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## American Oligarchy: How the Enfeebling of Antitrust Law Corrodes the Republic

Zachariah Foge

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# AMERICAN OLIGARCHY: HOW THE ENFEEBLING OF ANTITRUST LAW CORRODES THE REPUBLIC

Zachariah Foge, J.D.

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## INTRODUCTION

There is an old adage from the 19<sup>th</sup> century that best describes power: “Power corrupts; absolute power corrupts absolutely.”<sup>1</sup> As of January 2018, Google ranks among the top worldwide internet companies, with a market capitalization of 782 billion U.S. dollars.<sup>2</sup> With a market share of 75%, Google has undisputed dominance as a search engine company.<sup>3</sup> Google is just one of the major tech companies that have achieved unprecedented levels of success and wealth, joining the likes of Amazon, Apple, Facebook, and Microsoft.

These companies are all hailed for their innovation and progressive ideals, seemingly ushering in an age of friendly, people-loving multinational corporations. The “tech giants” are something different than

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<sup>1</sup> This quote is attributed to John Emerich Edward Dalberg Acton, the historian and moralist. *The Phrase Finder*, <https://www.phrases.org.uk/meanings/absolute-power-corrupts-absolutely.html>, (January 14, 2018).

<sup>2</sup> YAHOO FINANCE (January 2018), <https://finance.yahoo.com/quote/GOOG/>.

<sup>3</sup> *Market Share Statistics for Internet Technologies*, NET MARKETSHARE (January 2018), [netmarketshare.com](http://netmarketshare.com).

anything that has come before: reflecting the personalities of the quirky, young geniuses that built them, these Silicon Valley tech giants are altruistically giving it all to create a better, more connected world. Whereas corporations of the nineteenth and twentieth century were predatory, cold, and focused solely on profits, these new twenty-first century giants only want to build a better tomorrow. That's why Google's corporate slogan had for the longest time been "Don't be evil."<sup>4</sup> Or why Facebook wants to "bring the world closer together."<sup>5</sup>

At least, that is the perception that they are trying to create. There is a heavily concerted effort to portray themselves as nerdy kids working for the betterment of humanity.<sup>6</sup> In reality, the tech giants like Google and Facebook employ some of the most ruthless, calculating strategies in the business world.<sup>7</sup> Google, for example, has made the majority of its revenue from data mining and advertisements.<sup>8</sup> One of the main reasons they are so successful in selling advertisements, and one of their main sources of criticisms, is that they gather people's data and sell them for more targeted advertising.<sup>9</sup> Google has approached privacy hypocritically, fiercely defending its own privacy while violating everyone else's.<sup>10</sup>

One of the company's biggest controversies came in 2010 when it was discovered that Google had been collecting people's Wi-Fi data through its Street View cars.<sup>11</sup> The company took information like people's passwords, emails, and other personal information.<sup>12</sup> As Enderle, principal analyst at technology consulting firm Enderle Group put it: "I think they should change their slogan to 'evil are us.' It seems like every time you turn around they are doing something that is at best questionable and at worst anti-people."<sup>13</sup>

In September 2017, the New America Foundation think-tank scholar Barry Lynn was fired.<sup>14</sup> He alleges the firing was because Google—one of the think-tank's largest donors—was unhappy with his

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<sup>4</sup> Paul Buchheit, *Paul Buchheit on Gmail, AdSense and More*, GOOGLE BLOGOSCOPED (July 16, 2007), <http://blogoscoped.com/archive/2007-07-16-n55.html>.

<sup>5</sup> Alex Heath, *Facebook has a new mission statement: 'to bring the world closer together'*, BUS. INSIDER (June 22, 2017), <http://www.businessinsider.com/new-facebook-mission-statement-2017-6>.

<sup>6</sup> Olivia Solon & Sabrina Siddiqui, *Forget Wall Street – Silicon Valley is the new political power in Washington*, THE GUARDIAN (September 3, 2017), <http://www.theguardian.com/technology/2017/sep/03/silicon-valley-politics-lobbying-washington>.

<sup>7</sup> *Id.*

<sup>8</sup> Cadie Thompson, *Does 'Don't be evil' still apply to Google?*, CNBC (August 19, 2014), <https://www.cnbc.com/2014/08/19/does-dont-be-evil-still-apply-to-google.html>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Solon & Siddiqui, *supra* note 6.

research, which called for tech giants such as Google, Amazon, and Facebook to be regulated as monopolies.<sup>15</sup> His contention is not without merit: leaked emails revealed that the foundation was concerned about Lynn's research potentially jeopardizing future funding.<sup>16</sup> Moreover, Eric Schmidt, the chairman of Alphabet, Google's parent company, donated \$21 million to New America Foundation and even called it the "Eric Schmidt Ideas Lab."<sup>17</sup>

Amazon, like Google, is almost universally loved by its users,<sup>18</sup> and also tries to maintain a façade of altruism. Amazon is also one of the foremost powers of the twenty-first century, reaching a level of success that has so permeated commerce that their presence can only be described as ubiquitous. By some measures, Amazon captures nearly half of all online shopping.<sup>19</sup> Online retail is just one facet of the tech giant's business, with the company also producing television and films, lending credit, publishing, marketing, engaging in delivery and logistics, and manufacturing.<sup>20</sup> With the recent acquisition of Whole Foods, Amazon also looks to move into the grocery and food production business.<sup>21</sup> With all of these enterprises and a continuing practice of favoring aggressive expansion over profit, shares trade at over 900 times earnings, which tops Standard & Poor's 500 index as the most expensive stock.<sup>22</sup> Today, half of all U.S. households have an Amazon Prime membership, and one in every two dollars spent online by Americans goes to Amazon.<sup>23</sup> Despite the love from both consumers and investors, in recent years Amazon has had its benign mask peeled back to reveal the hungry predator underneath. Amazon greedily swallows up smaller competitors and uses aggressive bully tactics in negotiations.<sup>24</sup> Famously in 2014, in a negotiation with Hachette Publishing, Amazon delisted the publisher's books from its website as a form of leverage.<sup>25</sup> This is a practice, amongst other predatory practices, that eliminates competition and has led Amazon to consume industry after industry.<sup>26</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Kim Hart & Ina Fried, *Exclusive poll: Facebook favorability plunges*, AXIOS (March 26, 2018), <https://www.axios.com/exclusive-poll-facebook-favorability-plunges-1522057235-b1fa31db-e646-4413-a273-95d3387da4f2.html>.

<sup>19</sup> Lina Kahn, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 712 (2017).

<sup>20</sup> *Id.* at 713.

<sup>21</sup> Heather Haddon, *Amazon's Grocery Sales Increased After It Devoured Whole Foods*, THE WALL STREET JOURNAL (January 2018), <https://www.wsj.com/articles/amazons-grocery-sales-gained-weight-after-it-devoured-whole-foods-1515934801>.

<sup>22</sup> Kahn, *supra* note 19, at 713.

<sup>23</sup> Olivia LaVecchia & Stacy Mitchell, *Amazon's Stranglehold: How the Company's Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities*, INST. FOR LOC. SELF-RELIANCE 4 (Nov. 2016), [http://ilsr.org/wp-content/uploads/2016/11/ILSR\\_AmazonReport\\_final.pdf](http://ilsr.org/wp-content/uploads/2016/11/ILSR_AmazonReport_final.pdf).

<sup>24</sup> Kahn, *supra* note 19, at 715.

<sup>25</sup> *Id.*

<sup>26</sup> LaVecchia & Mitchell, *supra* note 23, at 6.

These Silicon Valley companies have all acted contrary to their perceived image, but the question is why? Why would these companies try so hard to appear socially progressive? After all, most people already expect large corporations to favor profits over customers. The answer is that these carefully constructed images are shrewd and calculated decisions made in response to the threat of antitrust enforcement. It was eighteen years ago when the U.S. government neutered Microsoft for violating antitrust law, and all of the fledgling tech companies, who would grow to dominate the world market, watched closely and learned an important lesson about the power of antitrust law.<sup>27</sup> Eric Schmidt, then CEO of the tech company Novell, witnessed the impact the lengthy case had on Microsoft, and he took the lesson to heart.<sup>28</sup> When Google hired him in 2001, Schmidt was determined to avoid the same fate that befell Microsoft.<sup>29</sup> *United States v. Microsoft* showed the world the power of antitrust and impressed upon the leaders of the young tech companies the need to play the political game and toe the line of monopoly and oligopoly.<sup>30</sup> Today, the tech giants are larger and more powerful than any company to come before, including Microsoft of the late 90's.<sup>31</sup> It is interesting, then, that the modern tech giants have evaded government scrutiny and continued to grow, seemingly unfettered.

The state of modern antitrust law, due to a shift in legal thinking and practice in the last four decades and the valuable lessons learned after *Microsoft*, has led to this current level of unprecedented dominance for the tech titans of the twenty-first century. Google, which has had massive control over the advertisement and search engine market, is only now starting to receive antitrust scrutiny; that is, at least in Europe.<sup>32</sup>

Domestically, antitrust law has waned in both power and prevalence, and the willingness of modern tech giants to play Washington's game has certainly helped avoid prosecution. Back in 1997, before the antitrust suit, Microsoft spent just \$2 million on lobbying to

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<sup>27</sup> Solon & Siddiqui, *supra* note 6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>31</sup> Ryan McQueeney, *You'll Never Believe Amazon's Share of the E-Commerce Market*, NASDAQ (Jan. 11, 2018), <https://www.nasdaq.com/article/youll-never-believe-amazons-share-of-the-e-commerce-market-cm904080>.

<sup>32</sup> Mark Scott, *Google Fined Record \$2.7 Billion in E.U. Antitrust Ruling*, THE NEW YORK TIMES (June 2017), <https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html>. For the past two decades, antitrust law has been thriving internationally, with the EU taking an especially aggressive stance towards the world's largest tech companies. *Id.*; see also Maurice Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012) ("The past twenty years witnessed more countries with antitrust laws and the birth and growth of the international organization of governmental competition authorities, the International Competition Network (ICN), with over 100 member countries.").

Washington.<sup>33</sup> Today, Microsoft, Google, Amazon, Apple, and Facebook have spent a combined \$49 million on DC lobbying, and many of Silicon Valley executives go to and from senior governmental positions.<sup>34</sup> Google alone spent more on lobbying than any other company, spending \$9.5 million in the first half of 2017, and \$15 million the year before.<sup>35</sup> Google and the other tech companies consistently use libertarian rhetoric and vehemently denounce anticompetitive practice, claiming that people can easily click other websites.<sup>36</sup> However, these actions conflict with empirical data, which indicates that the tech giants' practices result in real consumer harm.<sup>37</sup>

Despite the evidence, Washington has been hesitant to pursue any real action against Google. And they are not the only company to play the political game and avoid government scrutiny. Besides the millions spent in lobbying, Amazon and CEO Jeff Bezos have navigated the diluted waters of U.S. antitrust law to become the foremost retail power and undisputed king of internet commerce.<sup>38</sup> As domestic antitrust law has shifted from its stance of market-based structures and broad policy-driven goals to a narrow, economic outcome-based viewpoint, the influence of antitrust, and indeed our national attitude towards antitrust, has significantly waned.<sup>39</sup>

For example, Amazon has structured its business to consistently underprice its products, to the detriment of profits.<sup>40</sup> Due to the shift in legal ideology, underpricing is not viewed as anti-competitive and, in fact, is seen by courts to be evidence of good competition.<sup>41</sup> It seems that when he planned the course for Amazon's growth, Jeff Bezos did so with an eye on contemporary antitrust laws.<sup>42</sup> Amazon is almost universally loved by consumers and investors and ignored by the government, and as mentioned above, they have toiled steadily down the road to monopoly.<sup>43</sup> And yet there is real harm being done to the markets and to consumers that is now coming to light. Amazon's practices are gutting suppliers who refuse to deal with the tech giant's terms and fueling a sharp decline in smaller, independent retail business, among other cognizable harms.<sup>44</sup> On top of these other harms is the elimination of over 149,000 jobs in retail, and

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<sup>33</sup> Solon & Siddiqui, *supra* note 6.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> See generally, *The FTC Report on Google's Business Practices*, THE WALL STREET JOURNAL (March 2015), <http://graphics.wsj.com/google-ftc-report/>, for the FTC's 160-page report on Google's practices resulting in consumer harm.

<sup>38</sup> McQueeney, *supra* note 31.

<sup>39</sup> Eleanor Fox, *The Goals of Antitrust: Against Goals*, 81 FORDHAM L. REV. 2157, 2158 (2013).

<sup>40</sup> Kahn, *supra* note 19, at 713.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> LaVecchia & Mitchell, *supra* note 23, at 6.

Amazon's forcing of many of its workers to work in grueling conditions.<sup>45</sup> While not all harms are repressible under antitrust laws, these harms are necessary to show the massive impact that the company has and why it is important to change the way antitrust is approached and applied.

The shifting influence of anti-trust laws in the United States has waned over the last four decades. Where once antitrust was called the "Magna Carta of free enterprise," today the Court views antitrust as an annoyance at best.<sup>46</sup> Where presidential candidates used to debate antitrust, now it is only mentioned in how antitrust enforcement should be scaled back.<sup>47</sup> Americans once deeply cared about antitrust enforcement and viewed monopolies with fear and suspicion.<sup>48</sup> However, according to a 2004 Gallup poll, many young Americans are not only unconcerned with monopolies but view large corporations with a sense of satisfaction.<sup>49</sup> This new attitude is linked to the federal government no longer enforcing antitrust law the way it had historically and has now led to a sense of apathy towards monopolies on the whole.<sup>50</sup>

In contrast to the declining influence of antitrust in America, antitrust is flourishing internationally: the ICN continues to grow, and even traditionally antitrust-skeptic countries like China, Russia, and India now have competition laws.<sup>51</sup> In Europe, eight out of ten European Union ("EU") citizens agreed with fundamental principles of antitrust law: that small companies need protection from large companies and that competition creates more choices and leads to more innovation.<sup>52</sup> These principles are the foundation of the Clayton Act; so why then are these ideals prevalent in foreign antitrust regimes, yet diminished domestically where the Act was originally passed? To understand the answer, it is important to first trace the history of antitrust law.

In this note, I will argue that the current antitrust framework is misguided and based on erroneous legal and economic theories originating from the Chicago School.<sup>53</sup> I will argue that the neoclassical approach is

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<sup>45</sup> *Id.* at 6–7.

<sup>46</sup> Stucke, *supra* note 32, at 553.

<sup>47</sup> *Id.* In the 2000 campaign, President George W. Bush criticized the Microsoft antitrust case as potentially harming innovation. *See id.* at n.17. The president then promised to scale back antitrust enforcement, a trend that marks a notable shift in Republican policy that started with Reagan's reforms. *Id.*

<sup>48</sup> *Id.* at 553–54.

<sup>49</sup> Linda Lyons, *Youthful Optimism? Young Americans Happy with "Big Business"*, GALLUP (Mar. 2, 2004), <http://www.gallup.com/poll/10816/Youthful-Optimism-Young-Americans-Happy-Big-Business.aspx>.

<sup>50</sup> *Id.*

<sup>51</sup> Stucke, *supra* note 32, at 552

<sup>52</sup> *Id.* at 609–10.

<sup>53</sup> "The Chicago School" is the name given to the neoclassical legal scholars and economic theorists based out of the University of Chicago in the middle of the twentieth century. Kerry

not only wrong when examining the legislative intent of Congress but is also in contravention with the policy goals and foundational principles of antitrust law. Furthermore, I will argue that the Chicago School's narrow, outcome-based view of antitrust is ill-equipped to deal with the demands of the twenty-first century and especially with the online marketplace. The tech giants are unprecedented in their scale, and the online markets that they dominate are still in their infancy. The internet was not contemplated when antitrust laws were drafted and certainly not during the time of the Chicago School. That is why it is so critical to examine the original intent of the Sherman Act and its progeny, in order to accurately respond to the titanic power of these companies.

In Part II of this note, I will detail the history of antitrust law and how it shifted from a broad, policy-based law to its current narrow, economic framework. I will detail the policy and reasoning behind the antitrust laws and how the old American fear of concentrated power led to its inception. Part III will examine the most prominent tech giants that are currently acting as an oligopoly, and how they are exactly the kind of companies that the antitrust laws were meant to be applied to in the first place.

## I. THE HISTORY OF ANTITRUST LAW

### A. *Development of Antitrust Law*

Antitrust law began with the passing of the Sherman Antitrust Act (the "Act") of 1890.<sup>54</sup> The Act was born out of growing concern for the power of new, large business organizations called "trusts."<sup>55</sup> Congress intended to reign in the power of these trusts but left the Act's language vague and very broad.<sup>56</sup> This was done to allow the courts to develop the field of antitrust law.<sup>57</sup> The principle behind the Act was to stop the concentration of economic power, which many lawmakers thought could challenge democracy.<sup>58</sup> The Act sought to distribute power and provide "diversity and access to markets."<sup>59</sup>

The main aspects of the Act are embodied in Sections 1 and 2.<sup>60</sup> Section 1 of the Act "prohibits anticompetitive practices that are used to

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Gutknecht, *Apple and Amazon's Antitrust Antics: Two Wrongs Don't Make a Right, But Maybe They Should*, 22 *COMMLAW CONSPICUOUS* 160, 163 n.20 (2014).

<sup>54</sup> Gutknecht, *supra* note 53, at 165; *see also* The Sherman Antitrust Act 15 U.S.C. §§ 1-7 (1890).

<sup>55</sup> Fox, *supra* note 39, at 2157.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Kahn, *supra* note 19, at 740.

<sup>59</sup> Fox, *supra* note 39, at 2158.

<sup>60</sup> Gutknecht, *supra* note 53, at 166.



build and maintain market power.”<sup>61</sup> Section 1 goes on to make illegal “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . .”<sup>62</sup> Section 2 prohibits the formation of monopolies, and makes illegal activities that monopolize trade.<sup>63</sup>

Unfortunately, problems with the Act became immediately apparent, as there was little guidance or definition in the Act’s legislative history or in the bill’s language.<sup>64</sup> Once the new antitrust law reached the United States Supreme Court for the first time, there was already divisiveness in both the goals and the meaning of the law.<sup>65</sup> The justices were largely divided on how aggressive or conservative to be when wielding antitrust law, as would be the case throughout the next century.<sup>66</sup> However, for a law that was left open for judicial interpretation, Supreme Court interpretation faced a slow start.<sup>67</sup> It was not until two decades after the law’s initial passing that the first major case reached the Court in *Standard Oil v. United States*.<sup>68</sup>

The *Standard Oil* Court attempted to define the breadth and scope of antitrust law, and the best approach to its application.<sup>69</sup> This case saw the birth of the “rule of reason,” which would be used to guide the analysis of antitrust for many decades.<sup>70</sup> The rule of reason was created for courts “to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.”<sup>71</sup> In other words, this rule put the general public welfare at the center with a broad view of the market as a whole, rather than focusing on individuals.<sup>72</sup>

Alongside the “rule of reason,” the antitrust jurisprudence developed rules centered on the recognition that some business practices were so anticompetitive that no significant analysis was needed, and certain per se rules were created.<sup>73</sup> The first per se rule came before *Standard Oil*, in the landmark antitrust case *United States v. Trans-Missouri Freight Association*.<sup>74</sup> There, the Court held that collusive

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<sup>61</sup> *Id.*

<sup>62</sup> 15 U.S.C. § 1.

<sup>63</sup> 15 U.S.C. § 2.

<sup>64</sup> Gutknecht, *supra* note 53, at 167.

<sup>65</sup> Fox, *supra* note 39, at 2157.

<sup>66</sup> *Id.*

<sup>67</sup> Gutknecht, *supra* note 53, at 167.

<sup>68</sup> *Standard Oil v. United States*, 221 U.S. 1 (1911).

<sup>69</sup> Gutknecht, *supra* note 53, at 168.

<sup>70</sup> *Standard Oil*, 221 U.S. at 66.

<sup>71</sup> *Id.* at 64.

<sup>72</sup> Gutknecht, *supra* note 53, at 168.

<sup>73</sup> *Id.* at 169.

<sup>74</sup> *Standard Oil*, 221 U.S. 1; *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290 (1897).

pricing is always harmful and forbidden regardless of the intent of the parties in the agreement.<sup>75</sup> Since *Trans-Missouri*, the list of per se rules grew over the next several decades to include market divisions, group boycotts, and cartelization.<sup>76</sup> These rules helped to flesh out the specifics of the Act and develop antitrust law for the next several decades.<sup>77</sup>

The per se rules and the “rule of reason” should be understood as two different standards under which the Supreme Court evaluates potential antitrust violations.<sup>78</sup> The per se rules are “black-letter prohibitions on specific *types* of business arrangements.”<sup>79</sup> Since these arrangements are purely anticompetitive, the government must show that the arrangement in question “lacks any redeeming virtue.”<sup>80</sup> When a particular restraint on trade falls within per se category, it is deemed unreasonable and thus illegal as a matter of law.<sup>81</sup> On the other hand, the “rule of reason” is more like a balancing approach, with courts considering the trade restraint and “its context, purpose, and effect.”<sup>82</sup> Courts must take into consideration “the nature of the industry, the reasons that the restraint was imposed, and whether or not it has the desired consequences.”<sup>83</sup> Both rules were implemented on a case-by-case basis, and both were debated.<sup>84</sup>

Following *Trans-Missouri* and *Standard Oil*, Congress enacted a series of laws to bolster the Act.<sup>85</sup> The Clayton Act of 1914 would strengthen the Act by covering for scenarios that the Act did not.<sup>86</sup> Moreover, the Clayton Act provided for procedural and enforcement scenarios, as well as helped define common antitrust terms with specificity.<sup>87</sup> The majority opinion in *Standard Oil* had drawn much criticism due to its adoption of the “rule of reason,” as the holding of the case gave too much discretion to the courts.<sup>88</sup> The Clayton Act saw a departure from the overbroad language of the Act, by providing much more specific instances of unlawful acts.<sup>89</sup> The specific provisions deal with price discrimination, like predatory pricing practices,<sup>90</sup> and governs the mergers and acquisitions process.<sup>91</sup> Alongside the Clayton Act, the

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<sup>75</sup> *Trans-Mo. Freight Ass'n*, 166 U.S. at 342.

<sup>76</sup> Gutknecht, *supra* note 53, at 170.

<sup>77</sup> Stucke, *supra* note 32, at 553–55.

<sup>78</sup> Jared Killeen, *Throwing the E-Book at Publishers: What the Apple Case Tells Us About Antitrust Law*, 22 J.L. & POL'Y 341, 354–55 (2013).

<sup>79</sup> *Id.* (emphasis added).

<sup>80</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

<sup>81</sup> Killeen, *supra* note 78, at 355.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Kahn, *supra* note 19, at 723.

<sup>86</sup> *Id.*

<sup>87</sup> 3-18 Federal Antitrust Law § 18.1 (2017).

<sup>88</sup> *Id.*

<sup>89</sup> 3-18 Federal Antitrust Law § 18.2 (2017).

<sup>90</sup> Kahn, *supra* note 19, at 723.

<sup>91</sup> Gutknecht, *supra* note 53, at 165. For more of the specific provisions, see Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (1914).

Federal Trade Commission Act (“FTCA”), passed in the same session as the Clayton Act, was designed to provide a dedicated commission that would enforce the more specific laws of the new legislation and would be more effective in combating the powerful trusts.<sup>92</sup>

The next several decades saw an increase in antitrust enforcement and a broadening of antitrust powers with the passage of the Robinson-Patman Act of 1936 and the amendment to the Clayton Act in 1950.<sup>93</sup> Up until the 1960’s, the rules and goals of antitrust were largely agreed upon.<sup>94</sup> The rule of reason was the accepted approach, and per se rules continued to grow.<sup>95</sup> They would reach their height in 1967 in *United States v. Arnold, Schwinn & Co.* where the Supreme Court applied per se rules to nonprice vertical restrictions imposed on distributors by their supplier.<sup>96</sup>

However, at this time a movement in the economic world was beginning to pick up steam, and the Chicago School began writing about antitrust law and its goals.<sup>97</sup> Led by the influence of powerful advocates like Robert Bork and Richard Posner, the Chicago School derailed the well-established antitrust jurisprudence and greatly narrowed the scope of antitrust law.<sup>98</sup> The Chicago School approach was, in essence, a price theory view.<sup>99</sup> Consumer welfare is the central focus of this approach, and the goals of antitrust shifted to focus on outcomes, rather than enforcing the policy behind the Act’s passing.<sup>100</sup> According to the Chicago School, the biggest indicator of consumer welfare is market efficiency.<sup>101</sup> Market efficiency should not be confused with competition. Further, “competition can sometimes be inefficient. This is because while efficiency is an end in itself, competition is just one possible means of achieving it.”<sup>102</sup> The Chicago School approach, therefore, suggests that restraints on trade may be legal if they are efficient, as this would indicate that consumer welfare has not been harmed.<sup>103</sup> Thus, a business arrangement that would be illegal

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<sup>92</sup> 3-18 Federal Antitrust Law § 18.2 (2017).

<sup>93</sup> Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1059 (1979).

<sup>94</sup> Gutknecht, *supra* note 53, at 173.

<sup>95</sup> *Id.*

<sup>96</sup> *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *overruled by* *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

<sup>97</sup> Gutknecht, *supra* note 53, at 173.

<sup>98</sup> Kahn, *supra* note 19, at 718–19.

<sup>99</sup> *Id.* at 719.

<sup>100</sup> *Id.* at 744. The Chicago School thought that courts should focus on the outcomes like whether or not a particular business arrangement between competitors caused prices to rise. *Id.* Thus, consumer welfare is at the heart of the Chicago School theory. Killeen, *supra* note 78, at 367.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 368.

<sup>103</sup> *Id.* at 368–70. The Chicago Approach is backward looking and circular in its reasoning. Because the raised prices did not result in consumer harm, the businesses engaging in the restraint of trade did not violate antitrust law. This logic is not only conclusory, but it ignores the non-economic harms of antitrust.

under the broader rule of reason and per se approaches could be found to be legal under the Chicago School approach.<sup>104</sup>

The Chicago School approach gained prominence in the early 1970's and has since dominated the antitrust world.<sup>105</sup> The Chicago School's influence on antitrust law cannot be overstated. Supreme Court justices, heads of federal agencies, prominent lawyers and politicians, and even presidents have been influenced by the Chicago School.<sup>106</sup> Under the Reagan administration, the president mandated that the government should stay out of the business world and shrink regulation.<sup>107</sup> The Reagan administration operated under the influence of the Chicago School and began viewing business acts as presumptively valid.<sup>108</sup> The result was that business conduct was not anticompetitive unless it resulted in consumer harm.<sup>109</sup> Notable politicians like Ralph Nader and John Kenneth Galbraith championed the approach that consumer welfare was the sole goal of antitrust and that it was best achieved through market efficiency.<sup>110</sup> This huge shift means that conduct which would normally have violated antitrust law could be legal as long as the result did not reduce consumer welfare.<sup>111</sup>

From the early 1980s to the modern day, antitrust law operated with maximizing consumer welfare as its guiding principle: conveniently forgetting the ninety years of antitrust law that had come before.<sup>112</sup> Not only has the legislative view of antitrust shifted, but public attitude towards antitrust has appreciably declined. When looking at presidential speeches and party platforms for the mention of antitrust, this decline can be seen.<sup>113</sup> Since presidential candidates and parties have a tendency to only campaign on issues they think are relevant, their platforms are solid metrics for determining what issues interest and resonate with the public.<sup>114</sup> Since the Carter administration, many presidents have invoked antitrust in high-profile speeches, and the last significant mention of antitrust from either party was in 1984 when Walter Mondale admonished the FTC for running "roughshod over the nation's antitrust laws."<sup>115</sup> Since then, neither party has made any significant mention of antitrust and no president has had a major involvement with the antitrust cases.<sup>116</sup> Because politicians will typically speak about issues they think are relevant to the

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<sup>104</sup> *Id.* at 383–84.

<sup>105</sup> Robert Lande, *Proving the Obvious: The Antitrust Laws were Passed to Protect Consumers (Not Just to Increase Efficiency)*, 50 HASTINGS L. J. 959 (1999).

<sup>106</sup> *Id.*

<sup>107</sup> Fox, *supra* note 39, at 2158.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Kahn, *supra* note 19, at 742.

<sup>111</sup> *Id.*

<sup>112</sup> Fox, *supra* note 39, at 2159.

<sup>113</sup> Daniel Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1165–66 (2008).

<sup>114</sup> *Id.* at 1166.

<sup>115</sup> *Id.* at 1169.

<sup>116</sup> *Id.*

American people's interests, the fact that this decline has happened shows that the public does not care about antitrust as they once did.<sup>117</sup>

### *B. Antitrust Policy*

When the Act was passed by Congress in 1890, there were clear policy goals and populist concerns attached to the antitrust law.<sup>118</sup> But, the modern concept of antitrust law birthed from the Chicago School is erroneous: the Chicago School's backward-looking approach is flawed in its logic and ignores legislative history. More importantly, focusing on consumer welfare to the exclusion of everything else, and using market efficiency to do so, disregards the new and unique challenges presented by the twenty-first-century market. The world has changed dramatically with the internet, and the current framework of antitrust law is not equipped to deal with the change.

The framework before the Chicago School's intervention would be better able to handle the current market due to its broader approach and to the fact that antitrust law used to be driven by clear policy and goals. In order to understand antitrust law's place in the modern world and to show that the Chicago School was clearly wrong in its approach, it is helpful to examine the policy and goals behind antitrust law.

At the heart of antitrust law are the democratic sensibilities that shaped this country.<sup>119</sup> Ultimately, it was the fear and mistrust of concentrated power in the hands of the few that powered the Progressive-Era bill.<sup>120</sup> Moreover, Congress did not hold the Chicago School's view that the markets were self-correcting.<sup>121</sup> Instead, the legislators believed that unregulated corporations could amass so much power and have so much control over the markets that it could potentially threaten democracy.<sup>122</sup>

Antitrust law was the natural response to the fear of concentrated economic power and was used as the means to distribute that power.<sup>123</sup> When Congress passed the Act in 1890, Senator John Sherman, the bill's namesake, advocated for the new law as an economic "bill of rights."<sup>124</sup> In a speech, Senator Sherman articulated the underlying rationale for the antitrust law, and it's no coincidence that it rings with the voices of the liberty-laced rhetoric of the founding fathers. He states: "If we will not

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<sup>117</sup> *Id.* at 1170.

<sup>118</sup> *Id.* at 1165.

<sup>119</sup> *Id.* at 1181.

<sup>120</sup> *Id.*

<sup>121</sup> Stucke, *supra* note 32, at 556.

<sup>122</sup> *Id.* at 590.

<sup>123</sup> Kahn, *supra* note 19, at 739–40.

<sup>124</sup> *Id.* at 740.

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.”<sup>125</sup> From this speech, it is clear that Senator Sherman believed that the American ideals of liberty and freedom from monarchy should extend to the economic world.<sup>126</sup> He saw just how powerful the trusts were becoming in this era and knew the dangers that too much concentrated power could pose to democracy. Senator Sherman equates these trusts to “an emperor” and calls their leaders “autocrat[s] of trade.”<sup>127</sup>

The fear was that the economic concentration of power by a few elites would destabilize democracy.<sup>128</sup> When private individuals massed extraordinary wealth they could use that wealth to “influence government.”<sup>129</sup> The senators believed that monopolies were an existential threat to any republic, and thus laws with the authority of Congress and the will of the people were required in order to divide these monopolies.<sup>130</sup> These sentiments were echoed almost universally, as the Sherman Act passed with nearly unanimous support.<sup>131</sup>

The American ideals of liberty and the suspicion of concentrated power in the hands of a few gave life to the antitrust law, but so too did the concerns for robust markets and healthy competition.<sup>132</sup> These concerns stem from the belief that healthy competition causes healthy markets.<sup>133</sup> This is because competition ensures that business will innovate and will continually try to give the best price to consumers.<sup>134</sup> An efficiency standard like what the Chicago School advocated for does not further these consumer goals, and the likely result of this purely economic view of antitrust law “will be an economy so dominated by a few corporate giants that it will be impossible for the state not to play a more intrusive role in economic affairs.”<sup>135</sup>

The American preference for checks and balances aligns with antitrust law legislative history, but the Chicago School approach ignores this and a chief harm that antitrust law was created to defend. Congress has “exhibited a clear concern” that too much centralized power “dominated by a few corporate giants” could lead to “the overthrow of democratic institutions and the installation of a totalitarian regime.”<sup>136</sup> While it is uncertain that a massive concentration of economic power in a

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<sup>125</sup> 21 CONG. REC. 2457 (1890).

<sup>126</sup> Kahn, *supra* note 19, at 740.

<sup>127</sup> *Id.*

<sup>128</sup> Kahn, *supra* note 19, at 740.

<sup>129</sup> *Id.*

<sup>130</sup> 21 CONG. REC. 3146 (1890).

<sup>131</sup> *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 1 (2016) (statement of Bill Baer, Assistant Att’y Gen. of the United States).

<sup>132</sup> Fox, *supra* note 39, at 2160.

<sup>133</sup> Baer, *supra* note 131.

<sup>134</sup> Fox, *supra* note 39, at 2160.

<sup>135</sup> Pitofsky, *supra* note 93, at 1051.

<sup>136</sup> *Id.* at 1054.

few elites would lead to the downfall of our nation, it is telling that democracies and free market systems have almost always gone hand in hand, but totalitarian regimes have almost never followed those systems.<sup>137</sup> In fact, studying historical and contemporaneous democracies has revealed there is “an underlying common basis for democracy and a market economy, and common characteristics between democracy and a deconcentrated economic system.”<sup>138</sup>

Because of the close connection between political goals associated with antitrust law and America’s broader ideals, it is important to not separate the two when implementing antitrust. As free markets and individual liberty are so intrinsically tied to American democracy, the contemporary method of focusing on economic consumer welfare does not serve our national interests, and this method should be abandoned.

## II. THE CORRECT APPLICATION OF ANTITRUST LAW SHOULD BE APPLIED TO THE TECH GIANTS, AND FULFILL THE GOALS OF ANTITRUST

### A. *The Narrow View Problem and How the Law Should be Applied*

The current regime of antitrust law is narrowly focused and does not account for all forms of anticompetitive harm, especially in the context of the online market. The heart of the current approach is concentrating on market efficiency through the lens of consumer welfare.<sup>139</sup> Not only is this view flawed when compared to the original goals of antitrust law, but this view also forgets other critically important consumer interests like customer service and product quality, variety, and innovation.<sup>140</sup> Because the current antitrust framework fails to account for these concerns, the framework should be abandoned.

Abandoning the narrow market efficiency approach would faithfully apply antitrust law to the tech giants, who have escaped scrutiny due to their care to avoid implicating consumer welfare concerns. The tech giants have gained massive unprecedented power because the market efficiency approach has not been able to meet the unique internet marketplace. Certainly, the drafters of the Act and the later scholars of the Chicago School could not have possibly envisioned the online market place, but the original Act intended to stop the concentration of market power and the creation of monopolies and oligopolies.<sup>141</sup> The current

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<sup>137</sup> *Id.* at 1055.

<sup>138</sup> *Id.*

<sup>139</sup> See *supra* notes 96–100 and accompanying text.

<sup>140</sup> Kahn, *supra* note 19, at 737.

<sup>141</sup> *Id.* at 740–42.

framework betrays that intent and decades of jurisprudence.<sup>142</sup> It ignores our interests as consumers, as workers, as citizens, and as competing entrepreneurs.<sup>143</sup> It also falsely conflates the goal of antitrust law as an outcome-focused calculation, rather than addressing the concern over the distribution of power in the marketplace.<sup>144</sup> Hence, the current framework needs to be abandoned: the focus on welfare betrays the legislative history of antitrust and fails in the face of the current market's unique challenges.

Moreover, the current approach fails because it does not prevent harm to competition.<sup>145</sup> Since the current framework of antitrust law solely focuses on price and outcomes, enforcement cannot begin until *after* the harm has already occurred.<sup>146</sup> Specifically, the current approach ignores how and when a company acquires market power and only acts after a company has become so dominate that the company already rendered the market noncompetitive.<sup>147</sup> This approach is self-defeating and makes little sense: what is the point of protecting competition in the market once the market is no longer competitive? Logically, it makes much more sense to protect competition when the market is *at risk* of becoming noncompetitive and is conducive to the legislative purpose behind antitrust law.<sup>148</sup>

The Chicago School's approach not only betrays legislative intent, but also fails on its own terms. The current approach misapplies the law because the approach conflates market power with market efficiency and assumes only price and outcome can indicate competition.<sup>149</sup> In fact, growing evidence shows that the Chicago School approach has led to higher prices, but not to any efficiency gains.<sup>150</sup>

Further, the current antitrust framework has allowed such a concentration of power in a few massive companies which bars small businesses and entrepreneurs from entering the marketplace and from competing.<sup>151</sup> There has been a 50% drop in small business ownership in America since the Reagan administration castrated antitrust law by implementing the Chicago School philosophy.<sup>152</sup> Every administration

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<sup>142</sup> *Id.* at 737.

<sup>143</sup> *Id.* at 738.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 738–39.

<sup>146</sup> *Id.* at 738.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Benefits of Competition and Indicators of Market Power*, COUNCIL OF ECON. ADVISERS ISSUE BR. (Apr. 2016), [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414\\_cea\\_competition\\_issue\\_brief.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf); see e.g., John Kwoka, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 126* (2015).

<sup>151</sup> Kahn, *supra* note 19, at 739.

<sup>152</sup> Barry C. Lynn & Lina Khan, *The Slow-Motion Collapse of American Entrepreneurship*, WASH. MONTHLY (July/Aug. 2012), <http://washingtonmonthly.com/magazine/julyaugust-2012/the-slow-motion-collapse-of-american-entrepreneurship> (“The single biggest factor driving down entrepreneurship is precisely the radical concentration of power we have seen not only in the banking industry but throughout the U.S. economy over the last thirty years.”).



since 1981 has implemented the current antitrust framework and has “all but suspended traditional enforcement of America’s antimonopoly laws . . . .”<sup>153</sup> As a result, “regulators have done almost nothing to stop the great waves of mergers and acquisitions, with the result that control over most major economic activities is now more consolidated than at any time since the Gilded Age.”<sup>154</sup>

Clearly, the current antitrust framework allows for a highly concentrated market structure. This harms consumer interests overall and betrays the goal of antitrust law. Robust competition promotes consumer interest in a way that market efficiency does not.<sup>155</sup> An open market that is free from domination by industry giants, who hoard power, best promotes competition. This harms consumers and workers, and, as expressed by Senator Sherman, threatens democracy.<sup>156</sup> Because of the current application of antitrust laws, a small minority can amass outsized wealth and can influence government.<sup>157</sup> The legislators also wanted to avoid a state of affairs where “private discretion by a few in the economic sphere controls the welfare of all.”<sup>158</sup> With the unprecedented power of the tech giants and their enormous spending in Washington, D.C., it certainly seems that these companies are exactly to whom the original drafters of the Act wanted antitrust law to apply.

Unfortunately, the current doctrine of antitrust law does not see the tech giants as anticompetitive because they employ techniques such as predatory pricing, which the current framework does not recognize as harmful; in fact, the current framework presumes that a corporation’s activities are benign unless they lead to higher prices.<sup>159</sup> Moreover, courts and agencies mistakenly believe that practices like large corporate mergers actually promote efficiency, and these courts and agencies fear false positives.<sup>160</sup> The current antitrust landscape has led to a paradox where “modern U.S. antitrust protects monopoly and oligopoly, suppresses innovative challenges, and stifles efficiency.”<sup>161</sup> Focusing on efficiency has been illogical because it has not taken into account any post-merger inefficiencies and has led to the creation of firms that are too big to fail.<sup>162</sup> The best guardian of competition is a competitive process, and the unbridled power of the tech giants effectively acts as a barrier to entry.<sup>163</sup>

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Kahn, *supra* note 19, at 739.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Pitofsky, *supra* note 93, at 1051.

<sup>159</sup> Kahn, *supra* note 19, at 744.

<sup>160</sup> Stucke, *supra* note 32, at 594.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> Kahn, *supra* note 19, at 745.

The courts should abandon the Chicago School approach, and no longer ignore the tech giants.

### B. Amazon

Easily the world's largest online retailer, Amazon has unchallenged power over online commerce.<sup>164</sup> In fact, one study shows that 44% of U.S. consumers use Amazon before any other product search engine.<sup>165</sup> Amazon also controls 46% of all online commerce in the United States alone.<sup>166</sup> Half of all U.S. household members are subscribed to Amazon Prime, and Amazon sells more products than any other retailer, on or offline.<sup>167</sup> Indeed, the power and reach of Amazon is "something new in the history of American business."<sup>168</sup>

It is important to detail the extent of Amazon's reach in order to show that the online retailer is the exact kind of centralized threat that the Act framers were concerned about. Not only is Amazon the largest online retailer, but they are also involved in groceries, film and television, pharmaceuticals, and manufacturing.<sup>169</sup> Amazon further provides the cloud-based infrastructure for most of the country, powering everything from Netflix to the CIA.<sup>170</sup> In five years, estimates show that more than two-thirds of all online commerce will be captured by Amazon.<sup>171</sup> Moreover, Amazon has spread into dozens of industries and captured many businesses.<sup>172</sup> When we do business online, we may not think we are dealing with Amazon, but in actuality, we are buying from one of the many companies that they have conquered.<sup>173</sup> It owns other large e-commerce brands like AbeBooks, Woot, and Shopbop.<sup>174</sup> It owns Diapers.com and the shoe retailer Zappos.<sup>175</sup> It even owns Twitch, the number one video game streaming website.<sup>176</sup>

Amazon also recently obtained an ocean shipping license, allowing it to ship freight between China and the U.S.<sup>177</sup> Amazon's level of dominance and power is more akin to a small country than a corporation. It is due to the uniqueness of the online market place and the critical failures of courts and agencies to understand the online market

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<sup>164</sup> *Id.* at 773.

<sup>165</sup> *Id.*

<sup>166</sup> LaVecchia & Mitchell, *supra* note 23, at 10.

<sup>167</sup> *Id.* at 4.

<sup>168</sup> *Id.* at 5.

<sup>169</sup> *See supra* Part II.B.

<sup>170</sup> LaVecchia & Mitchell, *supra* note 23, at 5.

<sup>171</sup> *Id.* at 11.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 12.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

combined with the inadequacy of the modern Chicago School framework of antitrust law that has let Amazon grow out of control.

The scale of its growth can best be seen by its control over book sales. Amazon started as a simple retailer for used books, but in 2009 they reportedly had achieved a “90% market share of e-book sales.”<sup>178</sup> This state of affairs led to a highly publicized dispute between Apple and Amazon.<sup>179</sup> That case, and the underlying facts, are a great example of the tactics Amazon has used to achieve monarchical power.<sup>180</sup> It also showcases the failures of the current antitrust framework and the failures of the Chicago School’s reasoning.

Amazon dominates the e-book industry through predatory pricing.<sup>181</sup> Predatory pricing is the practice of cutting prices so low that competitors cannot effectively compete.<sup>182</sup> This strategy is one that Amazon has used consistently to achieve its power and success.<sup>183</sup> The important point to note about predatory pricing is that the Chicago School expressly stated that predatory pricing could not lead to sustained success.<sup>184</sup> Robert Bork, the leading scholar of the Chicago School, wrote that the concept of predatory pricing was unlikely even a real phenomenon, because it was irrational and did not reflect the Chicago School assumption that all businesses are profit-seeking, rational actors.<sup>185</sup> This stance is empirically wrong. As part of its effort to achieve the 90% market share of e-books, Amazon priced bestsellers at \$9.99, “which was substantially lower than the price for hardcover versions.”<sup>186</sup> Amazon has consistently taken losses over the past twenty years, putting growth over profits and directly contradicting Bork.<sup>187</sup> These predatory practices were so effective that it forced Apple and the five largest publishers to work together in order to compete.<sup>188</sup> Amazon has lowered its prices to predatory levels, invested heavily in expanding, and grown in scale at the expense of profits—practices that directly undercut contemporary antitrust thinking and practice.<sup>189</sup> This has allowed them to avoid scrutiny, and shows how inept the current antitrust framework is and how badly reform is needed.

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<sup>178</sup> Gutknecht, *supra* note 53, at 177.

<sup>179</sup> *United States v. Apple Inc.*, 952 F. Supp. 2d 638 (S.D.N.Y. 2013).

<sup>180</sup> *Id.*

<sup>181</sup> Kahn, *supra* note 19, at 753.

<sup>182</sup> Gutknecht, *supra* note 53, at 187–88.

<sup>183</sup> See generally Kahn, *supra* note 19.

<sup>184</sup> Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L. J. 585, 586 (1994).

<sup>185</sup> See Robert H. Bork, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 149–55 (1978).

<sup>186</sup> Gutknecht, *supra* note 53, at 177.

<sup>187</sup> Kahn, *supra* note 19, at 747.

<sup>188</sup> Gutknecht, *supra* note 53, at 178.

<sup>189</sup> Kahn, *supra* note 19, at 754.

Another anticompetitive practice Amazon has employed in its rise to power is its expansion into multiple business lines.<sup>190</sup> Amazon has vertically integrated with many manufacturers and producers and has reached the point where “Amazon’s rivals are also its customers.”<sup>191</sup> For example, retailers that compete with Amazon will use its delivery services and competing media companies will often buy a space on Amazon’s platform in order to show their contact.<sup>192</sup> In the last year alone Amazon doubled the number of warehouses it operates, purchased thousands of truck trailers, leased cargo planes, and increased its worth to nearly twice that of Walmart.<sup>193</sup> One investor, Chamath Palihapitiya, the owner of the Golden State Warriors, has called Amazon a potential “multi-trillion-dollar monopoly hiding in plain sight.”<sup>194</sup>

Palihapitiya’s comment highlights an important point about Amazon: its growing power is quiet and in the background.<sup>195</sup> Much of its unprecedented success comes from its use of new technology to mine data about our buying and browsing, and from its using that data to selectively raise its prices.<sup>196</sup> But Amazon’s pricing practices are not the only monopolistic activities it engages in:

Amazon increasingly controls what products make it to market and appear before us as we’re browsing. It has the power to pick winners and losers, which is alarming enough in the context of toys or fashion, but downright tyrannical when it comes to the creative, cultural, and political life of the nation.<sup>197</sup>

This type of behavior is exactly what the original goal of antitrust law was designed to stop.

Amazon’s activities in the e-book realm shows the company’s predatory practices towards its peers, including the tech giant’s incident with the e-commerce company Quidsi, the firm behind Diapers.com.<sup>198</sup> In 2009, Amazon offered to buy Quidsi, a company that had emerged as a top competitor in diaper sales.<sup>199</sup> When the founders refused, Amazon slashed all prices of diapers on its platform.<sup>200</sup> Amazon cut the prices by 30%—a result of Amazon’s online algorithms tracking other companies’ prices and then adjusting their own prices.<sup>201</sup> Amazon would immediately slash its

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> LaVecchia & Mitchell, *supra* note 23, at 12.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 13 (“Jeff Bezos is betting that he can make buying from Amazon so effortless that we won’t notice the company’s creeping grip and all that we’re losing as a result.”).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 14.

<sup>198</sup> *Id.* at 17.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Kahn, *supra* note 19, at 769.

prices in response to any Quidsi changes.<sup>202</sup> Amazon slashed its prices so much in order to outperform Quidsi that Amazon was “prepared to lose \$100 million over three months.”<sup>203</sup> Amazon’s tactics worked and stifled Quidsi’s growth.<sup>204</sup> Eventually, Amazon aggressively relaunched its bid to buy Quidsi, who capitulated “largely out of fear.”<sup>205</sup> Thus Amazon swallowed one of its chief competitors in online retail, and the FTC let it happen without a peep about antitrust concerns.<sup>206</sup>

The important point is that a year after buying out Quidsi, Amazon raised its prices and cut back the Amazon Mom program, which had been used to offer generous discounts while Quidsi was still Amazon’s rival.<sup>207</sup> The prices hiked over the course of the next three years, leading to customers expressing their frustrations online and threatening to take their business to Diapers.com.<sup>208</sup> Unfortunately, the Quidsi takeover meant that Diapers.com was essentially Amazon.<sup>209</sup>

This incident highlights the failures of the Chicago School and Robert Bork’s thinking. It runs contrary to the contemporary notion that predatory pricing is not a path to buying up a competitor.<sup>210</sup> The Chicago School’s view can hardly be blamed. It is entirely logical to assume that underpricing and intentionally losing profit would not lead to any kind of monopolistic success. However, that just shows how unprepared the current antitrust framework is to deal with the online tech giants.

Amazon is violating antitrust by their integration and expansion into other businesses, and by their pricing tactics.<sup>211</sup> But Amazon is also providing a massive barrier to entry and stifling competition.<sup>212</sup> This is because investment in online platforms is not constrained by physical barriers.<sup>213</sup> Courts have failed to recognize this distinction, and failed to recognize the psychological intimidation that the tech giants like Amazon employ in order to block startups from intruding on their business.<sup>214</sup>

Furthermore, Amazon used its massive power to leverage itself into other businesses. The tech giant negotiated lower prices with UPS because it makes up a massive portion of the shipping company’s business and, moreover, Amazon expanded its empire into physical infrastructure

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<sup>202</sup> *Id.*

<sup>203</sup> LaVecchia & Mitchell, *supra* note 23, at 17.

<sup>204</sup> Kahn, *supra* note 19, at 769.

<sup>205</sup> *Id.* at 770.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 771.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 772.

<sup>214</sup> *Id.*

by building warehouses in excess of \$13 billion.<sup>215</sup> Amazon vertically integrated its online platform into delivery at an astonishing rate, and proved to be a great barrier to entry into the market.<sup>216</sup> The problem with the current framework is that it does not account for these barriers to entry and its harmful effect on competition.<sup>217</sup> This is because under the current model, antitrust scrutiny only applies if Amazon used its dominance to hike the prices, focusing solely on the harm to the consumer and ignoring the harm to the competitor.<sup>218</sup>

Last year, Amazon expanded into a field completely unrelated to retail and books. It acquired the grocery store Whole Foods.<sup>219</sup> The reason that this raises antitrust concerns is because it now gives Whole Foods exclusive access among all grocery retailers to Amazon's massive platform.<sup>220</sup> As Ramsi Woodcock argues, "[t]hat is bad for consumers because it means that Whole Foods may come to dominate the grocery world not by offering better products for the best prices, as you'd find in a well-functioning market, but because of the promotional advantage that comes from its tie-up with Amazon."<sup>221</sup> Under the current framework, antitrust law focuses on consumer welfare through the outcome of increased price. However, this is in contravention with the express purpose of antitrust law.<sup>222</sup> Amazon is causing much harm to competition, to business owners, to manufacturers, and to workers, and this harm will pass on to the consumer if antitrust law is not reformed and applied correctly.<sup>223</sup>

One avenue for reform that would allow the courts to apply antitrust law against Amazon would be to include a presumption of predatory pricing when it can be identified that a company is pricing well below the average variable cost—a metric that most appellate courts agree is calculable.<sup>224</sup> It is inappropriate to use the current metric for predatory pricing, the probability of a company recouping the losses of lowering prices.<sup>225</sup> This is because this analysis "diminish[es] the significance of the

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<sup>215</sup> Daniella Kucera, *Why Amazon Is on a Building Spree*, BLOOMBERG (Aug. 29, 2013), <http://www.bloomberg.com/bw/articles/2013-08-29/why-amazon-is-on-a-warehouse-building-spree>.

<sup>216</sup> Kahn, *supra* note 19, at 779.

<sup>217</sup> *Id.* at 780.

<sup>218</sup> *Id.*

<sup>219</sup> Ramsi Woodcock, *Amazon's Whole Foods deal could still be reversed thanks to forgotten antitrust case*, CHICAGO TRIBUNE (Sep. 23, 2017), <http://www.chicagotribune.com/sns-amazons-whole-foods-deal-could-still-fall-apart-thanks-to-forgotten-antitrust-case-83063-20170828-story.html>.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> See *supra* Part II.B. The language of the Clayton Act makes it clear that Congress wanted to stop an acquisition when "the effect . . . may substantially lessen *competition*." Woodcock, *supra* note 219 (emphasis added). This language makes it clear that the focus was on competition and not on the consumer.

<sup>223</sup> LaVecchia & Mitchell, *supra* note 23.

<sup>224</sup> Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695, 1753 (2013).

<sup>225</sup> *Id.*

price-below-cost element.”<sup>226</sup> A good method advocated is to presume predatory pricing of below-cost sellers when a company dominates a market.<sup>227</sup> Whatever constitutes domination should be left up to the courts to develop, but there can be no doubt that Amazon dominates the market.

Moreover, a reform to antitrust law is appropriate in the case of Amazon and other tech giants, and involves applying a stricter standard for vertical integration. The current framework does not address how companies can leverage their power in one sector to dominate another sector. The courts should apply a stricter standard against corporations that have reached a certain threshold of dominance.<sup>228</sup> This is because the current framework allows for a platform’s involvement in multiple related and unrelated lines of businesses, which can create conflicts of interest and lead to businesses favoring themselves over competitors.<sup>229</sup> A prophylactic approach that prevents these harms would be much more effective in the case of Amazon than policing them after the fact. In Amazon’s case, a preemptive and broader approach would stop the company from dominating as a retailer and then entering into a market and competing directly with companies that depend on its services for their business.<sup>230</sup>

Finally, replacing the current price and consumer welfare approach with a broader rule-of-reason analysis is another possible venue to applying antitrust to Amazon. This involves analyzing the procompetitive effects of Amazon’s conduct and balancing them with its anticompetitive effects.<sup>231</sup> Amazon is clearly causing anticompetitive effects.<sup>232</sup> Increasing industry concentration in the tech giants such as Amazon is a danger to our markets and is a harm that Congress intended to prevent.

### C. Google

Google has an unprecedented amount of control and influence. A recent study shows that Google and Facebook combined have captured 83% of all ad revenue, and 73% of U.S. digital advertising.<sup>233</sup> Google dominates ad space and digital markets and has recently been the target of

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<sup>226</sup> *Id.* at 1752.

<sup>227</sup> Kahn, *supra* note 19, at 792.

<sup>228</sup> *Id.* at 793.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> Daniel C. Fundakowski, *The Rule of Reason: From Balancing to Burden Shifting*, PERSPECTIVES IN ANTITRUST (January 22, 2013), [https://www.americanbar.org/content/dam/aba/publications/antitrust\\_law/at303000\\_ebulletin\\_20130122.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/antitrust_law/at303000_ebulletin_20130122.authcheckdam.pdf).

<sup>232</sup> COUNCIL OF ECON. ADVISERS ISSUE BR., *supra* note 150, at 4.

<sup>233</sup> David Chavern, *Protect the News From Google and Facebook*, WALL ST. J. (Feb. 25, 2018), <https://www.wsj.com/articles/protect-the-news-from-google-and-facebook-1519594942>.

antitrust actions in the EU.<sup>234</sup> Officials at the FTC investigated Google in 2011 and concluded that the tech giant used anticompetitive tactics and “abused its monopoly power” in ways that harmed internet users and rivals, and favored its own business.<sup>235</sup> In the EU alone, Google has captured 90% of the online search market.<sup>236</sup> As the European competition chief Margarethe Vestager said, “Google’s magnificent innovations don’t give it the right to deny competitors the chance to innovate.”<sup>237</sup>

On top of the uncontested dominance of the search engine market share, Google owns the Android operating system which holds an 81% market share of all operating systems.<sup>238</sup> The EU’s antitrust chief alleges that Google uses its ownership of Android to “pre-install[] . . . apps and services onto Android smartphones” to give itself preferential treatment over its rivals.<sup>239</sup> Google counter-argued that its software is open to all; however, the pre-installation of Google apps and services, like Google Chrome, excludes other rival search engines and has “made it difficult, if not impossible, for rival search engines and smartphone app stores” to compete with Google.<sup>240</sup> Google has abused its dominance to harm cellphone manufacturers who are increasingly reliant on the Tech Giant and have been bound by Google’s contracts.<sup>241</sup>

Google requires cellphone manufacturers to preinstall the company’s services, and had given the manufacturers financial incentives to favor Google’s services over its competitors.<sup>242</sup> Moreover, Google has used its dominance over the internet by diverting traffic from its competitors towards its own site.<sup>243</sup>

However, one of the biggest concerns that the tech giants like Google implicates involves data. The control over data is a new field of commerce that has advertisers buying and selling personal information in order to better sell products.<sup>244</sup> This new field may also enable new forms

<sup>234</sup> James Titcomb, *Google still abusing search engine monopoly, rivals tell EU*, THE TELEGRAPH (Feb. 28, 2018), <https://www.telegraph.co.uk/technology/2018/02/28/google-still-abusing-search-engine-monopoly-rivals-tell-eu/>.

<sup>235</sup> Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, WALL ST. J. (Mar. 19, 2015), <http://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274>.

<sup>236</sup> Mark Scott & James Kanter, *Google Faces New Round of Antitrust Charges in Europe*, N.Y. TIMES (July 14, 2016), <https://www.nytimes.com/2016/07/15/technology/google-european-union-antitrust-charges.html>.

<sup>237</sup> *Id.*

<sup>238</sup> Scott & Kanter, *supra* note 236.

<sup>239</sup> James Kanter & Mark Scott, *Europe Challenges Google, Seeing Violations of Its Antitrust Law*, N.Y. TIMES (Apr. 15, 2015) <https://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html>.

<sup>240</sup> Mark Scott, *E.U. Charges Dispute Google’s Claims That Android Is Open to All*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/technology/google-europe-antitrust.html>.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> Scott & Kanter, *supra* note 236.

<sup>244</sup> Allen P. Grunes, Maurice E. Stucke, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, 14 ANTITRUST SOURCE 1, 2 (2015) (The EU’s antitrust chief, Margrethe Vestager called personal data the “new currency of the internet.”).



of anticompetitive activity that lawmakers have not contemplated.<sup>245</sup> The control over data allows Google to instill such dominance that it acts as an impenetrable barrier to entry, and stifles competition.<sup>246</sup> Finally, control over data unfairly harms competition because it allows for leveraging: that is, Google can use all the data about its user on one platform, such as Gmail or Google Chrome, and then use it to benefit another one of its businesses in a different market (YouTube, for example).<sup>247</sup>

Google allocates data gained from one business to advance the interests of its other businesses. For example, Google can use data gained from its other businesses like Gmail or YouTube to refine searches and highlight certain ads or products higher on a search and bury other products lower on the search.<sup>248</sup> Moreover, the existence of data driven businesses like Google implicates other non-price competition concerns, such as privacy protection offered to consumers.<sup>249</sup> The privacy concern is increasingly important to consumers when they decide which email to use, which search engine to use, and which browser to use.<sup>250</sup>

Because privacy and personal data is an important choice for consumers, agencies and courts should closely examine activity and mergers of tech companies like Google and determine if these companies' activities would likely reduce incentives to compete and to offer better privacy guarantees to the consumer.<sup>251</sup> Therefore, a viable antitrust theory that could be applied to Google's unmatched control over personal data is that the loss of privacy is similar to a reduction in the quality of a product or service.<sup>252</sup> The FTC's investigation of a Google merger echoes this sentiment, suggesting that consumer privacy is one of the "non-price attributes of competition."<sup>253</sup> Unfortunately, privacy is a hard-to-quantify harm, yet that does not mean that the law should disregard it as a concern.

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<sup>245</sup> Kahn, *supra* note 19, at 784.

<sup>246</sup> *Novell Inc. v. Microsoft Corp.*, 505 F.3d 302, 308 (4th Cir. 2007).

<sup>247</sup> Kahn, *supra* note 19, at 785–86.

<sup>248</sup> D. Daniel Sokol & Róisín Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1134 (2016).

<sup>249</sup> *Id.* at 1156.

<sup>250</sup> Grunes & Stucke, *supra* note 244, at 5.

<sup>251</sup> Sokol & Comerford, *supra* note 248, at 1145.

<sup>252</sup> Grunes & Stucke, *supra* note 244, at 5.

<sup>253</sup> Statement of the Fed. Trade Comm'n, *Google/DoubleClick*, FTC File No. 071-0170, at 2 (Dec. 20, 2007), [https://www.ftc.gov/system/files/documents/public\\_statements/418081/071220googledc-commstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf). The majority opinion concluded that there was not enough evidence of the effects on consumer privacy, and allowed Google to complete the merger, but Commissioner Pamela Harbour, in her dissent, wrote that the standard antitrust analysis was not equipped to handle the concerns that tech companies pose to competition, such as the potential impact on consumer privacy. Dissenting Statement of Commissioner Pamela Jones Harbour at 9–10, *Google/DoubleClick*, FTC File No. 071-0170 (Dec. 20, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/public\\_statements/statement-matter/google/doubleclick/071220harbour\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/public_statements/statement-matter/google/doubleclick/071220harbour_0.pdf).

A different antitrust framework is required for Google, because it is unique in American business, and the current framework was not created to comprehend the competitive harms that the tech giants have wrought. As Allen P. Grunes and Maurice E. Stuck argue, the tech giants are not just data driven companies, “they are media companies.”<sup>254</sup> As “advertising-supported media, they, like much of the traditional media, are free to the user.”<sup>255</sup> Advertisers subsidize the costs associated with the online service companies, “and advertising dollars account for most of the revenues.”<sup>256</sup> However, online service companies differ from traditional media in that they collect massive amounts of user data in real time and have a direct contract with the user.<sup>257</sup> Moreover, these companies have been able to convince some of the lower courts that, because their services are free, there is no market that can be harmed, which is clearly erroneous.

Google serves as a massive barrier to entry. The court in *United States v. Bazaarvoice* explicitly recognized that data can serve as an entry barrier.<sup>258</sup> The hoarding of data is incentivized economically by the fact that online companies make money by using data to sell targeted ads.<sup>259</sup> If data is not hoarded, then the money slows down. Therefore, it is not realistic to assume that the giant online service companies will willingly slow their data gathering to provide better privacy for consumers. It is also very difficult, because of Google’s dominance, for other companies to enter the market and provide better privacy for consumers.<sup>260</sup> There have been alternative online services like DuckDuckGo, but these companies have searches in the low millions compared to Google’s 5 billion searches daily.<sup>261</sup>

Treating online companies like Google the same as traditional media companies or focusing solely on one side of the market is a mistake and does not effectively address the harm to competition. Other potential avenues for enforcers and courts to apply antitrust law to Google and online service companies is to recognize data-driven exclusionary conduct. As noted above, data-driven companies like Google will often try to prevent rivals and smaller startups from accessing the data needed to grow, in order to maintain a competitive advantage.<sup>262</sup>

Courts and agencies should look to “how the control of personal information contributes market power in the digital economy and the

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<sup>254</sup> Grunes & Stucke, *supra* note 244, at 6.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* The “products” that the online service companies produce can include anything from search engines to a platform for user-generated videos. *Id.*

<sup>257</sup> Grunes & Stucke, *supra* note 244, at 6–7.

<sup>258</sup> *Id.* at 8.

<sup>259</sup> *Id.*

<sup>260</sup> Dietrich Vollarth, *There’s No Limit to Google’s Market Power*, THE NEW YORK TIMES (Apr. 28, 2016), <https://www.nytimes.com/roomfordebate/2016/04/28/is-google-a-harmful-monopoly/theres-no-limit-to-googles-market-power>.

<sup>261</sup> Grunes & Stucke, *supra* note 244, at 8–9.

<sup>262</sup> *Id.* at 10.

implications for data protection” and “the risks to the consumers posed by concentrations and the abuse of market dominance where firms possess massive amounts of personal data,” among other concerns, when analyzing the activities of Google and other online service platforms.<sup>263</sup> The FTC’s investigation of Google in 2012 revealed that the company had been engaged in data-exclusionary practices such as entering into exclusionary agreements with websites for better search positions and search advertising services.<sup>264</sup> In an FTC memo, the Commission explicitly wrote that “Google has monopoly power in one or more properly defined markets.”<sup>265</sup> Their recognition of Google’s monopoly and their failure to pursue an action suggests that the current antitrust framework is flawed and is not prepared to meet the challenge of the online tech companies. If the current Chicago School framework is abandoned and a framework that utilizes the suggested methods for enforcing antitrust law is used instead, then antitrust law would be back to serving the policy goals that the original drafters of the Sherman Act envisioned.<sup>266</sup>

#### D. Facebook

The online tech companies pose unique threats to competition that the Chicago School framework is not prepared to handle. As discussed previously in Section II.C, there is a new, emerging market in the form of buying and selling personal data in the advertising space.<sup>267</sup> Google is not the only company that implicates antitrust problems with data.<sup>268</sup> Facebook also has an antitrust problem, and similar to Google, Facebook is receiving strict scrutiny in Europe but almost none at home.<sup>269</sup> Regulators in Germany ordered Facebook to stop collecting and storing data about German users.<sup>270</sup> The German competition authority further

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<sup>263</sup> *Privacy and Competitiveness in the Age of Big Data: The Interplay Between Data Protection, Competition Law and Consumer Protection in the Digital Economy*, EUR. DATA PROT. SUPERVISOR (preliminary opinion Mar. 2014) [https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26\\_competition\\_law\\_big\\_data\\_EN.pdf](https://secure.edps.europa.eu/EDPSWEB/webdav/shared/Documents/Consultation/Opinions/2014/14-03-26_competition_law_big_data_EN.pdf).

<sup>264</sup> Memorandum from the Fed. Trade Comm’n, Bureau of Competition Staff to the Comm’n iii (Aug. 8, 2012), <https://www.benedelman.org/pdf/ftc-google-8aug2012.pdf>.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> See also Grunes & Stucke, *supra* note 244.

<sup>268</sup> Kelly Couturier, *How Europe Is Going After Apple, Google and Other U.S. Tech Giants*, THE NEW YORK TIMES (Dec. 20, 2016), <https://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us-tech-giants.html>.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

opened an investigation to determine if Facebook had misused its dominant position to collect people's information.<sup>271</sup>

One especially apparent antitrust problem for Facebook is that it refuses to let any company compete with it. Facebook is afraid of going the way of MySpace and becoming extinct due to a new, innovative start up supplanting it.<sup>272</sup> Facebook is the dominant social media platform today with over 1.7 billion users *monthly*.<sup>273</sup> Mark Zuckerberg, the creator and CEO of Facebook, noticed two companies that were growing so rapidly that they threatened Facebook's complete dominance of social media.<sup>274</sup> The two companies were Instagram and WhatsApp, and "both were amassing users at an amazing rate."<sup>275</sup> Instead of innovating and trying to outcompete the two companies, Facebook bought Instagram for \$1 Billion, and WhatsApp for \$21.8 billion.<sup>276</sup>

This is "par for the course in Silicon Valley" and is one of the many reasons that the tech giants have become so overwhelmingly dominant.<sup>277</sup> The United States and Europe both examined the Facebook and WhatsApp merger and cleared it, deciding the deal did not pose antitrust concerns.<sup>278</sup> However, they reasoned that the messenger service was an alternative form of competition.<sup>279</sup> This reasoning ignores the fact that dominance for a social media company is about users and views, as that directly correlates to advertiser dollars.<sup>280</sup> The current antitrust framework does not work, and as one commentator noted, "[t]he antitrust system results in the increasing oligopoly that we have, where a few companies dominate major industries, accruing the wealth and power that go with it as potential disrupters are swallowed at birth, the way Cronus, the titan in Greek mythology, ate his young to prevent their uprising."<sup>281</sup>

Alongside data hoarding and the swallowing up of smaller startups, Facebook poses another unique concern to our markets and our democracy. This is a phenomenon that has emerged in recent years and has dominated the public conscious. This problem is, of course, fake news, which is also an antitrust problem.<sup>282</sup>

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<sup>271</sup> Steven Davidoff Solomon, *Tech Giants Gobble Start-Ups in an Antitrust Blind Spot*, N.Y. TIMES (Aug. 16, 2016), <https://www.nytimes.com/2016/08/17/business/dealbook/expect-little-antitrust-challenge-to-walmarts-bid-for-jet-com.html>.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.* Google bought the navigation app Waze for \$1 billion in order to prevent Facebook from snatching it up. Solomon, *supra* note 271271.

<sup>278</sup> Case COMP/M.7217—Facebook/WhatsApp, Comm'n Decision (Mar. 10, 2014), [http://ec.europa.eu/competition/mergers/cases/decisions/m7217\\_20141003\\_20310\\_3962132\\_EN.pdf](http://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf)

<sup>279</sup> Solomon, *supra* note 271271.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> Sally Hubbard, *Why Fake News Is An Antitrust Problem*, FORBES (Jan. 10, 2017), <https://www.forbes.com/sites/washingtonbytes/2017/01/10/why-fake-news-is-an-antitrust-problem/#6de6f74330f1>.

As written above, tech giants like Google and Facebook double as media companies. When viewed this way, Facebook is competing with news publishers. “They compete for users’ time spent online, user data and advertising dollars.”<sup>283</sup> Facebook has effectively lessened the number of users that visit traditional news sites and directs the users to get their news from Facebook, which has helped the decline of legitimate news and helped facilitate the rise of fake news.<sup>284</sup> Legitimate news sites have overhead costs that fake news sites do not, and by giving a large platform to these fake news sites, they are indirectly helping the spread of fake news and destroying potential competitors in the process.<sup>285</sup> “Facebook is a juggernaut in news distribution, big data and online advertising.”<sup>286</sup> In fact, 66% of the 1.7 billion monthly users get their news from the platform, according to Pew Research.<sup>287</sup> That adds up to 44% of U.S. adults who get their news from Facebook.<sup>288</sup>

Facebook uses certain methods to keep users on its site and to divert its users away from news sites.<sup>289</sup> For example, Facebook hosts the content of legitimate news sites, but because it defaults to in-app browsing or embedded images, people can get the content from the news sites but give Facebook all the clicks.<sup>290</sup> This is an antitrust problem for a variety of reasons—chief among them is the fact that Facebook is leveraging its market dominance to capture all the traffic that should be going to its competitors who actually produce the content, while fake news publishers are given a platform on Facebook that also lessens the traffic to its competitors.<sup>291</sup>

There can be no doubt that legitimate news is under attack from the tech giants like Google and Facebook.<sup>292</sup> The duopoly holds 83% of all digital ad revenue.<sup>293</sup> Interestingly, this implicates one of the major concerns behind antitrust policy: namely that centralization of power in market actors harms our republic. Specifically, the spread of fake news and the increasing reliance of the American people on the tech giants for their information leads to the decline of legitimate information, which is the basis for any politically aware citizen’s choices.

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<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, PEW RESEARCH CENTER (May 26, 2016), <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/>.

<sup>288</sup> *Id.*

<sup>289</sup> Solomon, *supra* note 271271.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> David Chavern, *Protect the News From Google and Facebook*, WALL ST. J. (Feb. 25, 2018), <https://www.wsj.com/articles/protect-the-news-from-google-and-facebook-1519594942>.

<sup>293</sup> *Id.*

Antitrust law can be applied to Facebook as outlined by the European Commission's investigation into the Facebook/WhatsApp merger. There, the EU outlined a roadmap for antitrust enforcement.<sup>294</sup> Enforcers should check to see if the Tech Giant controls any "essential parts" of the network.<sup>295</sup> They should check whether users of consumer communications applications are locked-in to any physical network, and check whether the company controls and limits the "portability of data."<sup>296</sup> Finally, enforcers should check if parties' applications are pre-installed on a large base of mobile phones, tablets, or computers, and if "status quo bias" may affect consumers' choice.<sup>297</sup>

Ultimately, using this roadmap to determine if Facebook or other tech giants are engaging in anticompetitive activity would help agencies and courts by giving them specific, cognizable factors to consider. The current narrow framework of antitrust law could be applied to Facebook through these factors, but an overall change in the antitrust approach should be taken in order to meet the challenges posed by the tech giants.

## CONCLUSION

Antitrust law is not in a good place. The framework and analysis has shifted based on the theories of a few scholars in the Chicago School. Their undue influence resulted in a warping of antitrust law. No longer does antitrust law follow the goals of the original drafters of the Sherman and Clayton Acts. What once was a law designed to act as a safeguard against centralized mercantilism from encroaching on our democracy has become a much narrower and much weaker field of law. Senator Sherman and his Congress saw the threat that centralized economic power posed to America's freedom. It is a shame that the current lawmakers and agencies seem to be blind, or purposefully ignorant, to the dangers posed by the massive tech giants and, in general, the dominant multinational corporations that have largely escaped scrutiny.

The history of antitrust law and the legislative intent of the Sherman and Clayton Acts make it clear that antitrust law was supposed to be applied much more broadly and to companies who are as dominant and centralized as the tech giants. Amazon may be the most powerful private economic actor to ever exist; it is certainly unique in the history of American business. Amazon's dominance has led to unprecedented growth and to the stifling of any and all competitors, which has further led to lower wages and higher prices. The direction that Amazon is headed seems almost dystopian, but antitrust law as it should be applied would definitely curb this threat and restore competition to the online market. By

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<sup>294</sup> Case Comp/M.7217, *supra* note 278, at 24–25.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*

<sup>297</sup> *Id.*

abandoning the current framework, recognizing predatory pricing as a legitimate antitrust concern, reworking the framework of the vertical integration analysis, and applying a much broader rule of reason approach, antitrust law could be applied to Amazon.

Google is a data-hoarding monopoly that is shutting down anyone with differing views and using highly aggressive tactics to bludgeon dissenters into submission. Google's tactics developed under the cutthroat Eric Schmidt have sent a clear message to competitors and cooperators alike: play ball, or else. The android software that comes pre-installed with Google apps and the appropriation of personal data from one platform to benefit other Google businesses to the detriment of its competitors is a clear antitrust harm to competition. By abandoning the current Chicago School framework which only recognizes consumer welfare through a price-changing analysis and instead focusing on the company's effects on competition (which antitrust was originally designed to look at), antitrust law would be effective in curbing many of Google's anticompetitive practices. Furthermore, the current framework and agencies do not show a proper understanding of Google's activities. They must look to data-driven exclusionary practices and the creation of massive barriers to entry.

Finally, antitrust law could help to stop the spread of fake news and mass misinformation that is plaguing our nation, harms that are directly implicated by the policy goal of antitrust to protect democracy. By applying antitrust law to Facebook and treating Facebook as a media company directly competing with legitimate news organizations, the massive spread of misinformation can be stopped. Moreover, by applying antitrust principles to stop Facebook from swallowing up competition, and by breaking up Facebook's ownership over other social media companies, antitrust law would help facilitate stronger competition and ultimately help consumers. Antitrust enforcers should look to users and clicks to determine dominance in the social media market, as that directly correlates to advertising money.

Antitrust law could be robust and healthy and further the original goals that Senator Sherman and his colleagues intended. If the Chicago School framework of consumer welfare is abandoned and instead antitrust law focuses on the harm to *competition*, then antitrust law's legislative purpose would be satisfied. At the same time, this would stop the tech giants from completely controlling the destiny of both online and offline markets. Our nation's exercise of democracy depends on a fully informed populace who elect representatives without undue influence from an oligopoly. There is too much at stake, and therefore antitrust law needs to see a big change in the coming years.