

THE HIDDEN COSTS OF LOWER PRICES:
REEVALUATING ANTITRUST ANALYSIS

Comment

I.	INTRODUCTION	348
II.	THE AMAZON-WHOLE FOODS TRANSACTION.....	349
III.	HISTORY OF ANTITRUST LAW	350
	A. <i>Sherman Antitrust Act</i>	350
	B. <i>Clayton Antitrust Act</i>	351
	C. <i>Federal Trade Commission Act</i>	352
	D. <i>Hart-Scott-Rodino Antitrust Improvement Act</i>	352
IV.	“FOR THE BENEFIT OF THE CONSUMER”: PREVAILING ANTITRUST ANALYSIS IN THE UNITED STATES.....	353
V.	LIMITATIONS ON MODERN ANTITRUST ANALYSIS	354
VI.	HORIZONTAL ANTITRUST ANALYSIS	355
VII.	THE MISMATCH BETWEEN ANTITRUST ANALYSIS AND MODERN CORPORATIONS: A CLOSER LOOK AT AMAZON’S UNIQUE BUSINESS MODEL.....	357
	A. <i>FTC Approval of the Amazon-Whole Foods Acquisition and the Potential Effects</i>	357
	B. <i>The Growing Dominance of Amazon in the American Marketplace</i>	359
VIII.	TECHNOLOGY DOMINANCE AND THE POTENTIAL FOR ABUSE.....	360
IX.	PROPOSED UPDATES TO ANTITRUST LAW	363
X.	CONCLUSION	364

I. INTRODUCTION

*Antitrust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.*¹

Over the last twenty years, the United States has experienced an explosion of internet usage and reliance as well as a significant rise of an online consumer culture. American consumerism has reached unprecedented levels of efficiency and low prices with these innovations. Our modern economy is dominated by technology giants with more consumers turning to the internet to make purchases.² Despite the rapidly changing landscape of consumerism, the last major overhaul of American antitrust law was in the early 1900s.³ Antitrust review focuses on potential harm to intra-industry competition and its effect on the short-term interests of consumers.⁴ To remain effective at preventing market failures, American antitrust law must be updated to account for the numerous consumer shopping platforms prevalent in American culture.

The need for an updated antitrust analysis is particularly relevant after Amazon's 2017 acquisition of Whole Foods.⁵ Though this deal will certainly bring great benefits to consumers, the acquisition could result in abusive consumer practices that were not fully analyzed by the Federal Trade Commission (FTC). Specifically, the current focus and analysis of antitrust law scrutinizes the effect of intra-industry deals and the potential negative consequences those deals have on consumers. While this analysis remains beneficial, it must be expanded. Anticompetitive practices can harm consumers in the long-term, even when consumers receive low prices in the short-term.⁶ The underdeveloped antitrust law for modern mergers and acquisitions

1. United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

2. Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online*, FORTUNE (June 8, 2016), <http://fortune.com/2016/06/08/online-shopping-increases>.

3. See Clayton Antitrust Act of 1914, 15 U.S.C.A. § 18 (Westlaw through Pub. L. No. 115-281); cf. Hart-Scott-Rodino Antitrust Improvements (HSR) Act of 1976, *id.* § 18a (effective Sept. 30, 1976) (modifying the Clayton Act slightly by requiring merger prenotification and waiting period).

4. See Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 716 (2017) [hereinafter Khan, *Amazon's Antitrust Paradox*].

5. Lauren Hirsch, *A Year After Amazon Announced its Acquisition of Whole Foods, Here's Where We Stand*, CNBC (June 16, 2018, 2:34PM), <https://www.cnbc.com/2018/06/15/a-year-after-amazon-announced-whole-foods-deal-heres-where-we-stand>.

6. See, e.g., *How Do Consumers Benefit from Business Competition?*, REFERENCE, <https://www.reference.com/world-view/consumers-benefit-business-competition-b1d5526a1332b5e2> (last visited Mar. 11, 2019).

makes it difficult for the FTC to intervene and eliminate potentially harmful consumer practices, thus preventing market failure.⁷

II. THE AMAZON-WHOLE FOODS TRANSACTION

*It was never about the seventy-nine dollars. It was really about changing people's mentality so they wouldn't shop anywhere else.*⁸

More than half of all online shoppers begin their search on Amazon.⁹ The website altered the consumer marketplace with its \$13.7 million acquisition of Whole Foods in Spring 2017.¹⁰ This transaction marked Amazon's first acquisition of a physical retail store and the largest deal in the company's history.¹¹ In fact, the transaction impacted the grocery industry prior to official confirmation. In response to transaction rumors, stock prices for grocery chains and food suppliers dramatically dropped based on the assumption that the industry must lower prices to remain competitive.¹²

The acquisition did not raise serious antitrust concerns under current law and was quickly approved by the FTC, despite criticism from the public and many consumer protection groups.¹³ FTC scrutiny focused on Whole Food's relatively small presence in the grocery sector of the economy, rather than Amazon's increasing presence across a multitude of industries.¹⁴ Because Whole Foods only holds 1.4% of the grocery market in the United States, the FTC did not consider the

7. See *infra* Part V.

8. A *Prime Misunderstanding: Explaining Amazon Prime's Success*, LOOSETHEADS, <https://loosethreads.com/thearchive/2016/06/20/a-prime-misunderstanding-explaining-amazon-primers-success/> (last visited Mar. 20, 2019) (quoting Vijay Ravindran, director of Amazon's ordering systems).

9. Bryce Covert, *The Real Price of Those Cheaper Avocados*, SLATE: MONEYBOX (Aug. 28, 2017, 7:34 PM), https://www.slate.com/articles/business/moneybox/2017/08/we_need_a_better_antitrust_standard_to_deal_with_mergers_like_whole_foods.html.

10. *Amazon to Acquire Whole Foods Market*, WHOLE FOODS MARKET NEWSROOM (June 16, 2017), <https://media.wholefoodsmarket.com/news/amazon-to-acquire-whole-foods-market>.

11. Lisa Dunlop, *Why Amazon's Whole Foods Buy is Likely to be Cleared*, LAW360 (June 27, 2017, 12:13 PM), <https://www.law360.com/articles/938781/why-amazon-s-whole-foods-buy-is-likely-to-be-cleared>; David McLaughlin & Spencer Soper, *Amazon's Whole Foods Deal Wins Swift U.S. Antitrust Approval*, BLOOMBERG TECHNOLOGY (Aug. 23, 2017, 5:25 PM), <https://www.bloomberg.com/news/articles/2017-08-23/amazon-s-whole-foods-deal-wins-fast-track-u-s-antitrust-nod>.

12. Clare O'Connor, *Walmart and Target Being Crowded Out Online by Amazon Prime*, FORBES (Apr. 6, 2015, 12:59 PM), <http://www.forbes.com/sites/clareoconnor/2015/04/06/walmart-and-target-being-crowded-out-online-by-amazon-prime>.

13. McLaughlin & Soper, *supra* note 11.

14. Brent Kendall & Heather Haddon, *FTC Approves Whole Foods-Amazon Merger*, WALL ST. J. (Aug. 23, 2017), <https://www.wsj.com/articles/whole-foods-shareholders-approve-merger-with-amazon-1503498623>.

transaction a threat to grocery competition.¹⁵ Furthermore, the acquisition did not result in consolidated control over a high percentage of the grocery industry.¹⁶ Currently, Amazon controls roughly 5% of this industry in the United States.¹⁷

III. HISTORY OF ANTITRUST LAW

*If we will not endure a king as a political power, we should not endure a king over the production, transportation, and sale of any of the necessities of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.*¹⁸

In the late 1800s and early 1900s, Congress passed a series of laws seeking to promote competition and break up monopolies.¹⁹ The laws were necessary because corporations worked as “trusts” to dominate entire industries and eliminate competition, which resulted in increased prices and inferior products for consumers.²⁰ The decrease in competition also led to fewer options in the marketplace.²¹ Congress sought to remedy the market failure and regulate the massive industry dominance by passing various antitrust laws.²² Although Congress has become increasingly more specific, antitrust legislation defines unlawful business practices generally—leaving courts to fill in the details.²³

A. Sherman Antitrust Act

On the basis of its constitutional powers to regulate interstate commerce, Congress created the Sherman Act to empower the

15. McLaughlin & Soper, *supra* note 11.

16. *Id.*

17. Lina M. Khan, *Amazon Bites Off Even More Monopoly Power*, N.Y. TIMES (Jun. 21, 2017), <https://www.nytimes.com/2017/06/21/opinion/amazon-whole-foods-jeff-bezos.html?ref=opinion> [hereinafter Khan, *Amazon Bites Off*].

18. Khan, *Amazon's Antitrust Paradox*, *supra* note 4 at 740 (citing 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman)).

19. *FTC Fact Sheet: Antitrust Laws: A Brief History*, FED. TRADE COMM'N, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf (last visited Apr. 12, 2019) [hereinafter *FTC Fact Sheet*].

20. *Id.*; Andre Beattie, *A History of U.S. Monopolies*, INVESTOPEDIA (Jan. 15, 2018, 2:50 PM), <https://www.investopedia.com/insights/history-of-us-monopolies/>.

21. BUREAU OF COMPETITION, *Competition Counts: How Consumers Win When Businesses Compete*, FED. TRADE COMM'N (May 2015), https://www.ftc.gov/system/files/attachments/competition-counts/pdf-0116_competition-counts.pdf [hereinafter *Competition Counts*].

22. See *FTC Fact Sheet*, *supra* note 19.

23. See *The Antitrust Laws*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Mar. 18, 2019).

Department of Justice (DOJ) to challenge unlawful monopolies.²⁴ Under this Act, it is illegal for corporations to form unreasonable agreements to hinder competition.²⁵ When the legislation passed in 1890, Senator John Sherman called it “a bill of rights, [and] a charter of liberty.”²⁶ The Sherman Act has remained thanks to its effect of protecting both the public and the economy from corporate misconduct that eliminates competition.²⁷

B. Clayton Antitrust Act

Although the Sherman Act effectively outlawed monopolistic behavior, early on there was little guidance on which business practices qualified as monopolistic under this statute.²⁸ To provide clarity, Congress enacted the Clayton Antitrust Act in 1914 to specify the practices that would fall under the Sherman Act.²⁹ Corporations in the post-Sherman world realized that instead of forming cartels, which clearly violated the Sherman Act, they could combine their businesses into a single entity and accomplish the same goal.³⁰ The Clayton Act prohibits these improper behaviors. Specifically, the Clayton Act stops corporate actions that are likely to prevent competition and stifle growth in particular markets.³¹ Substantively, the Clayton Act prohibits: price discrimination,³² exclusive dealings,³³ mergers and acquisitions that dominate markets,³⁴ and the actions of any one person from serving as director of two or more competing corporations.³⁵ Finally, the Clayton Act does not seek to prohibit all mergers that could impact the market.³⁶ The main analysis under the Clayton Act is whether the proposed merger will result in one or a few corporations “unfairly” dominating a market.³⁷

24. See 15 U.S.C. §§ 1–7 (Westlaw through Pub. L. No. 115-281); Beattie, *supra* note 20.

25. See *FTC Fact Sheet*, *supra* note 19.

26. 21 CONG. REC. 2461 (1890) (statement of Sen. Sherman).

27. *Spectrum Sports, Inc. v. McQuallian*, 506 U.S. 447, 458 (1993).

28. Beattie, *supra* note 20.

29. *Id.*

30. See *FTC Fact Sheet*, *supra* note 19. Cartels are independent producers with a goal of increasing collective profits through manipulative agreements. *Id.*

31. *Id.*

32. 15 U.S.C. § 13(a) (Westlaw through Pub. L. No. 115-281).

33. *Id.* § 14.

34. *Id.* § 18a(a).

35. *Id.* § 19(a)(1).

36. See *Mergers*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers> (last visited Mar. 26, 2019).

37. *Id.*

C. Federal Trade Commission Act

To further provide clarity on anticompetitive corporate practices, Congress enacted the Federal Trade Commission Act in 1914—which established the Federal Trade Commission.³⁸ The FTC has the authority to investigate and prevent any practice that is unfairly deceptive to consumers or that hinders competition.³⁹ Though established in 1914, the FTC did not acquire the authority it has today until Congress specified its reviewing power and capabilities in 1975.⁴⁰

D. Hart-Scott-Rodino Antitrust Improvement Act

The Hart-Scott-Rodino Antitrust Improvement Act is the most recently enacted, major antitrust law.⁴¹ This amendment to the Clayton Act describes the basic reporting requirements for proposed mergers and acquisitions.⁴² Pursuant to the Act, corporations must notify the FTC and the DOJ before completing certain transactions.⁴³ The Act mandates a thirty-day waiting period after notification.⁴⁴ During the waiting period, the FTC reviews the proposal to determine whether the acquisition is anticompetitive.⁴⁵ In its review, the FTC considers the potential effects on the economy and the consumer.⁴⁶ The FTC will challenge a transaction if it will lead to higher prices, decreased options, inferior service, or barriers to entry.⁴⁷

The FTC tends to focus its investigations on areas of the economy where consumer spending is high.⁴⁸ Currently, these areas include: health care, food, computer technology, and internet services.⁴⁹ After a non-public investigation, the FTC attempts to gain voluntary compliance where the results indicate a violation, or potential violation, of the law.⁵⁰

38. See *FTC Fact Sheet*, *supra* note 19.

39. *Id.*

40. *About the FTC*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc?fbclid=IwAR00M_9lKro2QvLSwdJ9blNuyP2f-bJeah-V8U9bWhG83dYjNikh8Al0cz8 (last visited Mar. 28, 2019).

41. See *The Antitrust Laws*, *supra* note 23. The Act was passed in 1976. *Id.*

42. PREMERGER NOTIFICATION OFFICE, *What is the Premerger Notification Program? An Overview*, FED. TRADE COMM'N, <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf> (last visited Apr. 30, 2019) [hereinafter *Premerger Notification Program*].

43. 15 U.S.C. § 18a (Westlaw through Pub. L. No. 115-281).

44. *Id.* The typical waiting period is thirty days, though the FTC or DOJ may extend this period if a “second request” is deemed necessary. *Id.*

45. See *Premerger Notification Program*, *supra* note 42.

46. *Id.*

47. See *Competition Counts*, *supra* note 21.

48. *Id.*

49. *Id.*

50. *The Enforcers*, FED. TRADE COMM'N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Mar. 28, 2019).

Voluntary compliance entails a corporation entering into a consent order to resolve the anticompetitive practices identified by the FTC—though this does not necessarily mean that the corporation is admitting to a violation.⁵¹ If the FTC cannot secure voluntary compliance, it may seek injunctive relief in federal court or issue an administrative complaint.⁵² The FTC can assign steep civil penalties or an injunction if an order is ignored or later violated.⁵³ Finally, the FTC will direct any evidence of criminal antitrust violations to the DOJ for criminal sanctions.⁵⁴

IV. “FOR THE BENEFIT OF THE CONSUMER”: PREVAILING ANTITRUST ANALYSIS IN THE UNITED STATES

The widely accepted purpose of antitrust law is to promote healthy market competition that, in turn, leads to high quality goods and low prices for consumers.⁵⁵ Proposed transactions are analyzed in this respect by the FTC to determine if a merger or acquisition is “for the benefit of the consumer.”⁵⁶ Robert Bork cemented the idea of “for the benefit of the consumer” in his treatise *The Antitrust Paradox*.⁵⁷ Though these laws responded to inter-industry concentration of control in the form of trusts and cartels, they also seemed to conflict with the American ideal of a free market economy.⁵⁸ Bork, however, argued that the purpose of antitrust law was to protect consumers, not other market competitors.⁵⁹ Thus, according to Bork, the purpose of antitrust law was not to interfere with success in the marketplace or the free market.⁶⁰ Instead, the proper lens to analyze concentration of market power is through a “for the benefit of the consumer” analysis.⁶¹ That is, whether a proposed deal will result in decreased quality of goods and artificial rises in price.⁶²

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *See Competition Counts*, *supra* note 21.

56. *See id.*

57. *See generally* ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (Free Press 1978).

58. Daniel Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *Antitrust L.J.* 835, 835 (2014).

59. Daniel Fisher, *Robert Bork, The Man Who Redefined Antitrust, is Dead at 85*, *FORBES* (Dec. 19, 2012), <https://www.forbes.com/sites/danielfisher/2012/12/19/robert-bork-the-man-who-redefined-antitrust-is-dead-at-85/#4ad8bb8cad99>.

60. Crane, *supra* note 58, at 839.

61. *Id.*

62. *Id.*

More than forty years later, the concept of consumer protection remains the enduring purpose behind American antitrust law.⁶³ Bork's analysis was ultimately adopted by the Supreme Court, thus framing antitrust analysis around benefitting consumers.⁶⁴

V. LIMITATIONS ON MODERN ANTITRUST ANALYSIS

Antitrust analysis is properly focused on the consequences for consumers and subsequent market failures.⁶⁵ The for the benefit of the consumer analysis strikes the appropriate balance between the goal of a free market economy and the prevention of harmful consumer practices.⁶⁶ Despite this, the current analysis does not achieve its purpose in the modern, internet-focused, consumer economy. The analysis has primarily failed in two ways: (1) narrowing the focus to horizontal mergers⁶⁷ and (2) viewing consumer benefits exclusively in terms of short-term price effects.⁶⁸ Moreover, antitrust law has not been updated since 1970.⁶⁹ While these laws have an enduring validity, they do not fully encompass anticompetitive practices in the modern economy.

American antitrust law and analysis reflects a world before the emergence of widespread internet use and global economies. The FTC, DOJ, and courts still analyze potential mergers under a dated framework, aimed at eliminating the trusts of the early 1900s. Today's internet corporations are becoming even more powerful than the trusts that sparked the need for antitrust law in the early 1900s⁷⁰—89% of internet searches are on Google, 95% of young adults actively use Facebook, and 75% of book sales are through Amazon.⁷¹ In contrast, Standard Oil controlled roughly 80% of the oil market before its anticompetitive practices were dismantled under the Sherman Act.⁷² Modern internet corporations also possess duopolistic power.⁷³ For example, Google and Apple provide 99% of phone operating systems,

63. *The Relationship Between Antitrust and Consumer Protection*, FED. TRADE COMM'N, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/averitt.pdf (last visited Mar. 22, 2019) [hereinafter *Antitrust and Consumer Protection*].

64. *See Crane, supra* note 58, at 835 (citing *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979)).

65. *See Antitrust and Consumer Protection, supra* note 63.

66. *Belton v. Comcast Cable Holdings, LLC*, 151 Cal. App. 4th 1224, 1240 (Cal. Ct. App. 2007).

67. *See infra* Part VI.

68. *See infra* notes 119–127 and accompanying text.

69. *See The Antitrust Laws, supra* note 23.

70. Greg Ip, *The Antitrust Case Against Facebook, Google, and Amazon*, WALL ST. J. (Jan. 16, 2018, 11:52 AM), <https://www.wsj.com/articles/the-antitrust-case-against-facebook-google-amazon-and-apple-1516121561>.

71. *Id.*

72. *See Beattie, supra* note 20.

73. *Id.*

while Apple and Microsoft supply 95% of desktop computer operating systems.⁷⁴

VI. HORIZONTAL ANTITRUST ANALYSIS

A well-functioning free market economy depends on competition to drive overpriced and poor-quality goods out of the marketplace.⁷⁵ When a market is functioning effectively, companies are forced to produce high-quality, innovative goods at the lowest price to remain profitable and competitive.⁷⁶ Those that achieve this balance are rewarded in the marketplace through customer loyalty.⁷⁷ Thus, antitrust laws—with a focus on benefitting the consumer—can effectively protect authentic competition in the free market economy.

American antitrust law focuses on horizontal mergers occurring between corporations in the same industry. These transactions give corporations a greater market share which results in the elimination of competition.⁷⁸ Vertical mergers, in contrast, occur when corporations from various industries consolidate.⁷⁹ Because vertical mergers tend to make production more efficient and cost effective for corporations,⁸⁰ they are widely seen as beneficial to consumers. Therefore, there has been little call to reform antitrust analysis to include vertical transactions. In fact, the last published agency guideline that discusses vertical mergers⁸¹ notes that consolidation of the supply chain is a good thing for the economy.⁸² Particularly, this guideline focuses on the merging of different corporations in the supply chain for the *same* sector of the economy.⁸³

Moreover, in practice, the FTC's approach to potential vertical mergers is a de facto approval approach.⁸⁴ For example, in 2010, the FTC swiftly approved the vertical merger of Live Nation, a concert venue company, and Ticketmaster, a ticket sales company.⁸⁵ Like the Amazon-

74. *Id.*

75. *See The Antitrust Laws, supra* note 23.

76. *Id.*

77. *See id.*

78. *Horizontal Merger*, INVESTOPEDIA, <https://www.investopedia.com/terms/h/horizontalmerger.asp> (last visited Apr. 19, 2019).

79. *Id.*

80. *Id.*

81. *See* Dunlop, *supra* note 11.

82. *Id.*; *see 1984 Merger Guidelines*, DEP'T OF JUSTICE at 32 (1984), <https://www.justice.gld.ov/sites/default/files/atr/legacy/2007/07/11/11249.pdf>.

83. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 297–98 (1962).

84. *See* William E. Kovacic, *Built to Last? The Antitrust Legacy of the Reagan Administration*, 35 FED B. NEWS & J. 244, 245 (1988).

85. David Segal, *Calling Almost Everyone's Tune*, N.Y. TIMES (Apr. 24, 2010), <http://www.nytimes.com/2010/04/25/business/25ticket.html>; Ethan Smith & Thomas Catan,

Whole Foods merger, the approval faced great criticism from consumer advocates.⁸⁶ The criticism focused on the significant concentration of power in one corporation and industry.⁸⁷ Despite this, the FTC cited the traditional for the benefit of the consumer analysis.⁸⁸ The FTC determined that the potential price benefits to consumers—by combining a concert venue and ticket purchasing forum—justified the transaction.⁸⁹ Specifically, it concluded that prices would likely go down for consumers with a consolidated supply chain.⁹⁰ The only limitation placed on the two companies post-transaction was a consent decree imposed by the DOJ that prevents the companies from retaliating against venues that do not use Ticketmaster's services for ticket sales.⁹¹ However, in reality, there is no reporting or oversight on this decree to ensure compliance.⁹² Eight years later, Live Nation and Ticketmaster hold 80% of the market share in online ticketing.⁹³ The DOJ is reportedly investigating claims that Live Nation-affiliated concert venues report an inability to book major performers if they do not use Ticketmaster as their official ticketing platform.⁹⁴ Additionally, consumers have not yet seen a decrease in ticket prices as the FTC and DOJ predicted.⁹⁵ In fact, ticket prices have been steadily rising.⁹⁶ This can be attributed, in part, to the market position of Live Nation and Ticketmaster. When affiliated venues feel pressured to use Ticketmaster as its ticketing platform, it may not be the most rational or most-cost effective decision. Often, it is because these venues feel they cannot book major performers and events through Live Nation without also using Ticketmaster.⁹⁷ Live Nation and Ticketmaster, therefore, have almost no incentive to lower prices.

Concert Deal Wins Antitrust Approval, WALL ST. J. (Jan. 26, 2010), <http://www.wsj.com/articles/SB10001424052748704762904575025332380117008>.

86. Segal, *supra* note 85.

87. *Id.*

88. Christine A. Varney, *The Ticketmaster/Live Nation Merger Review and Consent Decree in Perspective*, DEP'T OF JUSTICE, <https://www.justice.gov/atr/speech/ticketmasterlive-nation-merger-review-and-consent-decree-perspective> (last visited Apr. 20, 2019).

89. *Id.*

90. *Id.*

91. *Id.*

92. See Bill Pascrell Jr., *Everyone's Worst Fears About the Live-Nation Ticketmaster Merger Have Come True*, L.A. TIMES (Mar. 17, 2018), <http://www.latimes.com/opinion/opt-ed/la-oe-pascrell-live-nation-concert-ticketing-20180517-story.html%3foutputType=amp>.

93. *Id.*

94. Alex Robert Ross, *That Live Nation-Ticketmaster Merger Looks as Shady as Everyone Suspected*, NOISY NEWS (Apr. 2, 2018), https://www.google.com/amp/s/noisey.vice.com/amp/en_us/article/43ba89/that-live-nation-ticketmaster-merger-looks-as-shady-as-everyone-suspected. Live Nation and Ticketmaster are able to secure their hold in the industry through informal pressures to affiliated venues. *Id.*

95. See Pascrell, *supra* note 92.

96. *Id.*

97. See Ross, *supra* note 94.

VII. THE MISMATCH BETWEEN ANTITRUST ANALYSIS AND MODERN CORPORATIONS: A CLOSER LOOK AT AMAZON'S UNIQUE BUSINESS MODEL

The Chicago School of Economics, under Robert Bork, theorized that predatory practices through vertical mergers are unlikely because businesses are rational. Under this view, businesses will not favor their own place in the supply chain if it is not the most profitable option.⁹⁸ This theory became official antitrust policy in the United States under President Reagan when the FTC and DOJ released merger guidelines under Bork's view of antitrust.⁹⁹ As noted above, these guidelines are the most updated guidelines on vertical mergers.¹⁰⁰ As exemplified by the recent Amazon-Whole Foods deal, however, modern corporations are not staying within their sector of the economy when it comes to mergers and acquisitions. Modern internet corporations achieve the domination of *many* markets.¹⁰¹ Thus, these corporations differ from any corporate structure American history has experienced. Current antitrust law is underdeveloped to handle the transactions implemented by these internet corporations. Consequently, antitrust law simply fails when mergers and acquisitions occur between vastly different industries.

A. *FTC Approval of the Amazon-Whole Foods Acquisition and the Potential Effects*

The Amazon-Whole Foods acquisition resulted in a major shift in Amazon's business model.¹⁰² Specifically, the deal gave Amazon control of over 460 physical store locations, a distribution network, a new source of consumer data, and an extensive supply chain.¹⁰³ Moreover, the acquisition of Whole Foods has elements of both a horizontal and vertical merger.

The online grocery presence of Amazon gave the transaction its horizontal element, yet this was primarily a vertical merger because completely different industries were merged.¹⁰⁴ Despite the controversy surrounding the quick approval by the FTC, most concerns regarding the deal looked to potential future effects of Amazon's increasing control in the marketplace.¹⁰⁵ The FTC, however, noted the

98. See Khan, *Amazon's Antitrust Paradox*, *supra* note 4, at 718-19.

99. See 1982 Merger Guidelines, DEP'T OF JUSTICE (1982), <https://www.justice.gov/archives/atr/1982-merger-guidelines>; see also 1984 Merger Guidelines, *supra* note 82.

100. See *supra* note 81 and accompanying text.

101. Khan, *Amazon's Antitrust Paradox*, *supra* note 4, at 711.

102. McLaughlin & Soper, *supra* note 11.

103. *Id.*; see Khan, *Amazon Bites Off*, *supra* note 17.

104. See Dunlop, *supra* note 11, at 2.

105. *Id.*

immediate price decreases for grocery consumers resulting from cheaper supply chain costs for Amazon.¹⁰⁶ The assumption was that these cheaper production costs would result in a decrease in product costs.¹⁰⁷ Likewise, the FTC determined that Amazon and Whole Foods each controlled insubstantial portions of the American grocery market.¹⁰⁸ For these reasons, the transaction was determined to not “substantially lessen competition or have an anticompetitive effect on the marketplace.”¹⁰⁹

Amazon avoided antitrust issues largely because its integrated supply chain creates lower prices for consumers.¹¹⁰ Amazon has been successful in its acquisitions because “courts and antitrust authorities have largely measured [consumer welfare] through effects on consumer prices”¹¹¹ and viewed “the Sherman Act as a ‘consumer welfare prescription.’”¹¹² This assumption is based on the notion advanced by Robert Bork “that the sole normative objective of antitrust should be to maximize consumer welfare, best pursued through promoting efficiency.”¹¹³ The flaw in this assumption is highlighted by Amazon’s corporate model and the FTC’s failure to address the willingness of some firms to forgo some short-term profits for long-term gains and strategies.¹¹⁴ For example, Amazon did not make a profit until its seventh year in operation.¹¹⁵ In fact, Amazon operated with millions of dollars of losses each quarter while continuing to offer aggressive discounts and running heavy advertising campaigns.¹¹⁶ Amazon

106. Steven Pearlstein, *Is Amazon Getting Too Big?*, WASH. POST (July 28, 2017), https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html?noredirect=on&utmterm=.29b9a7968ccf.

107. *Justice Department Allows Comcast-NBCU Joint Venture to Proceed with Conditions*, DEP’T OF JUSTICE (Jan. 18, 2011), <http://www.justice.gov/opa/pr/justice-department-allows-comcast-nbcu-joint-venture-proceed-conditions>; *Justice Department Requires Ticketmaster Entertainment Inc. to Make Significant Changes to Its Merger with Live Nation Inc.*, DEP’T OF JUSTICE (Jan. 25, 2010), <http://www.justice.gov/opa/pr/justice-department-requires-ticketmaster-entertainment-inc-make-significant-changes-its>; see also Jeremy Pelofsky & Yinka Adegoke, *UPDATE 3-Live Nation, Ticketmaster Cleared to Merge*, REUTERS (Jan. 25, 2010) <https://www.reuters.com/article/ticketmaster-livenation-idUSN2513450520100125>.

108. See Pearlstein, *supra* note 106.

109. See McLaughlin & Soper, *supra* note 11.

110. See, e.g., Covert, *supra* note 9.

111. See Khan, *Amazon’s Antitrust Paradox*, *supra* note 4, at 720.

112. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

113. See Khan, *Amazon’s Antitrust Paradox*, *supra* note 4, at 720 n.37.

114. *Id.* at 786 (“Given that online platforms operate in markets where network effects and control over data solidify early dominance, a company looking to compete in these markets must seek to capture them. The most effective way is to chase market share and drive out one’s rivals—even if doing so comes at the expense of short-term profits, since the best guarantee of long-term profits is immediate growth.”).

115. George Packer, *Cheap Words*, NEW YORKER (Feb. 24, 2014), <https://www.newyorker.com/magazine/2014/02/17/cheap-words>.

116. *Amazon: Ponzi Scheme or Wal-Mart of the Web?*, SLATE: MONEYBOX (Feb. 8, 2000, 5:52 PM), <https://slate.com/business/2000/02/amazon-ponzi-scheme-or-wal-mart-of-the-web.html>.

survived for years without making a profit.¹¹⁷ Despite prevailing antitrust theory, Amazon highlights that companies will not always act rationally in the market.¹¹⁸

Similarly, Amazon may not choose the most cost-effective method in the supply chain. Like its historical practices, Amazon may favor its own subsidiary in the supply chain as an attempt to gain favorable returns in the future.¹¹⁹ This tactic also pressures suppliers of similar goods to lower their prices in order to remain competitive.¹²⁰ Most corporations, however, cannot survive by imitating Amazon's business model.

These aggressive business tactics effectively create a "race to the bottom" with companies constantly lowering prices in response to each other.¹²¹ During this race, consumers enjoy cheap goods. However, this practice eventually eliminates competition in the marketplace.¹²² As companies continue to lower prices, they become unprofitable and go out of business.¹²³ Amazon is likely the only company that can survive this sort of industry competition due to its large investor base, market diversification, and industry dominance.¹²⁴ Thus, this scenario is likely to result in the type of market failure that antitrust law was designed to prevent: a single corporation dominating an entire industry.¹²⁵ Without genuine market competition, corporations are no longer incentivized to innovate their products or keep prices low.¹²⁶ Therefore, in the long run, consumers are harmed.¹²⁷

B. *The Growing Dominance of Amazon in the American Marketplace*

Amazon is a retailer, marketing platform, delivery service, logistics network, payment service, credit lender, auction house, television and movie producer, book publisher, fashion designer, hardware manufacturer, and host of cloud server space.¹²⁸ The position Amazon

117. See Covert, *supra* note 9. In the early days of Amazon, funding largely came from high-ticket investors who rewarded the expansive and aggressive growth of Amazon—not instant profitability. This model continues to serve Amazon, though it is finally experiencing levels of profitability. See, e.g., *Amazon Startup Story*, FUNDABLE, <https://www.fundable.com/learn/startup-stories/amazon> (last visited Mar. 24, 2019).

118. *Amazon Startup Story*, *supra* note 117.

119. *Id.*

120. See Covert, *supra* note 9.

121. See Khan, *Amazon's Antitrust Paradox*, *supra* note 4, at 779.

122. *Id.* at 716.

123. *Id.* at 755.

124. *Id.*

125. See *The Antitrust Laws*, *supra* note 23.

126. See Khan, *Amazon's Antitrust Paradox*, *supra* note 4, at 739.

127. *Id.*; see, e.g., McLaughlin & Soper, *supra* note 11.

128. See Khan, *Amazon's Antitrust Paradox*, *supra* note 4, at 710.

now holds in many different sectors of the economy reveals how ill-equipped current antitrust law is to handle transactions involving various fields.¹²⁹

As previously discussed, FTC analysis of the transaction was solely based on consumer prices in the type of business Whole Foods is engaged in—grocery sales.¹³⁰ The FTC looked to the portion of the grocery market that Amazon and Whole Foods would occupy post-approval and determined that the deal would not result in industry dominance.¹³¹ The FTC's analysis did not, however, scrutinize how the transaction would affect Amazon holistically.

The most important aspect of the transaction is that Amazon gained access to an entirely new physical channel of distribution in addition to its online presence.¹³² Soon after the deal was finalized, Amazon began using the physical Whole Foods stores as a pick up location for goods ordered from Amazon's online platform.¹³³ Amazon has also used Whole Foods to promote its other services, such as: AmazonFresh, where consumers pay monthly for next-day fresh grocery delivery; Prime Pantry, where consumers pay monthly for non-perishable household goods; and by allowing Whole Foods locations to periodically reward shoppers with Amazon credit.¹³⁴ The FTC failed to recognize the fact that the transaction would result in an expansion of Amazon's e-commerce dominance rather than simply a side-step into grocery sales.¹³⁵

VIII. TECHNOLOGY DOMINANCE AND THE POTENTIAL FOR ABUSE

Amazon is constantly innovating ways to gain customer loyalty, thereby maintaining a significant presence in its target industries. The most effective method by which Amazon has obtained loyalty is through the widespread use of Amazon Prime.¹³⁶ Prime users are more likely to

129. *See id.* at 716.

130. *See* Covert, *supra* note 9.

131. *See id.*

132. Washington Bytes, *Will Amazon-Whole Foods Survive Antitrust Scrutiny Under Trump?*, FORBES (July 3, 2017, 8:22 AM), <https://www.forbes.com/sites/washingtonbytes/2017/07/03/will-amazon-whole-foods-survive-antitrust-scrutiny-under-trump/#4bfa51ae8e1e>.

133. *See* Beth Kowitz, *How Amazon is Using Whole Foods in a Bid for Total Retail Domination*, FORTUNE (May 21, 2018), <http://fortune.com/longform/amazon-groceries-fortune-500/>.

134. *Free \$10 Amazon Credit w/ \$10 Whole Foods Market Purchase Starting 7/11 (Prime Members)*, HIP2SAVE.COM (July 10, 2018, 7:50 PM), <https://hip2save.com/2018/07/10/free-amazon-credit-whole-foods>.

135. *Id.*

136. Adam Levy, *Amazon's Focus on Customer Loyalty Is Paying Off*, MOTLEY FOOL (Mar. 21, 2018, 5:45 PM), <https://www.fool.com/investing/2018/03/21/amazon-is-showing-strength-in-shopper-loyalty.aspx>.

buy their goods on Amazon's platform compared to other retailers.¹³⁷ Sixty-three percent of Amazon Prime members carry out a paid transaction on the site in the same visit, compared to 13% of non-Prime members.¹³⁸ For Walmart and Target, these figures are 5% and 2% respectively.¹³⁹ This illustrates Amazon's dominance over the online sales industry, which could lead to anticompetitive behavior.

Anticompetitive practices can take other forms than price discrimination and price increases.¹⁴⁰ In particular, as Amazon diversifies and integrates across business lines, it positions itself to sell both its own products and competitors' products.¹⁴¹ Not only does Amazon provide a platform for its competition, but these competitors rely on Amazon to reach the American public.¹⁴² Small, up-and-coming retailers are especially reliant on Amazon to sell and advertise their goods.¹⁴³ Moreover, Amazon affords smaller merchants inexpensive access to markets, which in turn, benefits consumers by giving them access to a wide variety of goods and services.¹⁴⁴ Amazon's platform is especially beneficial to consumers in smaller towns that do not have access to specialty physical store locations.¹⁴⁵ Being the host to goods, as well as the producer and seller, places Amazon in a potential conflict of interest position if Amazon gives preferential treatment to its own products.¹⁴⁶

Current antitrust law and the methods of merger review are not equipped to handle this sort of anticompetitive practice.¹⁴⁷ There are no laws in place preventing these behaviors. As online consumer markets continue to expand, there is growing concern that online retailers could place their own items higher on search pages than competitor items.¹⁴⁸ Google and Amazon have both been accused of using this tactic—acting as gatekeepers of the products offered on their sites.¹⁴⁹ Specifically, Amazon was accused of exploiting the data it collects on external businesses that list on Amazon, so that Amazon can better compete with them.¹⁵⁰ Amazon has also maintained data records of customers since it

137. Pearlstein, *supra* note 106.

138. O'Connor, *supra* note 12.

139. *Id.*

140. *See The Antitrust Laws, supra* note 23.

141. *See Khan, Amazon Bites Off, supra* note 17.

142. *Id.*

143. Greg Bensinger, *Competing with Amazon on Amazon*, WALL ST. J., June 27, 2012, at B1.

144. *Id.*

145. *See Packer, supra* note 115.

146. Khan, *Amazon Bites Off, supra* note 17.

147. *See FTC Fact Sheet, supra* note 19.

148. *See Packer, supra* note 115.

149. *Id.*

150. *Id.*; *see* Bensinger, *supra* note 143.

began as an online book retailer in the mid-1990s.¹⁵¹ This data gives Amazon information on consumer search histories and purchases,¹⁵² which is then used to inform Amazon's marketing and purchasing teams.¹⁵³ Based on Amazon's aggressive business history, many believe Amazon could be using this information to undermine competition.¹⁵⁴ Notably, Amazon uses the data it collects to make suggestions directly to consumers.¹⁵⁵ By looking at a consumer's past purchase history, Amazon can recommend its own products at the detriment of its competitors.¹⁵⁶

Though corporations may not always give preferential treatment to their own products when other products are more profitable, the possibility that they will is problematic for smaller merchants entering the market and attempting to sell their product on an inherently unequal playing field.¹⁵⁷ Amazon not only has the capacity to promote its own products on its platform, it is able to do so at extraordinarily low prices.¹⁵⁸ While these low prices and fast services certainly benefit consumers, they do so at the expense of pushing out competition, specifically small start-up companies.¹⁵⁹ This exact practice has been employed by Google to alter search results in its own favor at the expense of its competitor Yelp.¹⁶⁰ Google's goal was to ensure that consumers could not easily access the services provided by Yelp.¹⁶¹ The long-term impact of these deceptive online practices is decreasing market entrants and stifling of innovation and product quality—all results that will harm consumers.¹⁶²

Recently, the European Union found Google to be in violation of a similar practice.¹⁶³ As a provider of hardware and software devices, Google was accused of forcing hardware companies to pre-install Google-owned software.¹⁶⁴ While this bundling resulted in lower consumer prices, it eliminated the element of consumer choice by

151. See Packer, *supra* note 115.

152. *Id.*

153. See Khan, *Amazon's Antitrust Paradox*, *supra* note 4, at 783.

154. *Id.* at 784.

155. *Id.* at 788.

156. *Id.*

157. See, e.g., Packer, *supra* note 115. See generally BORK, *supra* note 57.

158. See Packer, *supra* note 115.

159. *Id.*

160. *Ip*, *supra* note 70.

161. *Id.*

162. See Packer, *supra* note 115.

163. Adam Satariano & Jack Nicas, *EU Fines Google 5.1 Billion in Android Antitrust Case*, N.Y. TIMES (July 18, 2018), <https://www.google.com/amp/s/www.nytimes.com/2018/07/18/technology/google-eu-android-fine/amp.htm>.

164. *Id.*

driving out competitors in the market.¹⁶⁵ Thus, by analyzing long-term competitive effects, the European Union found this practice to be an antitrust issue.¹⁶⁶ While some argue the \$5 billion fine imposed on Google is unreasonable,¹⁶⁷ it is notable that other nations are updating their antitrust analysis in light of changing technology and business practices.¹⁶⁸

IX. PROPOSED UPDATES TO ANTITRUST LAW

While an analysis of potential transactions under a for the benefit of the consumer analysis remains beneficial, further analysis is necessary to prevent modern anticompetitive practices. Importantly, antitrust analysis cannot focus exclusively on the potential for short-term price increases to consumers. Modern corporate transactions have the potential for long-term anticompetitive effects. American technology giants have become as rooted in our economy as the railroad and oil companies that spurred the creation of antitrust law in the late 1800s.¹⁶⁹ Therefore, antitrust law must keep up with the vastly changing world of technology to remain faithful to its purpose of benefiting the consumer.¹⁷⁰

While the Amazon-Whole Foods acquisition provides consumer benefits in terms of price and access, the FTC should have investigated deeper into the potential for abuse. Under a purely horizontal, price-based analysis, anticompetitive practices that are commonplace in our modern economy will be permissible. Therefore, American antitrust law must be updated through either the passage of a revamped antitrust law or administrative guidance. This change will give the courts and FTC better guidance for analyzing modern anticompetitive practices.

For example, current antitrust analysis fails to investigate effects on producers in the supply chain or the health of the market. The FTC considers low consumer prices to be evidence of enduring, healthy competition.¹⁷¹ Through this framework, Amazon easily passed

165. *Id.* (Google's "practices have denied rivals the chance to innovate and compete on the merits. They have denied European consumers the benefits of effective competition in the important mobile sphere.").

166. Tom Warren, *Google Fined a Record \$5 Billion by the EU for Android Antitrust Violations*, THE VERGE (July 18, 2018), <https://www.theverge.com/2018/7/18/17580694/google-android-eu-fine-antitrust>.

167. David Meyer, *Here's Why the EU Just Hit Google with a Record \$5 Billion Antitrust Fine*, FORTUNE (July 18, 2018), <http://fortune.com/2018/07/18/google-eu-android-antitrust-fine-5-billion/>.

168. See Satariano & Nicas, *supra* note 163.

169. See Pearlstein, *supra* note 106.

170. See *id.*

171. Vauhini Vara, *Is Amazon Creating a Cultural Monopoly?*, NEW YORKER (Aug. 23, 2015), <http://www.newyorker.com/business/currency/is-amazon-creating-a-cultural-monopoly>; see, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107-08 (1984)

antitrust scrutiny because its current corporate strategy focuses on low consumer prices.¹⁷² If the FTC also considers corporate structure and long-term market effects, antitrust review would better encompass the broad variety of potential anticompetitive practice. A more expansive approach to antitrust investigation would better correspond to the legislative intent behind the Sherman and Clayton Acts given the unique issues faced by contemporary markets.¹⁷³

X. CONCLUSION

The current antitrust framework used by courts, the FTC, and DOJ for analyzing transactions is too focused on whether the immediate effects of a deal will result in higher prices for the consumer.¹⁷⁴ This framework does not adequately encompass the ways in which a consumer can be harmed by corporate mergers, especially in the age of internet and technology dominance.¹⁷⁵

Though internet platforms have given the American public access to large markets and massive amounts of information,¹⁷⁶ competition in these markets is staggering.¹⁷⁷ Amazon has built its online dominance by aggressively pursuing growth at the expense of profits.¹⁷⁸ As a result, Amazon has been able to dominate the online retail industry. As Amazon, and possibly other online companies, begins to enter the physical retail realm, antitrust law must improve to deal with this sort of integration. Specifically, change is necessary because the current law underappreciates risks of predatory pricing and other predatory practices when online and physical retailers merge.¹⁷⁹

("Congress designed the Sherman Act as a 'consumer welfare prescription.' . . . Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit" (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

172. *Vara*, *supra* note 171.

173. *See FTC Fact Sheet*, *supra* note 19; *supra* Part VII.

174. *See McLaughlin & Soper*, *supra* note 11.

175. *Id.*

176. *See generally Khan, Amazon's Antitrust Paradox*, *supra* note 4.

177. *Id.*

178. *See A Giant Problem—The Superstar Company*, *ECONOMIST* (Sept. 17, 2016), <http://www.economist.com/news/leaders/21707210-rise-corporatecolossus-threatens-both-competition-and-legitimacy-business> ("[T]he most striking feature of business today is . . . the entrenchment of a group of superstar companies at the heart of the global economy."); *see also Khan, Amazon's Antitrust Paradox*, *supra* note 4, at 747.

179. *See Khan, Amazon's Antitrust Paradox*, *supra* note 4, at 716–17; *see also The Antitrust Laws*, *supra* note 23. In a striking speech welcoming the public and political attention towards antitrust, Assistant Attorney General for Antitrust Renata Hesse stated, "Antitrust is too important to be left solely in the hands of antitrust experts." Renata Hesse, *Remarks at the 2016 Global Antitrust Enforcement Symposium: And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement*, DEP'T OF JUSTICE (Sept. 20, 2016), <https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening>.

To maintain the purpose of antitrust law, the FTC's anticompetitive analysis must be revised to keep up with modern corporations. Without this necessary update, antitrust law will continue to inadequately regulate the marketplace.

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