“Alexa, Can You Buy Whole Foods?” An Analysis of the Intersection of Antitrust Enforcement and Big Data in the Amazon-Whole Foods Merger[[1]](#footnote-1)♦

*“AMAZON, 1998: hello we sell books but online
AMAZON, 2023: please return to your Primehouse for your nightly Primemeal, valued Primecitizen”*[[2]](#footnote-2)

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Introduction

Once upon a time, a few grocery chains and retailing conglomerates dominated the national grocery market, enjoying large market shares and profit margins. More recently, the grocery titans of old have been struggling to keep up with new competition.[[3]](#footnote-3) Nearly twenty grocers have filed for bankruptcy in the past three years.[[4]](#footnote-4) Emerging regional chains, such as Wegmans and Trader Joe’s, have found success by expanding into new markets, while online delivery services have been growing in popularity,[[5]](#footnote-5) a boon for consumers. When Amazon.com (hereinafter “Amazon”) first announced its intention to acquire Whole Foods for $13.7 billion, it sent more than a mere ripple through the $800 billion-dollar grocery industry. After the announcement of the deal, shares of Whole Foods and Amazon rose thirty and two percent, respectively.[[6]](#footnote-6) On the other hand, Whole Foods’ competitors saw their share prices fall into the red. For example, shares of SuperValu took a massive fourteen percent hit.[[7]](#footnote-7) Kroger, the country’s largest supermarket chain by revenue, rumored late last year to be considering its own takeover of Whole Foods, was down nine percent.[[8]](#footnote-8) Later that summer, when Amazon announced its intention to slash prices at Whole Foods starting in late August, the six largest grocery chains, still smarting from June’s merger announcement, lost roughly $12 billion in value.[[9]](#footnote-9) The boost in Amazon’s share price from the merger announcement suggests that investors believe Amazon, despite paying a premium for Whole Foods shares, has the ability to turn its e-commerce market power into dominance of the retail sector and broader American economy.[[10]](#footnote-10)

It seems strange to think that Amazon’s purchase of Whole Foods, which gives Amazon a three-and-a-half-percent stake in the national grocery market,[[11]](#footnote-11) has such a seemingly outsized impact on the stock market. However, the economy knows that Amazon is unique: Amazon has previously shown aptitude in dominating industries through its access to consumer data. Amazon Founder and C.E.O. Jeff Bezos’ ultimate goal is to make Amazon the “world’s store” or the “everything store.”[[12]](#footnote-12) Amazon has always aimed to deliver customers the products they want at ever-declining prices.[[13]](#footnote-13) Nonetheless, there remains an open question of whether the merger will positively affect the economy and consumers or whether, in rather Orwellian fashion, Amazon will become a “destroyer of traditional retail that erodes jobs, ruins malls, and transforms a once-productive workforce into underemployed, couch-bound consumers.”[[14]](#footnote-14)

Ultimately, while it is not surprising that the Amazon-Whole Foods merger survived antitrust scrutiny under current standards of examining market share and consumer prices, this Note argues that this particular merger has potential anticompetitive implications that antitrust enforcement and the wider public should be wary of. Specifically, Amazon, through years of collecting data on its customers’ search, browsing, and purchase histories, likely creates “an insurmountable barrier to entry”[[15]](#footnote-15) for new market entrants when it is able to cross-leverage data gained from one industry into another one, thereby allowing it to engage in anticompetitive practices such as predatory pricing and tying arrangements.

For years, Wall Street investors have been enthusiastic about Amazon’s business strategy of market disruption, despite Amazon rarely returning profits during its first ten years of operation.[[16]](#footnote-16) Instead, Amazon’s investors have allowed its C.E.O. Bezos to invest in market share, through vertical integration of other firms on the supply chain, and infrastructure, which includes its network of warehouses, delivery routes, and cargo jets.[[17]](#footnote-17) This strategy has allowed Amazon to reach gargantuan proportions; notwithstanding its low profit margins, Amazon’s stock is now “worth nearly 200 times as much as it earns.”[[18]](#footnote-18) Some consumer and competition advocates have argued that investors know Amazon’s strategy is monopolistic and that is why Amazon’s stock price “has been so untethered from profits.”[[19]](#footnote-19) While Walmart and its peers may have enough market power to withstand Amazon’s foray into the grocery industry, Amazon’s presence may dissuade new entrants to the market, especially in the low-to-midsize grocery store sector. Amazon has not only added 400 brick-and-mortar stores to its e-commerce portfolio,[[20]](#footnote-20) but also now has unfettered access to the mountain of data that Whole Foods has been collecting on its customers. Amazon could theoretically be able to target particular consumers in a geographic area with below-cost or below-margin prices based on their preferences and purchase history from Amazon.com.[[21]](#footnote-21) The loss of potential competition and choice in localized markets should be enough for an antitrust enforcer to take a closer look at the Amazon-Whole Foods merger.

The merger did initially raise the specter of regulatory and antitrust approvals. President Donald Trump had previously taken to Twitter to criticize Amazon and Bezos for “doing great damage to tax-paying retailers,”[[22]](#footnote-22) thus opening the possibility of a heavily scrutinized but politicized merger review. Nonetheless, many legal experts predicted that the merger would receive antitrust approval from the Federal Trade Commission (FTC). “Generally speaking, there is very little overlap between Whole Foods and Amazon . . . . They’re not really competitors.”[[23]](#footnote-23) While Amazon has developed its online grocery platform Amazon Fresh over the past few years, it has not operated a brick-and-mortar retail grocery business on the scale of Whole Foods. Whole Foods itself does not have “the dominant positioning it did even a few years ago,”[[24]](#footnote-24) thus making the deal more likely to pass anti-competition scrutiny.

On August 23, 2017, Bruce Hoffman, the Acting Director of the FTC’s Bureau of Competition, issued a brief statement explaining that the FTC would not conduct a further investigation of Amazon’s acquisition of Whole Foods[[25]](#footnote-25):

[t]he FTC conducted an investigation of this proposed acquisition to determine whether it substantially lessened competition under Section 7 of the Clayton Act, or constituted an unfair method of competition under Section 5 of the FTC Act. Based on our investigation we have decided not to pursue this matter further.[[26]](#footnote-26)

In three short paragraphs, Acting Director Hoffman set off a wave of critical protestations from legal experts, consumer advocates, and legislators for the seemingly short, two-month timetable for approval.[[27]](#footnote-27) The statement itself was so brief because the Hart-Scott-Rodino (HSR) Act[[28]](#footnote-28) mandates that the FTC close antitrust investigations to the public, in part to protect confidential business information of the parties involved in the merger.[[29]](#footnote-29) Former Republican FTC Commissioner Josh Wright said, after first expressing his sympathies for calls for greater FTC transparency, that the Amazon-Whole Foods merger did not warrant a more generous statement because it did not raise “novel or close calls of antitrust law.”[[30]](#footnote-30)

Nevertheless, this did not dissuade various politicians and consumer advocacy groups from demanding a more extensive explanation from the FTC. Most notably, Senator Amy Klobuchar called the FTC’s decision into question:

[a]s Ranking Member of the Antitrust Subcommittee, I am concerned about the Federal Trade Commission’s decision not to fully review Amazon’s acquisition of Whole Foods. Amazon’s increased access to data on consumers and their behavior, and its dominance in internet retail sales, raises questions about whether this merger harms consumers and suppresses competition.[[31]](#footnote-31)

Other public interest groups raised concerns that the merger could adversely affect small grocery stores, existing Whole Foods jobs, and food delivery competitors: “It was inappropriate for the FTC to rubber-stamp a deal of this scale and complexity”[[32]](#footnote-32); “[t]he FTC apparently did a very cursory look and didn’t take the opportunity to think about how Amazon is impacting markets”[[33]](#footnote-33); and “[t]his failure is part of a larger trend that strongly suggests the FTC does not fully grasp the realities of how competition works in 21st-century markets, where dominant platforms can entrench their power and use data in anticompetitive ways.”[[34]](#footnote-34)

These statements outline the scope of the ire that the Amazon-Whole Foods merger has drawn. Unsurprisingly, the FTC first issued a non-response to counter these criticisms. FTC spokeswoman Betsy Lordan said the agency did not have any comments beyond its brief August 23 public statement in which it announced that it would not be pursuing its investigation of the deal any further. Acting FTC Chairman Maureen Ohlhausen, a Republican appointee, is adamant that the current approach used by antitrust enforcers is flexible enough for the digital age.[[35]](#footnote-35) In contrast, Terrell McSweeny, the other FTC Commissioner and Democratic appointee, has expressed interest in “revitalizing” antitrust enforcement, with the caveat that it would not be able to solve all of the issues posed by the dominance of the largest technology companies, including Amazon.[[36]](#footnote-36)

This Note is organized into five sections. Part I pays special attention to the historical development of the current analytical approach the FTC takes to vertical mergers and associated anticompetitive practices. Part II examines how Big Data should be defined within the context of antitrust enforcement. Part III then looks at previous examples of Amazon’s anticompetitive practices, and Part IV asks whether the Whole Foods acquisition gives Amazon a new opportunity to consolidate the grocery market through predatory pricing, price discrimination, and tying arrangements. Part V evaluates the political realities of meaningful antitrust reform.

I. Development of Current Antitrust Law & Policy on Vertical Merger

A. What Is a Vertical Merger and How Can They Be Anticompetitive?

Amazon’s acquisition of Whole Foods is considered a vertical merger because the two firms are primarily engaged in “different levels of the chain of distribution.”[[37]](#footnote-37) In very simple terms, Amazon, an e-commerce retailer, acquired Whole Foods, a primarily brick-and-mortar grocery retailer. While Amazon has sold groceries on its online platform, its “overlap [with Whole Foods] is probably not terribly great.”[[38]](#footnote-38) Vertical mergers and acquisitions do not eliminate competitors operating on the same “horizontal” plane of business.[[39]](#footnote-39) The Clayton Act bans foreclosure that creates a monopoly or virtual monopoly, while a de minimis closing of the market is permissible.[[40]](#footnote-40)

Harms resulting from vertical integration may include (1) facilitating collusion,[[41]](#footnote-41) (2) allowing monopolies to evade regulation,[[42]](#footnote-42) and (3) increasing or raising barriers to entry.[[43]](#footnote-43) The basic economic theory is that a market dominated by several larger companies is more likely to be anticompetitive than a market populated by many small to medium-sized companies. An over-concentrated market structure is more likely to allow dominant companies to coordinate with each other and engage in anticompetitive practices. These competitors could then use their power to squeeze consumers and workers while widening profit margins.[[44]](#footnote-44)

B. Early Days of Vertical Merger Enforcement

Government enforcement agencies had previously scrutinized vertical mergers on the grounds of indirect economic harm. Congress sought, through the Clayton Act, to prevent the formation of future oligopolies and monopolies and their adverse effects on small business and industry.[[45]](#footnote-45) “As a large concern grows through a series of such small acquisitions, its accretions of power are individually so minute as to make it difficult to use the Sherman Act tests against them.”[[46]](#footnote-46) According to the wording of the Clayton Act, a court need not find actual evidence of lessened competition after the merger occurs.[[47]](#footnote-47) A showing with reasonable certainty is sufficient. For example, the *Brown Shoe* court was particularly concerned with the trend toward vertical mergers between companies at different stages of the supply chain: “[these trends] are not the product of accident but are rather the result of deliberate policies of Brown Shoe and other leading shoe manufacturers.”[[48]](#footnote-48) A merger between two companies that operate at separate stages of the production process was thought to “foreclose competition,”[[49]](#footnote-49) because it “denies to competitors of the supplier the opportunity to compete for part or all of the trade of the customer-party to the vertical arrangement.”[[50]](#footnote-50) Vertical mergers that reduced the “vigor of competition” were thought to result “from a foreclosure of a share of the market otherwise open to competitors.”[[51]](#footnote-51) This is judged by the percentage of the market the merger foreclosed, although the percentage cannot “itself be decisive.”[[52]](#footnote-52) The government or court had to undertake “an examination of the interdependence of the market share foreclosed by, and the economic purpose of, the vertical arrangement.”[[53]](#footnote-53) When a customer is forced to engage in commerce with one actor in order to engage in commerce with the one he or she desires it means the arrangement between the two vertically-merged firms is inherently anticompetitive. By acting in this manner, an established company was thought to “substantially lessen competition,” even if only a relatively small amount of commerce is affected.[[54]](#footnote-54) This mode of analysis, focusing on interdependence of the foreclosed market share and purpose of the vertical merger, was heavily contested by a growing body of scholarly thought, discussed in the following section.

C. Legal and Regulatory Backlash

Beginning in the 1970s and 1980s, government vigilance against the threats of anticompetitive vertical integrations gradually diminished with the advent of the Chicago School of law and economics, which attacked the perceived excesses of judicial activism and government enforcement. Chicago School proponents believed (1) the “one and only goal of antitrust should be the enhancement of consumer welfare”[[55]](#footnote-55) and (2) the market is more efficient, fairer, and wiser “at detecting and punishing anticompetitive behavior than the government or the courts.”[[56]](#footnote-56) “[R]ational economic actors working within the confines of the market seek to maximize profits by combining inputs in the most efficient manner. A failure to act in this fashion will be punished by the competitive forces of the market.”[[57]](#footnote-57) Robert Bork’s 1978 book on the subject, *The Antitrust Paradox*,[[58]](#footnote-58) was particularly influential in shifting the U.S. Supreme Court’s approach to the antitrust laws. Bork argued that U.S. courts and antitrust enforcers of the era were concerned about lessened competition and market share in the hands of a few firms[[59]](#footnote-59)—a view corroborated by the *Brown Shoe* court[[60]](#footnote-60)—rather than determining how specific mergers would change the competitive environment in a market.[[61]](#footnote-61) Bork saved particular scorn for the *Brown Shoe* decision: “It would be overhasty to say that the Brown Shoe opinion is the worst antitrust essay ever written.”[[62]](#footnote-62) He called it a “disaster for rational, consumer-oriented merger policy” in a misguided attempt to “foresee danger in a presumably desirable trend that had barely started.”[[63]](#footnote-63)

Proponents of the Chicago School, in a manner akin to libertarians, preferred a *laissez-faire* approach to regulation of the economy, believing that government regulation “infringes . . . on rights to property and freedom to trade, and suppresses individuality, initiative, and creativity.”[[64]](#footnote-64) As such, vertical mergers, previously considered anticompetitive, became more permissible. This theory was born from the Chicago School’s academic thought: “vertical integration . . . never or almost never reduce[s] consumer welfare.”[[65]](#footnote-65) Instead, there “is nothing to fear unless a market share is gained that is large enough to permit profitable restriction of output.”[[66]](#footnote-66) The government should only become concerned when a firm with increased market power could fix its pricing policies.[[67]](#footnote-67)

If a merger produced the effect of streamlined business efficiencies instead of supra-competitive profits, then such a merger is considered procompetitive. “The law against vertical mergers is merely a law against the creation of efficiency.”[[68]](#footnote-68) If a firm wanted to acquire another firm engaged in the same production line but on a different tier, this firm was acting in an economically rational fashion. It would save markup costs and see increases in efficiency, which could be passed onto the consumer as savings. Bork’s theory was premised on this notion: “[P]redation through vertical merger is extremely unlikely.”[[69]](#footnote-69) In theory, the dominant company would only acquire the target company if it were relatively inexpensive to do so.

The acceptance of consumer welfare as the primary goal of antitrust meant consumer prices and market share became the primary factors in assessing economic competition. The 1982 vertical merger guidelines, issued during the Reagan Administration, stated that mergers “should not be permitted to create or enhance ‘market power,’” defined as the “ability of one or more firms profitably to maintain prices above competitive levels.”[[70]](#footnote-70) Price changes, especially short-term changes, are easily measured by economic analysts. Market welfare in a production line, where one firm aims to buy out other market actors engaged in different stages of the production, is less easily ascertainable. Budget cuts, HSR pre-merger filings, and Chicago School proliferation contributed to a “dramatic decrease in the percentage of litigated merger cases.”[[71]](#footnote-71) Outright rejection of a vertical merger became rare: from 1994 to 2013, the government only brought forty-six vertical merger enforcement actions.[[72]](#footnote-72) Antitrust enforcers would seek divesture of a business asset or division to assuage competition concerns, but would not block a merger outright.[[73]](#footnote-73) This trend continues into the present day, perhaps due to the lack of an update to the vertical merger guidelines.

The Chicago School has attracted its fair share of critics, most likely due to its influence and impact on antitrust law enforcement. “To describe current antitrust law, they cite only language that either condemns output limitation or extols restraints designed to prevent inefficiencies, such as the perceived or imagined drain on efficiency produced by free riders.”[[74]](#footnote-74) The Chicago School theory has also been decried as unfaithful to the original legislative goal of antitrust and promoting fair competition,[[75]](#footnote-75) where potential market entrants are put off by the presence of an oligopoly. Critics point to exclusionary effects of vertical mergers such as “input foreclosure,” where potential or actual competitors are unable to obtain the necessary economic inputs to be able to compete effectively with the merged firm, and “customer foreclosure,” where the merged firm could foreclose the market to other entrants due to a lack of access to consumers by competitors.[[76]](#footnote-76) There are also concerns about “misuse of competitively sensitive information” and “collusive information exchanges” by merged firms.[[77]](#footnote-77)

Curiously, some of these same concerns have emerged from within the Chicago School itself. “There is an emerging consensus among economists that competition in the economy has weakened significantly,”[[78]](#footnote-78) meaning that “incumbent firms may not need to innovate as much, and that inequality may increase if companies can hoard profits and spend less on investment and wages.”[[79]](#footnote-79) The change in mood may stem from the “abnormally high” profits of technology firms, which have allowed the so-called Big Five[[80]](#footnote-80) to collectively acquire 519 firms, “often embryonic rivals,” which stifles competition.[[81]](#footnote-81) “They [the data that the Big Five gather] may also allow firms to exert their market power ‘vertically’ up and down the supply chain.”[[82]](#footnote-82)

D. How to Improve Vertical Merger Antitrust Law

Concern about Amazon’s vertical acquisition of Whole Foods ties well in here: Amazon, already a giant of the online retail world, will have even more license to control consumer spending in the grocery market. The Whole Foods acquisition may give Amazon a significant foothold to take over the grocery market, then physical retail by extension. To combat this, a return to the legal standards set by the *Brown Shoe* court would be helpful in policing the foreclosure of competition up and down the supply chain. A 3.5% share of grocery spending[[83]](#footnote-83) may not seem like much, but the size of the market foreclosed need not be decisive.[[84]](#footnote-84) The significance of the merger is not simply one firm acquiring another firm on a different level of the supply chain to increase efficiency. Instead, Amazon is a unique case, and any merger and acquisition activity where Amazon is concerned should be met with the strictest scrutiny. Market share and consumer price analyses cannot be dispositive, because Amazon has one enormous unique advantage: its data. Amazon’s e-commerce dominance has come largely through its ability to analyze data collected through customer transactions on its platform. Part II explores whether this type of “Big Data” can have antitrust implications, and Part III examines how Amazon has previously leveraged its data in an anticompetitive fashion through price fixing and discrimination.

II. Defining Big Data in the Antitrust Context

A. Background

While Big Data has emerged as a much-debated competition policy topic, its implications are still being considered by U.S. policymakers and enforcers. So far, they have generally limited their consideration of Big Data to mergers, where large data sets are considered an asset.[[85]](#footnote-85) Under Section Two of the Sherman Act, which deals with exclusionary conduct, U.S. enforcers do not treat Big Data as an “essential facility”[[86]](#footnote-86) triggering a “duty to deal.”[[87]](#footnote-87) Instead, they choose not to impose a general duty to aid competitors. Treating Big Data as an essential facility could require, for example, sharing or granting access to data sets. There is a growing focus on whether and how these large datasets may present legitimate antitrust concerns, because Big Data is increasingly being considered a commodity that grants enormous power to the firms that control it.[[88]](#footnote-88)

B. What Is Big Data?

The term “Big Data” means different things to different people.[[89]](#footnote-89) Traditionally, Big Data refers to large or complex data sets. The increased availability of such vast quantities of data arguably can be traced to the rise of digital and mobile communication, which continues to make the world more connected, networked, and traceable.[[90]](#footnote-90) A popular way to describe Big Data is in reference to the “three Vs”: volume, velocity, and variety. The volume and velocity of Big Data refer to the sheer aggregate amount of data and the speed at which it is created and collected.[[91]](#footnote-91) For example, opening an application on a smartphone will create data that is collected by the smartphone manufacturer and software developer. The volumes collected by technology companies are ever-increasing. For instance, some experts estimate that the amount of data generated by a self-driving car will be 100 gigabytes per second.[[92]](#footnote-92)

However, what has made and continues to make Big Data so valuable for businesses and technology companies is not the size of data sets, but its “relationality” to other data.[[93]](#footnote-93) This is where the “variety” factor comes into play: “[Big Data’s] value comes from the patterns that can be derived by making connections between pieces of data, about an individual, about individuals in relation to others, about groups of people, or simply about the structure of information itself.”[[94]](#footnote-94) Big Data’s relationality has undeniably brought consumers many benefits. The speed and convenience with which consumers can access information is unprecedented. Every time a consumer logs into a website, runs a Google search, or shops online, software or technology collects valuable data from that consumer. The rise of some of America’s biggest software and technology companies would most likely not have been possible without the ability to aggregate and analyze consumers’ data. “A company that either manages to process and analyze data more quickly than its competitors or to better use the variety of information data can provide, may provide itself a significant competitive advantage.”[[95]](#footnote-95)

This has significant implications because some experts estimate that over eighteen billion devices are currently connected to the Internet and thirty billion will be connected by 2020.[[96]](#footnote-96) This increase in the number of devices connected to the Internet will only mean a greater amount of generated data to be collected. Internet companies, Amazon especially, have been eager to enhance the quality of their data by mining the volume of data already collected by brick-and-mortar stores, like Whole Foods. “Through loyalty programs, warranty cards, surveys, sweepstakes entries, and credit card purchases, we leave yet another trail of ‘little data’ bread crumbs. The trail has only gotten longer and wider as retail has expanded into electronic commerce and digital platforms.”[[97]](#footnote-97)

C. How Does a Firm Gain a Competitive Advantage with Big Data?

1. Big Data as an Asset

One way to evaluate the competitive advantage of Big Data is through network effects, where the more users who sign up for a product or service, the more attractive that product or service becomes to non-users.[[98]](#footnote-98) The extra-network effects of collecting more data could include having “more scope to improve . . . products, which attracts more users, generating even more data, and so on.”[[99]](#footnote-99) FTC Chairwoman Edith Ramirez stated the FTC would have to review mergers and acquisitions where Big Data played an outsized role on a case-by-case basis to determine whether mergers involving large data transactions would be detrimental to market and consumer interests.[[100]](#footnote-100) She spoke about the competitive significance of Big Data and its implications for consumers: “In assessing its potential significance or value, we generally view data as we would any other asset—either as a product or as an input to a product or service.”[[101]](#footnote-101)

Ramirez pointed to specific examples where an acquisition would have significantly reduced competition without intervention from the FTC. For example, in 2008, Reed Elsevier (now RELX Group), an information and analytics firm whose subsidiaries include LexisNexis, proposed to buy its rival, ChoicePoint.[[102]](#footnote-102) LexisNexis and ChoicePoint were the two largest providers of “electronic public record services for law enforcement customers.”[[103]](#footnote-103) This merger undoubtedly would have provided a short-term gain for customers of both platforms.

Nevertheless, the FTC looked beyond the potential consumer benefit: a new market entrant would be at a significant disadvantage because of the time and cost associated with developing comparable services and gaining customer acceptance, resulting in less vigorous competition and consolidated market share.[[104]](#footnote-104) The intense rivalry between LexisNexis and ChoicePoint had incentivized ChoicePoint to create a niche product service catered to law enforcement customers.[[105]](#footnote-105) The marketplace for these services stood to lose valuable innovation if LexisNexis and ChoicePoint felt they no longer had to “out-innovate” each other to gain market share. As an asset, Big Data certainly has the recognized potential of dampening or eliminating the competition[[106]](#footnote-106) that can be detrimental to market and consumer interests.

III. How Amazon Has Previously Used Big Data to Foreclose Competition

A. How Amazon Captures Big Data

Amazon’s biggest asset that permeates across its business lines is its trove of customer data, borne from years of an ever-increasing share of e-commerce sales. In 2009, Amazon captured fifteen percent of online spending; today, Amazon.com is the first place to search for products when shopping online for fifty-five percent of Americans.[[107]](#footnote-107) Consider how Amazon has been able to increase market share in this realm due to the popularity of Amazon Prime.[[108]](#footnote-108) The convenience of Prime’s perks ensures that Prime subscribers will return to Amazon time and again. Studies estimate that Prime subscribers spend three times as much with Amazon as compared to their non-Prime counterparts.[[109]](#footnote-109) However, it is estimated that Amazon loses one billion dollars per year on shipping expenses for Prime customers alone.[[110]](#footnote-110) Most firms could not sustain such consistent losses on a product line. This is of little consequence to Bezos, who would rather accrue market share and collect customers than worry about thin profit margins.[[111]](#footnote-111) The convenience of two-day shipping virtually ensures that a Prime customer will not shop around, “in part because the more one orders from Amazon, the more value in free shipping one derives from the annual fee.”[[112]](#footnote-112) Other studies estimate that less than one percent of Prime subscribers visit other competing retail sites to compare prices while using Prime.[[113]](#footnote-113) As of September 2017, it was estimated that Amazon counted ninety million Prime members, up from sixty-five million in September 2016.[[114]](#footnote-114) The perks of Prime will continue to draw retail consumers, but Amazon can utilize harsher methods to “persuade” even more customers to join its service. Its standard shipping service has gotten slower for non-Prime customers,[[115]](#footnote-115) and it has begun labeling some items “Prime exclusive,” including certain video games, movies, and television shows, to compete with other content providers like Hulu and Netflix.[[116]](#footnote-116) It is a simple equation: the more customers Amazon can pull into its fold, the more data it can harvest on its customers, their searches, and their purchases.

B. Possibility for Predatory Pricing

Prices that are “too low” seem like a paradox: in general, low prices benefit consumers. “A firm’s independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition.”[[117]](#footnote-117) However, consumers can be harmed when predatory pricing “allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time.”[[118]](#footnote-118) The short-run losses then have to be made up by higher prices after competitors have exited the market; this is known as the “recoupment test.”[[119]](#footnote-119)

Amazon is less concerned with making up short-term losses; rather, new market share is its primary motivation. To enter a new market, Amazon can use data and intelligence gleaned from a different business line, like its massive e-commerce business, and use a tailor-made approach to attract consumers. Once it identifies a product and matches a consumer to it, Amazon can slash prices on the product to drive out competitors and increase its market share. An ordinary firm would not be able to subsist on low or even negative profit margins, but Amazon can endure sustained losses due to the scale and sophistication of the data it collects. “They are data scientists. They know what people want and they’re going to mop it up.”[[120]](#footnote-120) Admittedly, predatory pricing claims are difficult to prove, and courts remain skeptical of them, but consider the following examples of Amazon’s previous conduct.

1. Predatory Pricing Case Study #1: Quidsi

Quidsi, a former competitor of Amazon in the baby care market, used to own Diapers.com. In 2009, Amazon offered to buy Quidsi; when the founders refused to yield to Amazon’s overtures, Amazon retaliated.[[121]](#footnote-121) After Amazon dropped prices on diapers and other baby products by over thirty percent, Quidsi executives suspected Amazon was monitoring their prices: “As an experiment, Quidsi executives manipulated their prices and then watched as Amazon’s website changed its prices accordingly. Amazon’s pricing bots—software that carefully monitors other companies’ prices and adjusts Amazon’s to match—were tracking Diapers.com.”[[122]](#footnote-122) In September 2010, Quidsi executives traveled to Amazon headquarters to discuss selling Quidsi. Quidsi’s financial position was precarious, as investment had dried up due to the specter of Amazon.[[123]](#footnote-123) On the morning of its meeting with Quidsi, Amazon introduced Amazon Mom, a new service that offered a year’s worth of free Prime shipping.[[124]](#footnote-124) Quidsi estimated that Amazon was prepared to lose $100 million over three months in the diaper category through free two-day Prime shipping and price cuts.[[125]](#footnote-125) Eventually, Quidsi ceded to Amazon’s pressure and sold itself to Amazon, despite a higher bid from Walmart.[[126]](#footnote-126)

After absorbing a rival at a significant loss, Amazon got what it wanted—majority share in a particular market.[[127]](#footnote-127) A year later, Amazon “temporarily closed” new memberships in its Amazon Mom program[[128]](#footnote-128); Amazon’s modified version of Amazon Mom significantly reduced the terms and benefits of the original version.[[129]](#footnote-129) Amazon certainly raised market prices once Quidsi left the market, but it is unclear whether Amazon recouped its losses.

2. Predatory Pricing Case Study #2: Rain’s Laptop Stand

Another tale from Amazon’s predatory pricing playbook is the story of Rain’s Laptop Stand. Rain, an electronics accessories company, designed and sold a laptop stand on Amazon. For a decade, the laptop stand enjoyed good sales and positive reviews. When Amazon entered the market with its own, virtually identical, AmazonBasics-produced laptop stand priced at $19, compared to Rain’s Laptop Stand’s $43, it cut Rain out of the market. Rain’s Laptop General Manager said, “We don’t feel good about it. But there’s nothing we can do.”[[130]](#footnote-130) Amazon, with its ability to collect data from its e-commerce platforms, could determine the precise demand for a product, analyze the costs for production and distribution (which would be lower than its competitors’ costs due to the vertical integration of different areas of the supply chain), and be able to undercut Rain’s Laptop Stand by sustaining losses on lower margins.[[131]](#footnote-131) To quote Bezos: “your margin is our opportunity,”[[132]](#footnote-132) meaning where incumbents are charging above cost (earning healthy margins), they are ripe for disruption by Amazon, which is willing to earn smaller (or no) margins in return for market share.

3. Predatory Pricing Case Study #3: Amazon Marketplace

As Amazon enters the brick-and-mortar world of the grocery business, it is worth examining examples of previous industries and markets Amazon has disrupted with vertical integration, low prices, and data collection. Some scholars believe that the clearest example of Amazon’s leverage of power across businesses and markets is Amazon Marketplace, where third-party retailers sell or resell products.[[133]](#footnote-133) Some notable statistics about Amazon Marketplace include: (1) Amazon collects fees ranging from 6% to 50% on sales from third-party retailers[[134]](#footnote-134); (2) Amazon has drawn more than two million third-party sellers to its platform (as of 2015)[[135]](#footnote-135); and (3) the share of Amazon’s overall revenue generated by Marketplace went from 26% in Q2 2007 to 51% in Q2 2017.[[136]](#footnote-136) Third-party sales are growing faster than those of the host site.[[137]](#footnote-137) These independent retailers have decidedly mixed views on the Marketplace platform. On the one hand, it allows sellers to quickly set up a business and reach millions of customers globally with virtually no upfront cost.[[138]](#footnote-138) It allows small-scale retailers to compete with bigger outfits while staying compact. On the other hand, Amazon extracts hefty commission fees for its service and retains the ability to undercut third-party retailers if a particular product is doing well, as demonstrated by the Rain Laptop Stand example.

Amazon argues, in a rather Chicago School-esque fashion, that price competition is good for everyone, because it enables people to spend less on the things they need.[[139]](#footnote-139) Nonetheless, Amazon has the advantage of “‘a lot of interesting and powerful data’, such as customers’ email addresses and their pre-purchase browsing history”—data that is not available to third-party Marketplace sellers.[[140]](#footnote-140) Scholars have argued that this setup is itself anticompetitive: the third-party sellers are the ones who “bear the initial costs and uncertainties when introducing new products.”[[141]](#footnote-141) When a product proves to be successful, Amazon can swoop in and undercut the sellers.[[142]](#footnote-142) In this sense, Amazon has used its ability to collect vast amounts of data to foreclose competition in a vertically integrated market. Amazon hosts the Marketplace platform but has an elevated perch from which to analyze the movement of supply and demand and it sells its own products on the platform. Its customers are sometimes also its competitors.[[143]](#footnote-143) Amazon hosts the infrastructure on which third-parties sell their products but keeps the data derived from third-party sales to itself, leaving third-party sellers at a distinct disadvantage. In turn, Amazon can use this data to cross-leverage its advantages across different market places. An antitrust policy based on price theory alone likely fails to appreciate the anticompetitive effects of Big Data and vertical integration. As such, “the current antitrust regime has yet to reckon with the fact that firms with concentrated control over data can systematically tilt a market in their favor, dramatically reshaping the sector.”[[144]](#footnote-144)

C. Consequences of Predatory Pricing

How exactly has Amazon managed to raise barriers to entry in an e-commerce market where startup costs should theoretically be low? Amazon has “huge first-mover advantages stemming from data collection and network effects.”[[145]](#footnote-145) In turn, the economic benefit gained therefrom allows Amazon to sell products at-or-below margin to foreclose competition and gain market share. With Amazon lurking, why bother entering the market at all if one cannot draw upon troves of data like Amazon? It is not a fair fight when Amazon’s Big Data assets allow it to identify entire product categories and sustain huge margin losses (abetted, of course, by Wall Street investment) in order to bleed the competition to death. Despite the fact that Amazon cornered the “laptop stand” or “baby care” market through “aggressive price cutting and selling steeply at a loss, its actions have not triggered predatory pricing claims,”[[146]](#footnote-146) thus allowing Amazon to raise barriers to entry and charge higher prices as it finds new markets.

Predatory pricing theory is recognized in case law, but the Chicago School argues that predatory pricing should be ignored[[147]](#footnote-147): lower prices “should always be welcomed.”[[148]](#footnote-148) There is a long-running debate about predatory pricing enforcement. Some believe such actions should be “confined to instances in which the accused monopolist charged below marginal costs.”[[149]](#footnote-149) Others believe that marginal costs do not approximate average costs because marginal costs are so low in many industries,[[150]](#footnote-150) including the grocery industry. In the latter case, advocates would look to show raised barriers of entry, loss of consumer choice, and loss of innovation resulting directly from the merger.

IV. The potential Anticompetitive Implications of the Whole Foods Acquisition

When the acquisition of Whole Foods was announced, it launched a flurry of speculation about why Amazon wanted to expand into the brick-and-mortar business of groceries. “After almost a decade selling groceries online, Amazon has failed to make a major dent on its own as consumers have shown a stubborn urge to buy items like fruits, vegetables and meat in person.”[[151]](#footnote-151) Besides virtually eliminating the heavy up-front investment cost that comes with brick-and-mortar retail, Amazon now has access to data collected by Whole Foods on its customers. Amazon has previously demonstrated its competitive advantage through its ability to access, analyze, and utilize data, which may raise barriers to market entry, thereby allowing it to engage in anticompetitive practices once it has streamlined a market through vertical integration or forced out competitors with predatory pricing.[[152]](#footnote-152) Since Amazon operates “in markets where network effects and control over data solidify early dominance,”[[153]](#footnote-153) Amazon must capture market share to compete. Once it has done so, whether through vertical integration or in a more “organic” fashion, Amazon’s presence in a new market is enough to raise the costs of entry to potential competitors such that they cannot enter or cannot adequately compete with Amazon because of Amazon’s ability to cross-leverage data gained from another sector into a new sector. The scope of Amazon’s business lines, from online retailing to publishing to cloud-based infrastructure, is staggering.[[154]](#footnote-154) None of Amazon’s previous transactions come anywhere near the $13.7 billion Amazon paid for Whole Foods, signifying the seriousness of its desire to expand its business lines.[[155]](#footnote-155)

Given that the Amazon-Whole Foods merger occurred relatively recently, the market has not quite had enough time to assess the potential anticompetitive practices that Amazon is engaging in. However, some of Amazon’s early behaviors may give clues to its intent to reshape the grocery marketplace. Its foray into the grocery industry will have far greater implications than the simple acquisition of market share. One analyst summed up Amazon’s strategy as follows: “‘Real value for Amazon will emerge when their consumer profiles stretch beyond the screen and into the physical aisle. . . .”[[156]](#footnote-156) This strategy ties in with Bezos’s ultimate goal for Amazon: to turn it into “The Everything Store.” Amazon may dominate the e-commerce or online market, but Amazon only accounts for five percent of total retail market sales.[[157]](#footnote-157) Also, the average consumer purchases groceries five times a month, while the average Prime subscriber make purchases four times a month and the average non-Prime customer makes them two times per month.[[158]](#footnote-158) Combining groceries with non-grocery items found on Amazon could increase the frequency with which shoppers purchase items from Amazon.[[159]](#footnote-159) Having already attracted customers to its stores with low prices on grocery staples and household products, Amazon could use the opportunity to market other products more commonly purchased online. For example, after the merger was approved, Amazon began selling its Amazon Echo device in Whole Foods stores, displayed with a cheeky “farm fresh” sign usually found next to locally-sourced produce.[[160]](#footnote-160) Amazon undoubtedly recognizes the value of having a robust brick-and-mortar presence.

Amazon’s retail rival, Walmart, operates 4,755 “units” in the U.S. alone with another 5,925 units internationally.[[161]](#footnote-161) Walmart executives recently told investors of its plan to compete with Amazon in their turf war: “grocery is key to hooking shoppers who may then go on to purchase the cosmetics, clothing and various other products that fill Walmart’s shelves.”[[162]](#footnote-162) Walmart’s aim is to make grocery shopping more convenient. Walmart customers “who buy produce, poultry and other household items at Walmart.com will be able to pick up their orders at 1,100 locations” by the end of 2017.[[163]](#footnote-163) Amazon’s turf war is not concerning per se, unless consumer choice was to be limited to only Amazon or Walmart.

A. Whole Foods’ Big Data

Whole Foods has much to offer in the way of data, as exemplified by the Whole Foods Privacy Policy. First, Whole Foods collects data provided to it by the customer. This includes instances where the customer registers; creates an account profile; subscribes to Whole Foods emails, mobile messages, push notifications, or social media notifications; posts on Whole Foods forums or blogs; participates in a sweepstakes, contest, promotion, survey, or poll; communicates with Whole Foods; shops the online store; orders physical or digital gift cards; requests customer support; or applies for a job.[[164]](#footnote-164) The data that Whole Foods acquires from these sources include personal information and personal data, which can be used to identify the customer. This includes the customer’s first and last name, email address, zip code or post code, billing address, shipping address, phone number, payment card information, user name and password, photo, and any other personally identifiable information the customer chooses to provide.[[165]](#footnote-165) Personal information and personal data may be anonymized or otherwise made into non-personal information so that Whole Foods can use and share it without obligation to the customer.[[166]](#footnote-166)

Second, Whole Foods, through its third-party servicers and providers, collects information and data automatically using a wide array of methods. Whole Foods can track information about a customer’s use of its online service (“log information”), such as the type of browser used, timestamp of access, pages viewed, IP address, and the referring link through which the customer accessed the Whole Foods website.[[167]](#footnote-167) Whole Foods also collects data with cookies and other tracking technologies, such as web beacons,[[168]](#footnote-168) embedded scripts,[[169]](#footnote-169) location identifying technologies,[[170]](#footnote-170) fingerprinting,[[171]](#footnote-171) device recognition technologies,[[172]](#footnote-172) and in-app tracking methods.[[173]](#footnote-173) Whole Foods adds that it may combine this automatically-collected data with a customer’s personal information and personal data, but that it will treat the data in accordance with its policy to make personal information and data “de-identified” before delivering it to third parties.[[174]](#footnote-174) The motivation for Whole Foods to collect this much data through these various techniques is to analyze and track the data, determine the popularity of certain content, and deliver targeted advertising and content to its consumers.[[175]](#footnote-175) Whole Foods can also share this data with third parties for the purpose of “interest-based advertising” or “retargeting,” which means that information from one retailer is used to suggest relevant products offered by another retailer.[[176]](#footnote-176) It should also be noted that Whole Foods’ data practices detailed in its Privacy Policy “[do] not cover any third party activities or third parties’ use of information that such third parties themselves may have collected [from the customer]” or “the methods used by the third-parties to collect that information.”[[177]](#footnote-177) The more data Whole Foods can gather about its in-store and online customers, the better it can attract consumers and repeat customers to its stores and online store.

B. Potential Anticompetitive Practices Resulting from the Merger

1. Predatory Pricing

After the FTC gave the merger its blessing, Amazon announced it would lower the prices of some of Whole Foods’ best-selling grocery staples as a “down payment” for the vision “of making Whole Foods Market’s high-quality, natural and organic food affordable for everyone.”[[178]](#footnote-178) Amazon and Whole Foods also announced plans to integrate Whole Foods’ customer rewards program with Amazon Prime, thus providing Prime members with “special savings and other in-store benefits,”[[179]](#footnote-179) making Whole Foods’ inventory of brands available through Amazon.com, AmazonFresh, Prime Pantry, and Prime Now,[[180]](#footnote-180) and introducing Amazon Lockers in select Whole Foods stores.[[181]](#footnote-181) Amazon promises that these changes are “just the beginning—Amazon and Whole Foods Market plan to offer more in-store benefits and lower prices for customers over time as the two companies integrate logistics and point-of-sale and merchandising systems.”[[182]](#footnote-182)

Consumers who are already Amazon Prime and Whole Foods customers would certainly welcome a price reduction in the most popular grocery staples. This is the lens Amazon would prefer a consumer to use to view the Whole Foods acquisition: what is beneficial for Amazon is also beneficial for the customer. Nevertheless, this aphorism should not be taken at face value. While Amazon’s modus operandi may skirt current antitrust law, what does this mean for Amazon’s competitors? Some industry analysts feel that the price cutting is already paying off for Amazon, because it is putting pressure on its rivals, like Wal-Mart, Trader Joe’s, and Sprouts Farmers Market.[[183]](#footnote-183) The price cuts may be an indication of Amazon’s long-term strategy of “forego[ing] margins in favor of gaining market share.”[[184]](#footnote-184) Even moderate price drops have the potential to “hurt traditional grocery chains’ bottom lines, considering the already high quality of products at Whole Foods.”[[185]](#footnote-185) The largest grocery chains, Walmart, Kroger, et al., may have the size and strength to withstand any price cuts at Whole Foods, at least in the short-term.

However, smaller, more local firms may not have the stamina to withstand sustained price cuts. Moreover, such firms cannot call upon the data collected from millions of customers over years to effectively target customers that have shopped on a certain online platform and retain them with unsustainably low prices. The sustained pressure from Amazon could have far-reaching repercussions in the grocery industry considering the challenges the industry has already faced.[[186]](#footnote-186) On one level, “cutting prices in order to increase business often is the very essence of competition.”[[187]](#footnote-187) The biggest grocery chains may be better placed to survive a price war with Amazon, but if a small, innovative upstart is unable to enter the market as a result of Amazon’s presence, the American consumer will be irreparably harmed in ways they cannot conceive. In order to win a predatory pricing claim with respect to Amazon, legislatures should consider revising predatory pricing doctrine by “abandoning the recoupment requirement in cases of below-cost pricing by dominant platforms,”[[188]](#footnote-188) since Amazon pricing algorithms may not be provable at trial. The recoupment test has ensured that plaintiffs’ predatory pricing claims are rarely successful.[[189]](#footnote-189) While its economically-focused pricing analysis is attractive to the Chicago School, it fails to take crucial intangibles—loss of competition and raised barriers to entry—into account. The previously-cited examples of Amazon’s anticompetitive conduct show that Amazon is more interested in acquiring market share than earning short-term profits[[190]](#footnote-190); thus, the presence of a company as large and powerful as Amazon makes recoupment moot if investors are willing to back this kind of business strategy.

2. Tying Arrangements

Price discrimination determined by Prime membership can go a step further: “Will Amazon offer Prime membership at Whole Foods, making participation in the program even more irresistible (or mandatory, even)?”[[191]](#footnote-191) This would bring even more new customers into Amazon’s fold, but forcing Whole Foods’ customers to join Prime—even if Amazon owns Whole Foods—would be textbook anticompetitive behavior. This is known as a tying arrangement, which is “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product [e.g. Amazon Prime], or at least agrees that he will not purchase that product from any other supplier,”[[192]](#footnote-192) whether the customer wants the tied product or not.[[193]](#footnote-193) Tying arrangements are illegal per Section One of the Sherman Act and Section Three of the Clayton Act.[[194]](#footnote-194) Tying arrangements restrain trade because they “deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market.”[[195]](#footnote-195)

Not all tying arrangements are illegal per se. To prove a per se illegal tying violation, a plaintiff not only must meet the requirements above, but also must show that the seller has “sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a ‘not insubstantial’ amount of interstate commerce is affected.”[[196]](#footnote-196) If “market power”[[197]](#footnote-197) cannot be shown, per se illegality may still be proved if the tie-in violates the “rule of reason.”[[198]](#footnote-198)

A claim would have to show (1) that Amazon conditioned the sale of a Whole Foods product or allowed access to a particular discount by tying it to the purchase of Prime; (2) the Whole Foods product is separate and not part of Prime; (3) Amazon has sufficient power in the market for Prime to enforce the tie-in[[199]](#footnote-199); and (4) the Amazon Prime tie-in has affected a substantial amount of commerce. The third element may be the most difficult to prove, since “in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”[[200]](#footnote-200) It is a significant, but not insurmountable, burden. Considering the number of Prime subscribers Amazon counts and the benefits it provides,[[201]](#footnote-201) it can be certainly argued that Amazon that has the requisite market power in the tying product. With the Whole Foods acquisition, Amazon now has greater insight into what kinds of products consumers are interested in and can drop prices low enough, so long as the consumer has Prime membership, to stir demand. “In this way, Amazon’s ability to sustain losses creates an entry barrier for any firm that does not enjoy the same privilege.”[[202]](#footnote-202)

V. Political Considerations

A. Will Lawmakers and Enforcers Act?

“Do we want to trust in America and Americans and American history? Or do we want to trust in Jeff Bezos? That’s what this comes down to.”[[203]](#footnote-203) The dichotomy of the two positions is certainly stark. The government enforcement agencies in charge of maintaining competition in the American economy have the power to take on Amazon. The problem is “finding willing regulators and an executive[[204]](#footnote-204) that’s willing to get in a fight.”[[205]](#footnote-205) America’s biggest technology companies have thus far escaped liability and government regulation likely because of their perceived status as pillars of American ingenuity and because antitrust law has not yet caught up with their business models. Is Amazon successful because it has a lot of data, or does Amazon have a lot of data because it is successful? Until they face more robust enforcement, Amazon will take as much latitude as it can: “There are so many ways that Amazon can use its power that it’s simply impossible to figure out what it will do. Amazon probably doesn’t even know yet; it will discover and test them, relentlessly.”[[206]](#footnote-206)

Even the staunchest antitrust advocates hesitate to talk openly about breaking up America’s “Big Five” technology firms in order to improve market competition. “The nature of data makes the antitrust remedies of the past less useful. Breaking up a firm like Google into five Googlets would not stop network effects from reasserting themselves: in time, one of them would become dominant again.”[[207]](#footnote-207) Nonetheless, the old consensus that competition “is only a click away” holds far less sway than it used to.[[208]](#footnote-208) If politicians and regulators are serious about curtailing the power of Amazon and its peers, it follows that antitrust enforcers might have to “loosen the grip that providers of online services have over data and give more control to those who supply them.”[[209]](#footnote-209)

The American public is also unlikely to raise objections to Amazon’s looming ubiquity in the near future—they are too busy “enjoying the benefits of these corporations far too much to think hard about distant dangers.”[[210]](#footnote-210) With discounts, free Prime movies and television shows, and free two-day Prime shipping, American consumers have grown to expect conveniences that Amazon offers as their “birthright.”[[211]](#footnote-211) It is almost “politically perilous” to suggest that consumers should automatically be suspicious of lower prices.[[212]](#footnote-212) Bezos is aware of staying in the good graces of the greater Amazon-using public—Amazon claims the gains from doubling its workforce to 180,000 workers offset the job losses from the struggling brick-and-mortar retail economy.[[213]](#footnote-213) In addition, two days before the Whole Foods acquisition announcement, Bezos requested that his Twitter followers suggest philanthropic strategies,[[214]](#footnote-214) demonstrating a desire to maintain goodwill with the public to stave off potential backlash from future deal-making.

Afterword

“Antitrust is dead, isn’t it? That was my impression,”[[215]](#footnote-215) said Judge Richard A. Posner, formerly of the United States Court of Appeals for the Seventh Circuit. During a keynote interview at the Stigler Center Conference on Concentration in America at the University of Chicago Booth School of Business,[[216]](#footnote-216) Posner stated that he was “very comfortable with the modern American giant companies,”[[217]](#footnote-217) adding that “real, lurking, serious antitrust problems” did not appear before him during his tenure.[[218]](#footnote-218) There is a good reason for that: lack of robust antitrust enforcement comes from the school of thought promulgated by the very host of the conference.

Consumers should not wait for some major transgression on the part of Amazon or one of its peers—thereby completely eroding their trust in these companies—to act, for then it may already be too late to take meaningful action. To focus too much on the perceived benefit of low prices misses the real costs of a lack of innovation. Take, for example, a technology giant of a previous generation: Microsoft. Until the government pursued antitrust action against it, Microsoft used to employ the well-worn tactic of buying competitors or squeezing them out of the market because they made superior products.[[219]](#footnote-219) Does this sound familiar?[[220]](#footnote-220) Arguably, because of the government’s action, Microsoft’s tactical retreat gave young companies like Google and Skype the space to grow.[[221]](#footnote-221) “‘Antitrust gets some credit for . . . [making] sure the web would stay open.’”[[222]](#footnote-222)

Is antitrust dead? The truth of this statement is not up to judges like Posner—it is up to the American public to demand that their legislators craft effective legislation for the government to enforce. The gains in productivity and innovation afforded by new technology will be for naught if Amazon absorbs the power and wealth from which it derives. Perhaps the Whole Foods deal itself will not change Amazon’s ability to engage in such anticompetitive practices in any measurable way in the near term, but antitrust enforcers, the courts, and the public must remain vigilant to threats that Amazon presents to the markets in the longer term.

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2. Krang Nelson (@KrangTNelson), Twitter (June 16, 2017, 7:01 AM), https://twitter.com/KrangTNelson/status/875714916723826689?ref\_src=twsrc%5Etfw&ref\_url=https%3A%2F%2F. [↑](#footnote-ref-2)
3. Abha Bhattarai, *Amazon to Buy Whole Foods Market in Deal Valued at $13.7 Billion*, Wash. Post (June 16, 2016), https://www.washingtonpost.com/news/business/wp/2017/06/16/amazon-to-buy-whole-foods-market-in-deal-valued-at-13-7-billion-2/. [↑](#footnote-ref-3)
4. *Id.* [↑](#footnote-ref-4)
5. *Id.* [↑](#footnote-ref-5)
6. The Amazon share gain was itself notable—normally, shares of the acquiring company (Amazon) fall when completing a merger. Numerous factors may affect this. To finance the acquisition, the acquiring firm either takes on debt, reduces available cash, or issues equity, which dilutes the value of existing shares. These acts may impact the valuation of the acquiring firm due to the uncertainty of the acquisition’s effect on its balance sheet. Markets tend to react adversely to uncertainty. The acquiring firm usually has to also pay a premium for the shares of the target company, unless the target is distressed. Shareholders of the acquiring company may also choose to voice discontent with the acquisition by selling the shares as a show of their displeasure to the proposed transaction. However, there are exceptions to these general trends: shares of the acquiring company will rise if the market finds the acquisition will genuinely benefit the company. [↑](#footnote-ref-6)
7. Bhattarai, *supra* note . Supervalu is the fifth-largest food retailing company in the United States with a network of 2,000 stores, *id.* [↑](#footnote-ref-7)
8. Bhattarai, *supra* note . [↑](#footnote-ref-8)
9. Dylan Byers, *What Amazon Knows: ‘The War for Retail Will be Won in Groceries’*, CNN: CNN Bus. (Aug. 25, 2017, 11:35 AM), http://money.cnn.com/2017/08/25/technology/business/amazon-whole-foods-strategy/index.html. [↑](#footnote-ref-9)
10. Robinson Meyer, *When Does Amazon Become a Monopoly?*, Atlantic (June 16, 2017), https://www.theatlantic.com/technology/archive/2017/06/when-exactly-does-amazon-become-a-monopoly/530616/. [↑](#footnote-ref-10)
11. Wingfield & de la Merced, *infra* note (the deal makes Amazon the country’s fifth-largest grocery retailer). [↑](#footnote-ref-11)
12. Zachary Karabell, *The Everything Store Expands*, Wired (June 17, 2017, 11:00 AM), https://www.wired.com/story/amazon-whole-foods-expansion/. [↑](#footnote-ref-12)
13. *Id.* [↑](#footnote-ref-13)
14. *Id.* [↑](#footnote-ref-14)
15. Nathan Newman, *Search, Antitrust, and the Economics of the Control of User Data*, 31 Yale J. on Reg. 401, 409 (2014). [↑](#footnote-ref-15)
16. Meyer, *supra* note . [↑](#footnote-ref-16)
17. *Id.* [↑](#footnote-ref-17)
18. *Id.* [↑](#footnote-ref-18)
19. *Id.* (quoting Lina N. Khan, fellow at the Open Markets team at New America, a center-left think tank). [↑](#footnote-ref-19)
20. Anna Nicolau, *Walmart and Amazon in Acquisition Shopping Spree in Retail Battle*, Fin. Times (June 17, 2017), https://www.ft.com/content/bca88eac-52f6-11e7-bfb8-997009366969.  [↑](#footnote-ref-20)
21. Joe Kennedy, *Should Antitrust Regulators Stop Companies from Collecting So Much Data?*, Harv. Bus. Rev. (Apr. 17, 2017), https://hbr.org/2017/04/should-antitrust-regulators-stop-companies-from-collecting-so-much-data. [↑](#footnote-ref-21)
22. Donald J. Trump (@realDonaldTrump), Twitter (Aug. 16, 2017, 3:12 AM), https://twitter.com/realdonaldtrump/status/897763049226084352?lang=en (“Amazon is doing great damage to tax paying retailers. Towns, cities and states throughout the U.S. are being hurt - many jobs being lost!”); *see also* Donald J. Trump (@realDonaldTrump), Twitter (July 24, 2017, 7:36 PM), https://twitter.com/realDonaldTrump/status/889675644396867584 (“Is Fake News Washington Post being used as a lobbyist weapon against Congress to keep Politicians from looking into Amazon no-tax monopoly?”). [↑](#footnote-ref-22)
23. Bhattarai, *supra* note (quoting Michael Carrier, a Rutgers Law School professor who specializes in antitrust issues). [↑](#footnote-ref-23)
24. Bhattarai, *supra* note . [↑](#footnote-ref-24)
25. Press Release, Fed. Trade Commission, Statement of Federal Trade Commission’s Acting Director of the Bureau of Competition on the Agency’s Review of Amazon.com, Inc.’s Acquisition of Whole Foods Market Inc. (Aug. 23, 2017), https://www.ftc.gov/news-events/press-releases/2017/08/statement-federal-trade-commissions-acting-director-bureau. [↑](#footnote-ref-25)
26. *Id.* (“‘Of course, the FTC always has the ability to investigate anticompetitive conduct should such action be warranted.’”). [↑](#footnote-ref-26)
27. Alexis, *infra* note . [↑](#footnote-ref-27)
28. Clayton Act § 7A, 15 U.S.C. §18a (2000). The Hart-Scott-Rodino Act requires companies and individuals planning substantial purchases or sales of voting securities or assets until they have made a detailed filing with the FTC or Department of Justice and wait for approval. [↑](#footnote-ref-28)
29. Liz Crampton, *Open and Shut, the Amazon Way*, Bloomberg BNA: Corp. Transactions Blog (Aug. 27, 2017), https://www.bna.com/open-shut-amazon-b73014463653/. [↑](#footnote-ref-29)
30. *Id.* [↑](#footnote-ref-30)
31. *Klobuchar Statement on FTC Approval of Amazon-Whole Foods Merger*, U.S. Senate: Sen. Amy Klobuchar (Aug. 25, 2017), https://www.klobuchar.senate.gov/public/index.cfm/2017/8/klobuchar-statement-on-ftc-approval-of-amazon-whole-foods-merger. [↑](#footnote-ref-31)
32. Alexei Alexis, *Speedy Amazon-Whole Foods Approval Puts FTC Under Fire*, Bloomberg BNA: Antitrust & Trade Reg. Rep. (Sept. 1, 2017), https://www.bloomberglaw.com/ms/product/antitrust/document/XCQPT52K000000 (quoting Patrick Woodall, research director at Food and Water Watch, a Washington-based advocacy group). [↑](#footnote-ref-32)
33. *Id.* (quoting Stacy Mitchell, co-director of the Institute for Local Self-Reliance, an advocacy group for communities and independent businesses). [↑](#footnote-ref-33)
34. *Id.* (quoting a statement from New America, a Washington D.C. think tank focused on new technologies). [↑](#footnote-ref-34)
35. Alexei Alexis, *New Antitrust Groups Target Tech ‘Super Monopolies’*, Bloomberg BNA: Antitrust & Trade Reg. Daily, ATD Issue No. 182 (Sept. 5, 2017), https://www.bloomberglaw.com/ms/product/antitrust/document/XE0RBQUO000000. [↑](#footnote-ref-35)
36. Alexei Alexis, *FTC’s McSweeny Is Open to Antitrust Changes*, Bloomberg BNA: Antitrust & Trade Reg. Rep. (Sept. 29, 2017), https://www.bloomberglaw.com/ms/product/antitrust/document/X9I4U46S000000. [↑](#footnote-ref-36)
37. Douglas Broder, U.S. Antitrust Law and Enforcement: A Practice Introduction 129 (2010). [↑](#footnote-ref-37)
38. Wingfield & de la Merced, *infra* note . [↑](#footnote-ref-38)
39. *Id.* [↑](#footnote-ref-39)
40. Although “an agreement between two individuals to form a partnership theoretically restrains trade, it is lawful under antitrust law.” *The Antitrust Laws*, Fed. Trade Commission, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws. [↑](#footnote-ref-40)
41. *1984 Merger Guidelines*, U.S. Dep’t Just. §§ 4.221–4.222 (1984), https://www.justice.gov/archives/atr/1984-merger-guidelines. [↑](#footnote-ref-41)
42. *Id.* at § 4.23. [↑](#footnote-ref-42)
43. Robert Pitofsky, *Vertical Restraints and Vertical Aspects of Mergers—A U.S. Perspective*, Fed. Trade Commission (Oct. 16, 1997), https://www.ftc.gov/public-statements/1997/10/vertical-restraints-and-vertical-aspects-mergers-us-perspective.

One theory of competitive harm under the 1984 Merger Guidelines is that a vertical merger could require a would-be entrant to enter the upstream and downstream markets simultaneously in order to be successful. For example, in an industry with a high degree of vertical integration and a limited independent supply of product in the upstream market, an entrant into the downstream market may find it necessary to enter the upstream market as well. If such “two-level” entry is more risky, more difficult, or more time-consuming than entry into the entrant’s primary market alone, a merger that increases vertical integration could create barriers to entry.

*Id.* [↑](#footnote-ref-43)
44. *See,* *e.g.*, Donald F. Turner & Carl Kaysen, Antitrust Policy: An Economic and Legal Analysis (1959); Joe S. Bain, *Workable Competition in Oligopoly: Theoretical Considerations and Some Empirical Evidence*, 40 Am. Econ. Rev. 35, 36–38 (1950).  [↑](#footnote-ref-44)
45. Brown Shoe Co. v. United States, 370 U.S. 294, 316 n.28 (1962); *cf.* United States. v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945), per Learned Hand, J., “[t]hroughout the history of these (antitrust) statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.” [↑](#footnote-ref-45)
46. *See,* *e.g.*, *Brown Shoe Co.*, 370 U.S. at 333–34. [↑](#footnote-ref-46)
47. *Id.*

The concept of reasonable probability conveyed by these words is a necessary element in any statute which seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act. A requirement of certainty and actuality of injury to competition is incompatible with any effort to supplement the Sherman Act by reaching incipient restraints.

*Id.* at 323, n.39. This reasoning and wording were eventually incorporated into the Clayton Act. [↑](#footnote-ref-47)
48. *Id.* at 332. [↑](#footnote-ref-48)
49. *Id.* at 324–34 (“[B]y foreclosing the competitors of either party from a segment of the market otherwise open to them, the arrangement may . . . ‘deprive . . . rivals of a fair opportunity to compete.’” (quoting Standard Oil Co. v. United States, 337 U.S. 293, 314 (1949))). In *Brown Shoe*, The Supreme Court enjoined a vertical merger between Brown Shoe Company and G. R. Kinney Company, Inc., the eighth-largest shoe seller in the United States. [↑](#footnote-ref-49)
50. *Brown Shoe Co.*, 370 U.S. at 324. [↑](#footnote-ref-50)
51. *Id.* at 328. [↑](#footnote-ref-51)
52. *Id.* at 329. [↑](#footnote-ref-52)
53. *Id.*

Although it is “unnecessary for the Government to speculate as to what is in the ‘back of the minds’ of those who promote a merger,” H.R.Rep.No.1191, 81st Cong., 1st Sess. 8, evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger.

*Id.* at 347; *see* *also* Swift & Co. v. United States, 196 U.S. 375, 396; United States v. Md. & Va. Milk Producers Ass’n, 167 F. Supp. 799, 804 (D.D.C. 1958), *aff’d* in part*, rev’d* in part, 362 U.S. 458 (1960). [↑](#footnote-ref-53)
54. *Brown Shoe* *Co.*, 370 U.S. at 330. [↑](#footnote-ref-54)
55. Broder, *supra* note , at 9. [↑](#footnote-ref-55)
56. *Id.* [↑](#footnote-ref-56)
57. Marc Allen Eisner, Antitrust and the Triumph of Economics: Institutions, Expertise, and Policy Change 107 (1991). [↑](#footnote-ref-57)
58. Robert Bork, The Antitrust Paradox (1978). [↑](#footnote-ref-58)
59. *Id.* at 202–05. [↑](#footnote-ref-59)
60. Brown Shoe Co. v. United States, 370 U.S. 294, 333–34 (1962). [↑](#footnote-ref-60)
61. Bork, *supra* note , at 202–05. [↑](#footnote-ref-61)
62. *Id.* at 210 (“The connoisseur of bad antitrust opinions must take into account *Fortner Enterprises I*, *Utah Pie*, *Sealy*, *Schwinn*, *Procter & Gamble*, *Von’s* *Grocery*, and many others. . . .”). [↑](#footnote-ref-62)
63. *Id.* at 216. [↑](#footnote-ref-63)
64. Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 Calif. L. Rev. 917, 923 (1987). [↑](#footnote-ref-64)
65. Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 Antitrust L. J. 835, 852 (2014). [↑](#footnote-ref-65)
66. Bork, *supra* note , at 237. [↑](#footnote-ref-66)
67. Broder, *supra* note , at 10. [↑](#footnote-ref-67)
68. Bork, *supra* note , at 234. [↑](#footnote-ref-68)
69. *Id.* at 232. [↑](#footnote-ref-69)
70. *See generally* *1982 Merger Guidelines* 2, U.S. Dep’t Just. (1982), http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11248.pdf.   [↑](#footnote-ref-70)
71. Broder, *supra* note , at 10. [↑](#footnote-ref-71)
72. Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, Geo. U. L. Ctr.: Scholarly Commons (Dec. 8, 2014), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub. [↑](#footnote-ref-72)
73. *Id.* [↑](#footnote-ref-73)
74. Fox, *supra* note ; *see also* Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 378 (7th Cir. 1986) (Posner, J.) (“The monopolist cannot be faulted for wanting to sell *more* output unless he is engaged in some predatory or exclusionary scheme the long-run effect of which may be to restrict output.”), *cert. denied*, 480 U.S. 934 (1987) (emphasis in original); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 211 (D.C. Cir. 1986) (Bork, J.) (“Atlas’ policy is designed to make the van line more efficient rather than to decrease the output of its services and raise rates[.]”), *cert. denied*, 107 S. Ct. 880 (1987); Polk Bros., Inc. v. Forest City Enters., Inc., 776 F.2d 185, 188–91 (7th Cir. 1985) (Easterbrook, J.) (“[T]he restrictive covenant made the cooperation possible.”). [↑](#footnote-ref-74)
75. Fox, *supra* note . [↑](#footnote-ref-75)
76. Lisl 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. [↑](#footnote-ref-76)
77. *Id.* [↑](#footnote-ref-77)
78. *The University of Chicago Worries About a Lack of Competition*, Economist: Schumpeter (Apr. 12, 2017), https://www.economist.com/news/business/21720657-its-economists-used-champion-big-firms-mood-has-shifted-university-chicago. [↑](#footnote-ref-78)
79. *Id.* [↑](#footnote-ref-79)
80. The Big Five consists of Alphabet (Google’s parent company), Amazon, Apple, Facebook, and Microsoft. [↑](#footnote-ref-80)
81. 80 *The University of Chicago Worries About a Lack of Competition, supra* note . [↑](#footnote-ref-81)
82. *Id.* [↑](#footnote-ref-82)
83. Wingfield & de la Merced, *infra* note . [↑](#footnote-ref-83)
84. Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962). [↑](#footnote-ref-84)
85. Paul Lugard & Lee Roach, *The Era of “Big Data” and EU/U.S. Divergence for Refusals to Deal*, 31 Antitrust Mag. 59 (2017). [↑](#footnote-ref-85)
86. Broder, *supra* note , at 268. The Essential Facilities Doctrine is “the doctrine in the law of *monopolization* and *joint ventures* under which a party or parties that controls essential facilities essential to effective competition may be required to permit its competitors access to those facilities.” *Id.* (emphasis in original); *see* United States v. Terminal R.R. Ass’n of St. Louis, 224 U.S. 383 (1912). [↑](#footnote-ref-86)
87. As the Court wrote in *Colgate* almost a century ago, the Sherman Act “does not restrict the long-recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal.” United States v. Colgate & Co., 250 U.S. 300, 307 (1919). [↑](#footnote-ref-87)
88. *The World’s Most Valuable Resource Is No Longer Oil, but Data*, Economist (May 6, 2017), https://www.economist.com/news/leaders/21721656-data-economy-demands-new-approach-antitrust-rules-worlds-most-valuable-resource. [↑](#footnote-ref-88)
89. *See generally* Robert P. Mahnke, *Big Data as a Barrier to Entry*, Comp. L. Int’l: CPI Antitrust Chron. (May 2015), https://www.competitionpolicyinternational.com/assets/Uploads/Mahnke2May-152.pdf. [↑](#footnote-ref-89)
90. Ramirez, *infra* note . [↑](#footnote-ref-90)
91. *See, e.g.*,Doug Laney, *3D Data Management: Controlling Data Volume, Velocity, and Variety*, META Group(Feb. 6, 2001), https://blogs.gartner.com/doug-laney/files/2012/01/ad949-3D-Data-Management-Controlling-Data-Volume-Velocity-and-Variety.pdf. [↑](#footnote-ref-91)
92. *The World’s Most Valuable Resource Is No Longer Oil, but Data*, *supra* note 87. [↑](#footnote-ref-92)
93. Danah Boyd & Kate Crawford, Symposium, *Six Provocations for Big Data*, A Decade in Internet Time: Symposium on the Dynamics of the Internet and Society (Sept. 21, 2011), http://dx.doi.org/10.2139/ssrn.1926431. [↑](#footnote-ref-93)
94. *Id.* at 2. [↑](#footnote-ref-94)
95. Xavier Boutin & Georg Clemens, *Defining “Big Data” in Antitrust*, 1 Competition Pol’y Int’l: Antitrust Chron. 22, 25 (2017). [↑](#footnote-ref-95)
96. Sam Lucero, *IoT Platforms: Enabling the Internet of Things*, IHS Tech. 5

(Mar. 2016), https://cdn.ihs.com/www/pdf/enabling-IOT.pdf. [↑](#footnote-ref-96)
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98. *The World’s Most Valuable Resource Is No Longer Oil, but Data*, *supra* note 87. [↑](#footnote-ref-98)
99. *Id.* [↑](#footnote-ref-99)
100. *Id.* [↑](#footnote-ref-100)
101. Edith Ramirez, Chairwoman, *Deconstructing the Antitrust Implications of Big Data*, Keynote Remarks at Annual Conference on International Antitrust Law and Policy Fordham Competition Law Institute (Sept. 22, 2016). [↑](#footnote-ref-101)
102. F.T.C., In the Matter of Reed Elsevier NV, et al., File No. 081-0133 (filed Sept. 16, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080916reedelseviercpcmpt.pdf. [↑](#footnote-ref-102)
103. *Id.* [↑](#footnote-ref-103)
104. *Id.* [↑](#footnote-ref-104)
105. F.T.C., Analysis to Aid Public Comment: In the Matter ofReed Elsevier NV, et al., File No. 081-0133 (filed Sept. 16, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/09/080916reedelseviercpanal.pdf. [↑](#footnote-ref-105)
106. Ramirez, *supra* note 100. [↑](#footnote-ref-106)
107. Olivia LaVecchia & Stacy Mitchell, *Amazon’s Stranglehold: How the Company’s Tightening Grip Is Stifling Competition, Eroding Jobs, and Threatening Communities* 17, Inst. for Local Self-Reliance (Nov. 2016), https://ilsr.org/wp-content/uploads/2016/11/ILSR\_AmazonReport\_final.pdf. [↑](#footnote-ref-107)
108. *Id.* (Amazon Prime is “a program that offers customers unlimited 2-day shipping, and same-day shipping in some cities, along with perks like streaming movies and television shows, for a $99 annual membership fee.”). [↑](#footnote-ref-108)
109. *Id.* [↑](#footnote-ref-109)
110. Nanette Byrnes,*How Amazon Loses on Prime and Still Wins*, MIT Tech. Rev. (July 12, 2016), https://www.technologyreview.com/s/601889/how-amazon-loses-on-prime-and-still-wins/. [↑](#footnote-ref-110)
111. *Id.* [↑](#footnote-ref-111)
112. LaVecchia & Mitchell, *supra* note 106, at 17. [↑](#footnote-ref-112)
113. Jillian D’Onfro, *These New Stats about Amazon Should Make Google very Nervous*, Bus. Insider (Apr. 20, 2015, 3:17 PM), http://www.businessinsider.com/macquarie-amazon-prime-estimates-2015-4. [↑](#footnote-ref-113)
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116. Andrew Liptak, *Amazon Has Begun Labeling Some Items Prime-Exclusive (Updated)*, Gizmodo (April 24, 2016, 8:38 AM), https://gizmodo.com/amazon-has-begun-labeling-some-items-prime-exclusive-1772677640. [↑](#footnote-ref-116)
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118. *Id.* [↑](#footnote-ref-118)
119. *Id.*; *see also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993) (“Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced.”). [↑](#footnote-ref-119)
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121. Brad Stone, *The Secrets of Bezos: How Amazon Became the Everything Store*, Bloomberg (Oct. 10, 2013, 5:57 AM), http://www.bloomberg.com/news/articles/2013-10-10/jeff-bezos-and-the-age-of-amazon-excerpt-from-the-everything-store-by-brad-stone. [↑](#footnote-ref-121)
122. *Id.* [↑](#footnote-ref-122)
123. Will Oremus, *The Time Jeff Bezos Went Thermonuclear on Diapers.com*, Slate (Oct. 10, 2013, 12:37 PM), http://www.slate.com/blogs/future\_tense/2013/10/10/amazon\_book\_how \_jeff\_bezos\_went\_thermonuclear\_on\_diapers\_com.html. [↑](#footnote-ref-123)
124. *Id.* [↑](#footnote-ref-124)
125. *Id.* [↑](#footnote-ref-125)
126. *Id.* [↑](#footnote-ref-126)
127. *Target, Walmart, Amazon Dominate the Online Baby Goods Market*, Bus. Insider (Apr. 22, 2016, 8:30 PM), http://www.businessinsider.com/target-walmart-amazon-dominate-the-online-baby-goods-market-2016-4 (“Including Diapers.com, Amazon currently makes up 43% of all market share for online baby supplies—followed by Walmart with 23% and Target with 18%.”). [↑](#footnote-ref-127)
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130. Spencer Soper, *Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too*, Bloomberg (April 20, 2016, 7:00 AM), https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too. [↑](#footnote-ref-130)
131. *Id.* [↑](#footnote-ref-131)
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133. Lina Khan, Note, *Amazon’s Antitrust Paradox*, 126 Yale L. J. 710, 780 (2017). [↑](#footnote-ref-133)
134. *See*Angus Loten & Adam Janofsky, *Sellers Need Amazon, but at What Cost?*, Wall Street J. (Jan. 14, 2015, 6:30 PM), https://www.wsj.com/articles/sellers-need-amazon-but-at-what-cost-1421278220. [↑](#footnote-ref-134)
135. *Id.* [↑](#footnote-ref-135)
136. *Percentage of Paid Units Sold by Third-party Sellers on Amazon Platform as of 3rd Quarter 2018*, Statista, https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/ (“This statistic gives information on the third-party seller share of the Amazon platform as of the third quarter of 2018, based on paid units. As of the last reported quarter, 53 percent of paid units were sold by third-party sellers. In 2017, Amazon generated 31.88 billion U.S. dollars in third-party seller service revenues, up from 22.99 billion U.S. dollars in the previous year. Seller-service revenues account for the second-largest revenue segment of the online retail platform, after retail product sales and ahead of Amazon Web Service revenues.”). [↑](#footnote-ref-136)
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138. *See generally* *id.* [↑](#footnote-ref-138)
139. *Id.* [↑](#footnote-ref-139)
140. *Id.* [↑](#footnote-ref-140)
141. Khan, *supra* note , at 782–83. [↑](#footnote-ref-141)
142. *Id,* at 783. [↑](#footnote-ref-142)
143. *Id.*  [↑](#footnote-ref-143)
144. *Id.* [↑](#footnote-ref-144)
145. *Id.* at 772. [↑](#footnote-ref-145)
146. *Id.* at 768, 774, 782. [↑](#footnote-ref-146)
147. *See* Broder, *supra* note , at 93. [↑](#footnote-ref-147)
148. *Id.* at 93 n.41 (“Similar arguments have long been advanced again the Robinson-Patman Act’s prohibition of price-discrimination, *i.e.* the practice of charging different prices to similarly situated customers.”). [↑](#footnote-ref-148)
149. *Id.* at 98*.* [↑](#footnote-ref-149)
150. *Id.* (“Because average total costs, which must include allocations for fixed costs and sales and general and administrative overheads, are so subject to debate in their calculation, and because for short-term costing purposes, the fixed portion of the costs are by definition not transferable to other product lines and therefore cannot be put to other uses, many courts accept proof that the accused monopolist has charged below average variable costs, i.e., average costs not including fixed costs. This compromise has the advantage of allowing for easier measurement than for marginal costs or total costs. At the same time, it does not provide a cost measure so low as to virtually eliminate the possibility of ever proving below cost pricing.”). [↑](#footnote-ref-150)
151. Nick Wingfield & Michael J. de la Merced, *Amazon to Buy Whole Foods for $13.4 Billion*, N.Y. Times (June 16, 2017), https://www.nytimes.com/2017/06/16/business/dealbook/amazon-whole-foods.html. [↑](#footnote-ref-151)
152. *See* Pitofsky, *supra* note . [↑](#footnote-ref-152)
153. Khan, *supra* note , at 786. [↑](#footnote-ref-153)
154. *10-K Annual Report January 2016*, Last10K.com, (Jan. 29, 2016), https://last10k.com/sec-filings/amzn/0001018724-16-000172.htm#link\_fullReport. The industries in which Amazon competes include: (1) online, offline, and multichannel retailers, publishers, vendors, distributors, manufacturers, and producers of the products we offer and sell to consumers and businesses; (2) publishers, producers, and distributors of physical, digital, and interactive media of all types and all distribution channels; (3) web search engines, comparison shopping websites, social networks, web portals, and other online and app-based means of discovering, using, or acquiring goods and services, either directly or in collaboration with other retailers; (4) companies that provide e-commerce services, including website development, advertising, fulfillment, customer service, and payment processing; (5) companies that provide fulfillment and logistics services for themselves or for third parties, whether online or offline; (6) companies that provide information technology services or products, including on-premises or cloud-based infrastructure and other services; and (7) companies that design, manufacture, market, or sell consumer electronics, telecommunication, and electronic devices. *Id.* [↑](#footnote-ref-154)
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156. *Id.* (quoting Greg Portell, head partner at retail consultancy A.T. Kearney). [↑](#footnote-ref-156)
157. Lauren Thomas, *This Chart Shows How Quickly Amazon Is ‘Eating the Retail World’*, CNBC, https://www.cnbc.com/2017/07/07/amazon-is-eating-the-retail-world.html (last updated July 7, 2017, 2:39 PM). [↑](#footnote-ref-157)
158. Wingfield & de la Merced, *supra* note 150. [↑](#footnote-ref-158)
159. *Id.* [↑](#footnote-ref-159)
160. Jon Fingas, *Whole Foods is Already Hawking Amazon Echo Speakers*, Engadget (Aug. 28, 2017), https://www.engadget.com/2017/08/28/amazon-sells-echo-speakers-at-whole-foods/; *see also* Matt Yglesias (@mattyglesias), Twitter (Aug. 28, 2017, 8:12 AM) (“This is the future neoliberals want”). [↑](#footnote-ref-160)
161. *Unit Count Information as of October 31, 2018*, Walmart: Investors, http://stock.walmart.com/investors/financial-information/unit-counts-and-square-footage/default.aspx (last updated July 31, 2017). In the U.S., Walmart operates 3,568 Supercenters, 388 Discount stores, 699 Neighborhood Markets, and twenty “Other” units. [↑](#footnote-ref-161)
162. Charisse Jones, *Walmart Is Doubling Down on Grocery in its Race Against Amazon*, USA Today, https://www.usatoday.com/story/money/2017/10/10/walmart-reiterates-earnings-outlook-announces-20-billion-share-buyback/749162001/ (last updated Oct. 10, 2017, 4:38 PM). [↑](#footnote-ref-162)
163. *Id.* [↑](#footnote-ref-163)
164. *Privacy Policy*, Whole Foods Mkt., https://www.wholefoodsmarket.com/privacy-policy (last visited Oct. 8, 2017). [↑](#footnote-ref-164)
165. *Id.* Personal information or data may also include sensitive information, such as health and family information.  [↑](#footnote-ref-165)
166. *Id.* [↑](#footnote-ref-166)
167. *Id.* [↑](#footnote-ref-167)
168. *Id.* (“Small graphic images called web beacons, also known as “Internet tags” or “clear gifs,” in our web pages and email messages. We may use web beacons . . . to count the number of visitors to our Service, to monitor how users navigate the Service, and to count how many emails that we sent were actually opened or how many particular articles or links were actually viewed.”). [↑](#footnote-ref-168)
169. *Id.* (“[P]rogramming code that is designed to collect information about your interactions with the Service. It is temporarily downloaded onto your computer from our web server or a third party with whom we work, is active only while you are connected to the Service, and is deleted or deactivated thereafter.”). [↑](#footnote-ref-169)
170. *Id.* Includes: “GPS (global positioning systems) software, geo-filtering and other location-aware technologies locate (sometimes precisely) you, or make assumptions about your location, for purposes such as verifying your location and delivering or restricting content based on your location . . . . [Y]our device location may be tracked.” *Id.* [↑](#footnote-ref-170)
171. *Id.* (“Collection and analysis of information from your device, such as, without limitation, your operating system, plug-ins, system fonts, and other data, for purposes of identification and/or tracking.”). [↑](#footnote-ref-171)
172. *Id.* (“Technologies, including application of statistical probability to data sets, as well as linking a common unique identifier to different device use (e.g., Facebook ID), which attempt to recognize or make assumptions about users and devices (e.g., that a user of multiple devices is the same user or household).”). [↑](#footnote-ref-172)
173. *Id.* (“There are a variety of Tracking Technologies that may be included in mobile applications, and these are not browser-based like cookies and cannot be controlled by browser settings. Some use device identifier, or other identifiers such as “Ad IDs” to associate app user activity to a particular app and to track user activity across apps and/or devices.”). [↑](#footnote-ref-173)
174. *Id.*  [↑](#footnote-ref-174)
175. *Id.* [↑](#footnote-ref-175)
176. *Id*. [↑](#footnote-ref-176)
177. *Id.* [↑](#footnote-ref-177)
178. *Amazon and Whole Foods Market Announce Acquisition to Close This Monday, Will Work Together to Make High-Quality, Natural and Organic Food Affordable for Everyone*, Bus. Wire (Aug. 24, 2017, 1:45 PM), https://www.businesswire.com/news/home/20170824006124/en/Amazon-Foods-Market-Announce-Acquisition-Close-Monday (explaining that discounted staples include “Whole Trade bananas, organic avocados, organic large brown eggs, organic responsibly-farmed salmon and tilapia, organic baby kale and baby lettuce, animal-welfare-rated 85% lean ground beef, creamy and crunchy almond butter, organic Gala and Fuji apples, organic rotisserie chicken, 365 Everyday Value organic butter, and much more.”). [↑](#footnote-ref-178)
179. *Id.*  [↑](#footnote-ref-179)
180. *See id.* (indicating brands include “365 Everyday Value, Whole Foods Market, Whole Paws and Whole Catch.”). [↑](#footnote-ref-180)
181. *See id.* (explaining that Amazon Locker is a service where customers “can have products shipped from Amazon.com to their local Whole Foods Market store for pick up or send returns back to Amazon during a trip to the store.”) [↑](#footnote-ref-181)
182. *Id.* [↑](#footnote-ref-182)
183. *See* Donna Rivera, *Whole Foods’ New Customers From Wal-Mart, Kroger, Costco*, Investopedia (Oct. 3, 2017), http://www.investopedia.com/news/whole-foods-new-customers-walmart-kroger-costco/. [↑](#footnote-ref-183)
184. Rakesh Sharma, *Amazon Announces Lower Prices for Whole Foods Products*, Investopedia (Aug. 25, 2017, http://www.investopedia.com/news/amazon-announces-lower-prices-whole-foods-products/. [↑](#footnote-ref-184)
185. *Id.* [↑](#footnote-ref-185)
186. *See generally* Bhattarai, *supra* note . [↑](#footnote-ref-186)
187. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986). [↑](#footnote-ref-187)
188. Khan, *supra* note 132, at 791. [↑](#footnote-ref-188)
189. *See* D. Daniel Sokol, *The Transformation of Vertical Restraints: Per Se Illegality, the Rule of Reason, and Per Se Legality*, 79 Antitrust L. J. 1003, 1014–15 (2014). [↑](#footnote-ref-189)
190. *Supra* Part III.B. [↑](#footnote-ref-190)
191. Nitasha Tiku, *Ready for a Monopoly Fight? Amazon and Whole Foods Isn’t It*, Wired (June 20, 2017, 11:22 AM), https://www.wired.com/story/amazon-whole-foods-monopoly-antitrust/. [↑](#footnote-ref-191)
192. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958). [↑](#footnote-ref-192)
193. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theorem*, 123 Harv. L. Rev. 397, 466–67 (2009). [↑](#footnote-ref-193)
194. 15 U.S.C. §§ 1, 14 (2004). [↑](#footnote-ref-194)
195. *N. Pac. Ry. Co.*, 356 U.S. at 6. [↑](#footnote-ref-195)
196. *Id.* at 6 (quoting Int’l. Salt Co. v. United States, 332 U.S. 392, 396 (1947), *abrogated by* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006)); *cf.* United States v. Paramount Pictures, 334 U.S. 131, 156–59 (1948) (upholding restriction of a tying arrangement in conjunction with a copyright); United States v. Griffith, 334 U.S. 100 (1948), *disapproved of by* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (holding that wholly owned subsidiaries are not legally capable of conspiring with each other). [↑](#footnote-ref-196)
197. Defined as: “to force a purchaser to do something that he would not do in a competitive market.” Jefferson Par. Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984), *abrogated by* *Ill. Tool Works Inc.*, 547 U.S. 28. [↑](#footnote-ref-197)
198. Rule of reason is “an inquiry into market power and market structure designed to assess the combination’s actual effect,” but “it is not necessary to prove that concerted activity threatens monopolization.” *Copperweld Corp*., 467 U.S. at 768. [↑](#footnote-ref-198)
199. *See* *Number of Amazon Prime Members*, *supra* note . [↑](#footnote-ref-199)
200. *See generally* *Ill. Tool Works Inc.*, 547 U.S. 28. [↑](#footnote-ref-200)
201. See discussion *infra* Part V.A. [↑](#footnote-ref-201)
202. Khan, *supra* note 132, at 779. [↑](#footnote-ref-202)
203. Alex Shephard, *How Amazon Is Changing the Whole Concept of Monopoly*, New Republic (June 19, 2017), https://newrepublic.com/article/143376/amazon-changing-whole-concept-monopoly (quoting Barry Lynn, director of the New America Foundation’s Open Markets program). [↑](#footnote-ref-203)
204. Trump, *supra* note . As mentioned in the Introduction, President Trump has previously indicated a willingness to go after Bezos and Amazon but has yet to take any action against them. [↑](#footnote-ref-204)
205. Shephard, *supra* note 202. [↑](#footnote-ref-205)
206. Matt Stoller, *America’s Amazon Problem*, Huffington Post (June 16, 2017, 6:19 PM), https://www.huffingtonpost.com/entry/americas-amazon-problem\_us\_59443b5be4b06bb7d2731cba. [↑](#footnote-ref-206)
207. *The World’s Most Valuable Resource Is no Longer Oil, but Data*, *supra* note 87. [↑](#footnote-ref-207)
208. Nitasha Tiku, *Digital Privacy Is Making Antitrust Exciting Again*, Wired (June 4, 2017, 8:15 PM), https://www.wired.com/2017/06/ntitrust-watchdogs-eye-big-techs-monopoly-data/. [↑](#footnote-ref-208)
209. *The World’s Most Valuable Resource Is no Longer Oil, but Data*, *supra* note 87. [↑](#footnote-ref-209)
210. Franklin Foer *Amazon Must Be Stopped*, New Republic (Oct. 9, 2014), https://newrepublic.com/article/119769/amazons-monopoly-must-be-broken-radical-plan-tech-giant. [↑](#footnote-ref-210)
211. *Id.* [↑](#footnote-ref-211)
212. Farhad Manjoo, *Can Washington Stop Big Tech Companies? Don’t Bet on It*, N.Y. Times (Oct. 25, 2017), https://www.nytimes.com/2017/10/25/technology/regulating-tech-companies.html?emc=edit\_dk\_20171026&nl=dealbook&nlid=76648778&te=1. [↑](#footnote-ref-212)
213. *See* Cecilia Kang, *Internet Giants Face New Political Resistance in Washington*, N.Y. Times (Sept. 20, 2017),

https://www.nytimes.com/2017/09/20/technology/internet-giants-face-new-political-resistance-in-washington.html; *cf.* LaVecchia & Mitchell, *supra* note 106 (explaining that Amazon’s contention is vigorously disputed by the Institute of Local Self-Reliance: “[Amazon] had displaced enough sales at brick-and-mortar stores to force the elimination of about 295,000 retail jobs. We then counted all of the full-time, part-time, and temporary employees on Amazon’s payroll at the end of December, and found that Amazon had created only 146,000 jobs in the U.S. In other words, Amazon’s expansion has resulted in a net loss of about 149,000 American jobs. Our figure is conservative: Amazon’s employment is higher in December than at other times in the year, and we counted all of the company’s jobs, including those in Amazon Web Services and other divisions that are not involved in retailing goods” (citation omitted)). [↑](#footnote-ref-213)
214. Jeff Bezos (@JeffBezos), Twitter (June 15, 2017, 2:22 PM), https://twitter.com/JeffBezos/status/875418348598603776. [↑](#footnote-ref-214)
215. Asher Schechter, *Richard Posner: “The Real Corruption Is the Ownership of Congress by the Rich”*, ProMarket (Mar. 28, 2017), https://promarket.org/richard-posner-real-corruption-ownership-congress-rich/. [↑](#footnote-ref-215)
216. *Id.* Posner described how he had “a lot of interesting antitrust cases” during the first three years of his judicial tenure beginning in 1981, until they gradually trickled away, *id.* [↑](#footnote-ref-216)
217. *Id.* [↑](#footnote-ref-217)
218. *Id.* [↑](#footnote-ref-218)
219. *Id.* [↑](#footnote-ref-219)
220. *See* *generally* Rankin, *supra* note 136. [↑](#footnote-ref-220)
221. Foer, *supra* note 209. [↑](#footnote-ref-221)
222. *Id.* (quoting from Tim Wu, The Master Switch (2010)). [↑](#footnote-ref-222)