platform serving as "single-source arbiter").

¹⁶⁸ *Id.* at 15.

¹⁶⁹ *Id.* at 17-18.

¹⁷⁰ See generally James Pethokoukis, *Washington vs. Big Tech: Should You 'Own' All Your Social Network Data? An AEIdeas Online Symposium*, AM. ENTER. INST. (Oct. 10, 2017), <https://www.aei.org/economics/washington-vs-big-tech-should-you-own-all-your-social-network-data-an-acideas-online-symposium/> (quoting University of Nebraska College of Law professor Gus Hurtwitz) (opining that an interoperability mandate "wouldn't so much allow other firms to interconnect with Facebook or limit the network effects of the social graph as it would dissolve Facebook as a going concern into a pool of social media acid.").

¹⁷¹ Warner, *supra* note 16 (describing delegatability as "the idea that consumers should be able to allow a third-party service to manage their privacy settings across multiple platforms.").

¹⁷² *Infra* notes 175-77 and accompanying text.

and account settings.”¹⁷³ Third-party agents responsibilities include: protecting user data,¹⁷⁴ “not access[ing] or manag[ing] a user’s online interactions, content, or account settings” so as to benefit the agent at the user’s expense,¹⁷⁵ and conforming to the user’s “directions or reasonable expectations.”¹⁷⁶ Significantly, custodial third-party agents “shall not collect, use, or share any user data provided to it by a user, or accessed on a user’s behalf” for their own commercial benefit.¹⁷⁷ This means the entities to which the ACCESS Act allows delegation cannot compete directly with internet platforms by adopting their monetization strategy—collecting user data. The sponsors of the ACCESS Act instead expect these third-party data custodians to charge a fee to manage users’ privacy settings across the different platforms they use.¹⁷⁸

Despite the limitations on the potential business models data custodians can employ, the ACCESS Act is compatible with a more robust form of delegatability. In particular, the Act’s broad language allowing data custodians to “manage the user’s online interactions, content, and account settings”¹⁷⁹ suggests that they could serve as customizable content curators. Presently, internet platforms use complex and opaque algorithms to determine what content appears to users.¹⁸⁰ Since their business model depends on user engagement (i.e., time spent on the platform), they prioritize content that maximizes engagement, often disseminating material that generates outrage over that which is true, reputable, and thoughtful.¹⁸¹ Users are likely to have different priorities for what content appears in their feeds.¹⁸² Under the current regime, internet users face a binary choice: use the dominant platform, and abdicate control over the content

¹⁷³ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 2(5) (2019).

¹⁷⁴ *Id.* § 5(f)(1).

¹⁷⁵ *Id.* § 5(f)(2)(A).

¹⁷⁶ *Id.* § 5(f)(2).

¹⁷⁷ *Id.* § 5(f)(3).

¹⁷⁸ *Id.* § 5(g).

¹⁷⁹ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 2(5) (2019).

¹⁸⁰ Joanna Stern, *Social-Media Algorithms Rule How We See the World. Good Luck Trying to Stop Them.*, WALL ST. J. (Jan. 17, 2021), <https://www.wsj.com/articles/social-media-algorithms-rule-how-we-see-the-world-good-luck-trying-to-stop-them-11610884800>.

¹⁸¹ STIGLER REPORT, *supra* note 63, at 62; *see also* Peter Dizikes, *Study: On Twitter, False News Travels Faster Than True Stories*, MIT NEWS (Mar. 8, 2018), <https://news.mit.edu/2018/study-twitter-false-news-travels-faster-true-stories-0308> (finding that Twitter “falsehood[s] diffuse[] significantly farther, faster, deeper, and more broadly than the truth, in all categories of information.”); Keach Hagey et al., *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead.*, WALL ST. J. (Sept. 15, 2021), https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215?mod=article_inline (explaining how Facebook’s algorithm tweaks, designed to increase engagement, boosted “[m]isinformation, toxicity, and violent content”).

¹⁸² *See* Masnick, *supra* note 2, at 17-18.

they are exposed to, or go without the platform altogether, which is a daunting and isolating prospect for many.¹⁸³ Delagatability, as called for by the ACCESS Act, has the potential to give internet users the best of both worlds—the connectedness of a vibrant platform and more autonomy and control over their online experience.

B. STRENGTHS OF THE ACCESS ACT

The ACCESS Act is a nuanced yet forceful effort to address the underlying dynamics of internet markets that contribute to unhealthy concentration. It formulates an approach that builds on the Telecommunications Act and incorporates some of the lessons learned from that attempt at structural intervention to correct market imbalance. The real-world outcomes of the Telecommunications Act are helpful in considering how the ACCESS Act would work if enacted.

Despite the significant confounding variables of legal uncertainty surrounding the Telecommunications Act's unbundling mandate and the emergence of substitutes to traditional wired telephony, several key takeaways are apparent. First, forcing incumbents to share their facilities with competitors did induce competitors to enter formerly monopolistic markets and helped lower consumer prices.¹⁸⁴ Second, facility-sharing appeared nonetheless not to be a feasible stepping-stone for entering competitors to build their own facilities.¹⁸⁵ Third, the structural regulation was thus more of a forced transfer of surplus from incumbent firms to entrants than a temporary intervention to accomplish a specific purpose.¹⁸⁶ Finally, incumbent telephone companies, who were best-positioned to determine the 'reasonable price' to charge competitors to use their facilities, had every incentive to instead price out and otherwise obstruct competitors.¹⁸⁷

The ACCESS Act incorporates some of the lessons of the Telecommunications Act a generation before. Its sponsors recognize that

¹⁸³ See Aja Romano, *How Facebook Made It Impossible to Delete Facebook*, VOX (Dec. 20, 2018), <https://www.vox.com/culture/2018/3/22/17146776/delete-facebook-how-to-quit-difficult> (noting how embedded Facebook is in modern society); see also Harper Neidig, *Facebook Ends 2018 with Record Profits*, THE HILL (Jan. 30, 2019), <https://thehill.com/policy/technology/427732-facebook-ends-2018-with-record-profits> (“[T]he #DeleteFacebook campaign has failed to make a noticeable dent on the company's finances . . .”).

¹⁸⁴ Ford et al., *supra* note 96, at 99; Schneider et al., *supra* note 94, at 18.

¹⁸⁵ See *supra* text accompanying notes 109-110 (explaining that constructing duplicative local wired telephone infrastructure was not economically justified).

¹⁸⁶ See Ford et al., *supra* note 96, at 123, 124 (describing the Telecommunications Act's mandate that incumbent telephone companies provide competitors access to their facilities at cost).

¹⁸⁷ See *supra* text accompanying notes 110, 101 (describing incumbent telephone companies' resistance to and efforts to undermine the mandate).

injecting competition into monopoly markets benefits consumers but that conditions in the internet economy, like those in local telephone markets, require structural regulation to facilitate competition.¹⁸⁸ At the same time, they are committed to the idea that structural intervention can be a stepping-stone for new entrants to eventually being able to compete with the incumbent on their own terms.¹⁸⁹ To that end, the ACCESS Act contains mechanisms designed to impede entering firms from becoming long-term parasites of the incumbent, with no other business model than freeloading off of the incumbent.

Competing platforms' access to the incumbent's data obtained through the interoperability interface is limited to facilitating interoperability and protecting user privacy and security; commercialization is prohibited under Section 4(d).¹⁹⁰ The competing platform would still be able to commercialize the data imported by its user but not the data accessed from users of the incumbent platform who had not provided the competing platform their data. In practice, this prevents a competing platform from building its business model on extracting valuable data from an incumbent platform. Rather, a competing platform could only directly financially benefit from its own users and the content they generated, which means it would need to grow its own user base to generate sustainable revenues. The ACCESS Act's intervention would thus only provide an indirect financial benefit to competing platforms, by overcoming the lock-in effects that makes it difficult for new internet platforms to enter concentrated markets and enable them to attract users of incumbent firms.¹⁹¹ Therefore, while it works via a similar mechanism to the Telecommunications Act's unbundling mandate, the ACCESS Act's interoperability mandate creates a more feasible stepping stone for competing platforms to overcome network effects and gain market share on the strength of their own service.

The ACCESS Act's limitations on delegatability, most prominently the ban on data custodians commercializing user data,¹⁹² present a challenge to monetizing these services. Most platforms make their money from advertising, especially targeted advertising based on user data.¹⁹³ Preventing data custodians from monetizing through targeted ads would make offering data custodian

¹⁸⁸ Warner, *supra* note 15.

¹⁸⁹ *Id.*

¹⁹⁰ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 4(d) (2019).

¹⁹¹ See *supra* notes 63-64 (explaining why internet platforms exhibit lock-in effects); Spencer W. Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1791-92 (2012) (discussing Facebook's market power through lock-in effects); Warner, *supra* note 15.

¹⁹² Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 5(f)(3) (2019).

¹⁹³ See Greg McFarlane, *How Facebook, Twitter, Social Media Make Money From You*, INVESTOPEDIA (Sept. 21, 2021), <https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx>.

services less desirable for firms and likely leave consumers with fewer interface choices.¹⁹⁴ Still, the internet is entirely devoid of effective alternative platform interfaces at present,¹⁹⁵ so providing some instead of none would be a significant step forward.

By prying open concentrated digital markets to competitors, the ACCESS Act would exert pressure on incumbents to behave better. For instance, in the absence of effective competitors, Facebook rode through the 2018 public backlash stronger than ever.¹⁹⁶ But if users could have switched to another platform while keeping their friend networks, the fizzled #deleteFacebook movement would have almost certainly gained more traction.¹⁹⁷ In Google's case, video recommendations its subsidiary YouTube makes have been observed to steer users toward more extreme and outlandish content.¹⁹⁸ Interoperability might well divert market share from Google to an upstart competitor offering more transparent and customizable recommendation algorithms.

Internet incumbents would of course strongly resist the ACCESS Act as a regulatory challenge to their hegemony. They are much better funded than the local telephone companies that managed to obstruct, delay, and finally overturn the Telecommunications Act's unbundling mandate,¹⁹⁹ and have just as strong an incentive to resist a mandate to interoperate with competitors.²⁰⁰ That reality points out a major flaw in the ACCESS Act, its replication of one of the mechanisms of the Telecommunications Act that did not go smoothly.

¹⁹⁴ See John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 155-57 (2015) (discussing revenue strategies for zero-price markets, some of which the ACCESS Act's limitations on data custodians would preclude).

¹⁹⁵ See Thomas E. Kadri, *Digital Gatekeepers*, 99 TEX. L. REV. 951, 976-977 (2021) (describing MIT's Gobo interface as a promising way for users to control what content displays in their social media feeds that, at present, is hobbled by Facebook's refusal to let it access posts from friends).

¹⁹⁶ James Thorne, *Facebook Posts Strong Profits as Users Grow 9%*, GEEKWIRE (Jan. 30, 2019), <https://www.geekwire.com/2019/facebook-posts-strong-profits-users-grow-9/> (describing user, income growth despite "ongoing public backlash against the company's privacy practices").

¹⁹⁷ Stephen Carrillo et al., *#DELETEFACEBOOK, #MOVEME*, <https://moveme.berkeley.edu/project/deletefacebook/> (last visited Oct. 9, 2021) (providing statistics on the movement).

¹⁹⁸ Mathew Ingram, *The YouTube 'Radicalization Engine' Debate Continues*, COLUM. JOURNALISM REV. (Jan. 9, 2020), https://www.cjr.org/the_media_today/YouTube-radicalization.php.

¹⁹⁹ See *supra* text accompanying notes 100-01, 105-06 (discussing incumbent telephone companies' protracted and ultimately successful resistance to the mandate).

²⁰⁰ McIntosh, *supra* note 79, at 194-95 (discussing the competitive advantage and obstacle to competitors' entry that amassing large amounts of data confers on internet companies).

C. WEAKNESSES OF THE ACCESS ACT

For companies such as Google and Facebook, whose business model is centered around user-generated data, that data is their key input.²⁰¹ Thus, the ACCESS Act replicates the approach beset with problems when the Telecommunications Act tried it two decades ago; expecting dominant firms to facilitate competitors' entry into their market by sharing their key input.²⁰² Further, the ACCESS Act gives even less account to the entirely predictable reluctance of dominant firms to do so than its telecommunications predecessor. Rather than requiring incumbents to charge market entrants a reasonable fee for the use of their facilities as in the Telecommunications Act, the ACCESS Act forces them to provide competitors access for *free* up to a reasonable point.²⁰³ To monopolists, the reasonable amount of free access to their key inputs is as little as they can get away with. The monopolist has no market justification for helping competitors enter its domain, so any transactions that take place will only happen because of government coercion. When government agencies set prices at which these transactions will take place, they do so without the benefit of firms' internal economic information. Thus, as in the telecommunications context, government price-setting runs the risk of failing to properly incentivize competitors to enter the market (if the price is too low) or undermining incentives for investment and innovation (if it is too high).²⁰⁴

One element of the ACCESS Act that limits its potential to correct the internet economy's structural imbalances is that its 100 million U.S. user cutoff means it only applies to the largest internet platforms.²⁰⁵ The ACCESS Act's sponsors attempt to strike a balance between addressing the biggest platforms' dominance and not putting a damper on emerging firms' incentive to innovate. Further, they appear to have gleaned from Europe's attempts at sector-specific regulation that unless internet laws are drafted carefully, they can place a greater burden on small and mid-size companies than large ones.²⁰⁶ Universally

²⁰¹ *Id.*; Newman, *supra* note 67 at 403-04, 425-26.

²⁰² See generally *supra* text accompanying notes 94-100 (discussing the Telecommunications Act's facilities-sharing mandate).

²⁰³ *Supra* text accompanying note 154; Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 4(c)(2)(B)(i)-(iv) (2019).

²⁰⁴ Hazlett, *supra* note 86, at 507-08.

²⁰⁵ *Supra* text accompanying notes 119-21.

²⁰⁶ Sam Schechner & Nick Kostov, *Google and Facebook Likely to Benefit From Europe's Privacy Crackdown*, WALL ST. J. (Apr. 23, 2018), <https://www.wsj.com/articles/how-europes-new-privacy-rules-favor-google-and-facebook-1524536324>; Russell Brandom, *Everything You Need to Know About GDPR*, THE VERGE (May 25, 2018), <https://www.theverge.com/2018/3/28/17172548/gdpr-compliance-requirements-privacy-notice> ("Regulations like this tend to hit small companies the hardest, so the GDPR might also tip the scales even further toward big players like Google and Facebook . . .").

applicable regulation disadvantages upstart tech companies relative to incumbents, since incumbents have more resources to spend complying with complex and demanding rules.²⁰⁷ Thus, to avoid disadvantaging smaller and newer firms, it was necessary to include a user number threshold in the Act. Placing the threshold at 100 million monthly active users, however, means several of the most popular technology companies are not covered by the ACCESS Act.²⁰⁸

Another problem with the ACCESS Act related to the high user number threshold is that the interoperability mandate only applies to large communications platforms, not platforms operated by large communications providers. So, it would seem that a tech company like Facebook, which operates several services that currently qualify as large communications platforms,²⁰⁹ could get around the interoperability mandate by splitting those services into smaller platforms but still centrally managing them. Splitting itself up into smaller (but still quite large) networks, perhaps based on region, age, or interests, might well be less onerous to a company like Facebook than submitting to the ACCESS Act's interoperability demands. Thus, the ACCESS Act's high user threshold and formulaic applicability requirements appear to leave open a major loophole.

The possibility that mandating portability and interoperability will impose homogeneity on internet services and forestall innovative new platform types presents another concern about the ACCESS Act.²¹⁰ It requires the National Institute of Standards and Technology to create and publish model standards to make interoperable three "popular classes of communications or information services"—online messaging, multimedia sharing, and social networking.²¹¹ It is plausible that an interoperability mandate could enshrine the present technology and ways of thinking about the provision of these classes of service, at the expense of outside-the-box innovation. However, examples from current social media platforms suggest that concerns about interoperability mandates stifling innovation are overblown. In an effort to fend off competition and keep users on its apps, Facebook has copied and incorporated features that drove

²⁰⁷ Brandom, *supra* note 206.

²⁰⁸ See *supra* note 121 and accompanying text (stating that Twitter, Snapchat, and Pinterest are exempt from the ACCESS Act's requirements).

²⁰⁹ Adam Warner, *Which Social Media Platform Has the Most Users? (2021)*, WEBSITE PLANET, <https://www.websiteplanet.com/blog/social-media-platform-users/> (last visited Nov. 6, 2021) (stating that Facebook and Instagram have more than 100 million active monthly U.S. users).

²¹⁰ Pethokoukis, *supra* note 170, (quoting law professor Daniel Lyons) (arguing that an ACCESS Act-style interoperability mandate would encourage homogenization, which could hamper the competitive dynamic of differentiation).

²¹¹ Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2019, S. 2658, 116th Cong. § 6(c) (2019).

competitors' success, such as Snapchat's disappearing Stories²¹² and Tik Tok's short videos.²¹³ Knowing that if one's service takes off it will likely be copied by the incumbent is surely a present disincentive to innovation.

By contrast, the playing field would be leveled in a world with interoperability. Currently, the incumbent platform is able to add to the benefits of its established network by copying an upstart's successful new features and making them part of its service. Meanwhile, upstarts struggle to grow or maintain market share because users can access the feature that made them unique through their account with the incumbent platform.²¹⁴ In the interoperable system proposed by the ACCESS Act, a competing platform could offer a new feature to early-adopting users while still providing access to their set of connections from the established platform.²¹⁵ Thus, interoperability would make users more willing to venture onto new platforms and allow innovative tech firms to capture more of the benefits of their innovation than in the current arrangement. Rather than interoperability dampening innovation, it is likely to promote it.

Beyond specific criticisms of the ACCESS Act, some commentators, like Masnick, think major regulatory intervention might not even be necessary to fix the internet if new technology makes the current platform models obsolete.²¹⁶ He is hopeful that various decentralized internet services, like InterPlanetary File System (IPFS) and Solid, may eventually provide compelling alternatives to the current "great powers" model currently dominating the internet.²¹⁷ Nonetheless, these efforts, as well as upstart decentralized social media networks such as Mastodon, haven't gained much traction yet. IPFS debuted in 2015 and remains a niche service requiring computer programming knowledge to effectively access.²¹⁸ The privacy-oriented Solid web platform is still in its pilot stage for

²¹² Kurt Wagner, *'Stories' Was Instagram's Smartest Move Yet*, VOX (Aug. 8, 2018), <https://www.vox.com/2018/8/8/17641256/instagram-stories-kevin-systrom-facebook-snapchat>.

²¹³ Julia Alexander, *Instagram Launches Reels, Its Attempt to Keep You Off Tik Tok*, THE VERGE (Aug. 5, 2020) <https://www.theverge.com/2020/8/5/21354117/instagram-reels-tiktok-vine-short-videos-stories-explore-music-effects-filters>.

²¹⁴ Kurt Wagner & Rani Molla, *Why Snapchat Is Shrinking*, VOX (Aug. 7, 2018) <https://www.vox.com/2018/8/7/17661756/snap-earnings-snapchat-q2-instagram-user-growth> (showing that Snapchat's growth leveled off after Instagram copied its 'Stories' function).

²¹⁵ See *supra* text accompanying notes 146-47 (describing how the ACCESS Act would allow users of competing platforms to access content and connections from the incumbent platform).

²¹⁶ Masnick, *supra* note 2, at 32 ("Services like IPFS . . . are already laying the groundwork and infrastructure for a distributed set of services . . .").

²¹⁷ *Id.*

²¹⁸ Amber Case, *Why The Internet Needs IPFS Before It's Too Late*, TECHCRUNCH (Oct. 4, 2015), <https://techcrunch.com/2015/10/04/why-the-internet-needs-ipfs-before-its-too-late/>; see Zachary Muller, *Guide to IPFS – The InterPlanetary File System*, GIGANET (July 10, 2018),

companies and organizations.²¹⁹ And Mastodon's 4.4 million users,²²⁰ are still only a tiny fraction of its competitor Twitter's 186 million daily users.²²¹ This aspiring next generation of internet platforms faces an uphill battle against the network effects of existing internet platforms as well as the public's apparent resignation to the current state of affairs.²²²

IV. CONCLUSION

Fittingly, this Note concludes by coming full circle to a second internet declaration of independence. Dr. Larry Sanger, co-founder of Wikipedia,²²³ wrote his "Declaration of Digital Independence" in 2019.²²⁴ Barlow, in his 1996 "Cyberspace" declaration, warned against government interference and control.²²⁵ Sanger, with twenty-three more years of perspective on how the internet actually developed, warns against corporate interference and control.²²⁶ He stakes out the position that people have as much right to free speech, privacy, and security on the internet as they do in general and that we, as a society, should reconsider our willingness to give up those liberties.²²⁷

Visionaries like Sanger and Masnick are right to hope for something better than the "proprietary, centralized architecture" of today's internet and the harms it fosters.²²⁸ Emerging technology may yet shift the internet toward user

<https://www.gigenet.com/blog/an-introductory-guide-to-the-ipfs/> (explaining the coding necessary to install and use IPFS).

²¹⁹ Steve Lohr, *He Created the Web. Now He's Out to Remake the Digital World*, N.Y. TIMES (Jan. 10, 2021), <https://www.nytimes.com/2021/01/10/technology/tim-berners-lee-privacy-internet.html>.

²²⁰ MASTODON, *supra* note 74.

²²¹ Mansoor Iqbal, *Twitter Revenue and Usage Statistics (2021)*, BUS. OF APPS (July 5, 2021), <https://www.businessofapps.com/data/twitter-statistics/> (also noting that "Twitter's [monthly active users] are reportedly at between 350 and 400 million").

²²² Leslie K. John, *We Say We Want Privacy Online, but Our Actions Say Otherwise*, HARV. BUS. REV. (Oct. 16, 2015), <https://hbr.org/2015/10/we-say-we-want-privacy-online-but-our-actions-say-otherwise>; Greg Satell, *Let's Face It, We Don't Really Care About Privacy*, FORBES (Dec. 1, 2014), <http://www.forbes.com/sites/gregsatell/2014/12/01/lets-face-it-we-dont-really-care-about-privacy>.

²²³ Frances Romero, *Who Founded Wikipedia?*, TIME (Jan. 13, 2011), http://content.time.com/time/specials/packages/article/0,28804,2042333_2042334_2042587,00.html.

²²⁴ Larry Sanger, *Declaration of Digital Independence*, LARRYSANGER.ORG (June 26, 2019), <https://larrysanger.org/2019/06/declaration-of-digital-independence/>.

²²⁵ Barlow, *supra* notes 1-2.

²²⁶ Sanger, *supra* note 224.

²²⁷ *Id.*

²²⁸ *Id.*

autonomy, decentralized innovation, free speech, privacy, and security.²²⁹ But it does not follow from a belief that technological innovation will eventually improve the situation that nothing should be done now. The sponsors of the ACCESS Act and many others are calling for regulation to alleviate present ills and facilitate the desired changes. If their efforts are successful, internet users might not have to wait for an organic shift in the internet paradigm to get effective data portability, interoperability, and delegability, and the free speech, privacy, and security these innovations promote and protect.

²²⁹ Tim Berners-Lee, *One Small Step for the Web*, INRUPT (Oct. 22, 2018), <https://inrupt.com/one-small-step-for-the-web>; Berners-Lee, inventor of the internet, aims to counter centralization and intrusive data collection by putting internet users back in control of their own data through personal online data stores (PODS). *Id.*; Lewin Day, *Solid Promises a New Approach to How the Web Works*, HACKADAY (Mar. 30, 2020), <https://hackaday.com/2020/03/30/solid-promises-a-new-approach-to-how-the-web-works/> (describing the PODS technology).