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I. INTRODUCTION

As the economy declined during the COVID-19 pandemic and many businesses foundered, big technology companies experienced unprecedented growth and influence.[1] Despite a crashing economy, "[t]he stocks of Apple, Amazon, Alphabet, Microsoft[,] and Facebook, the five largest publicly traded companies in America, rose [thirty-seven] percent in the first seven months [of 2020]."[2] Those companies comprise around "[twenty] percent of the stock market's total worth."[3] This level of participation in the stock market is unprecedented given that no industry has seen such success in seventy years or more.[4] Explosive growth and market participation begs the question: are these big technology companies attaining such enormous milestones through monopolistic practices?[5]

Critics argue big technology companies are finding this level of success in-part due to anticompetitive practices.[6] In her renowned article on the paradoxical intersection of Amazon and antitrust law, antitrust advocate Lina M. Khan argued that Amazon has managed to dodge antitrust inquiry by keeping prices low to benefit consumers while simultaneously undercutting

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[1] Peter Eavis & Steve Lohr, *Big Tech's Domination of Business Reaches New Heights*, N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Anticompetitive Practices*, FED. TRADE COMMISSION, https://www.ftc.gov/enforcement/anticompetitive-practices (last visited Mar. 31, 2022). Anticompetitive practices are those likely to lead to a reduction in competition, higher prices, and less innovation and "include activities like price fixing, group boycotts, and exclusionary exclusive dealing contracts or trade association rules . . . ." *Id.*

[6] Eavis & Lohr, *supra* note 1. In 1929, A&P and Sears were responsible for three percent of retail sales, which gave rise to antitrust laws in 1936 after Congress became concerned about their level of growth. Currently, experts believe "Walmart and Amazon jointly account for [fifteen percent] of retail sales." *Id.*

smaller businesses, dominating the online retail market, and spreading its influence into a wide range of fields—from credit lending to book publishing.[7] Khan asserts that Amazon's avoidance of antitrust inquiry stems from a systemic problem within antitrust law as a whole—namely, the principle that antitrust seeks primarily to prevent companies from becoming the sole source for a product or service, which would raise prices, and harm consumers.[8] Focusing on only price and consumer welfare to analyze Amazon's dominance "blinds us to the potential hazards" because big tech companies are uniquely situated to keep prices low and benefit consumers while simultaneously domineering marketplaces.[9] Amazon has been, and will continue, amassing structural influence which increasingly allows it to assert control over portions of the economy, but the company will likely continue evading antitrust inquiry by exploiting the consumer welfare standard—a hack to the antitrust system.[10] Though some find these claims radical, Khan is not alone in demanding change for antitrust laws.[11] In fact, her assertions bred so much discussion that mainstream media brought the debate to the general public, and the Federal Trade

[7] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017). In addition to its prominence in retail, Amazon has become "a marketing platform, a delivery and logistics network, a payment service, a credit lender, an auction house, a major book publisher, a producer of television and films, a fashion designer, a hardware manufacturer, and a leading provider of cloud server space and computing power." *Id.* at 713.

[8] *Id.* The FTC seeks to prevent "unfair business practices" that are likely to reduce competition, quality, or innovation and raise prices. *Anticompetitive Practices*, *supra* note 5.

[9] Khan, *supra* note 7, at 717. Khan asserts that Amazon's increasing dominance coincides with needed changes in antitrust laws. *Id.* "Due to a change in legal thinking and practice in the 1970s and 1980s, antitrust law now assesses competition largely with an eye to the short-term interests of consumers . . . antitrust doctrine views low consumer prices, alone, to be evidence of sound competition." *Id.* at 716.

[10] *Id.*; *see also* David Streitfeld, *Amazon's Antitrust Antagonist has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html.

[11] Streitfeld, *supra* note 10.

Commission (FTC) hired Khan as a temporary adviser to assist in policy reformation discussions.[12] Khan's viewpoint, and the viewpoint of those who agree with her, is called "hipster antitrust" by antitrust practitioners and researchers.[13]

Despite hipster antitrust's growing popularity, many voices in the legal community counter that Amazon does not create an antitrust issue and should not be a concern.[14] Timothy J. Murtis and Jonathan E. Nuechterlein compared Amazon to the A&P grocery store chain, which the FTC targeted for antitrust inquiry in the 1900s and slowly eliminated from the marketplace.[15] "More than 80 years ago, the A&P grocery chain was a vertically integrated retailer that made use of unprecedented scale and innovation to offer consumers a wider range of products than the competition and at lower prices."[16] A&P's great success harmed smaller competitors that were less efficient and therefore could not keep their prices as low, triggered antitrust inquiry, and eventually resulted in a "successful prosecution under the Sherman Act," which pushed A&P into irrelevance.[17] Murtis and Nuechterlein compare the attacks on A&P to the attacks today

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[12] *Id.*

[13] Kevin Yeh, *Hipster Antitrust: A Brief Primer,* A.B.A., https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/antitrust/hipster-antitrust-brief-primer/ (last visited Mar. 31, 2022).

[14] Ashlyn Myers, *Amazon Doesn't Have an Antitrust Problem: An Antitrust Analysis of Amazon's Business Practices,* 41 HOUS. J. INT'L L. 387 (2019); *see also* John Ceccio & Christopher Mufarrige, *Digital Platform Competition, Merger Control, and the Incentive to Innovate: Don't Kill the Goose that Lays the Golden Egg,* 30 COMPETITION: J. ANTITRUST UNFAIR COMPETITION L. SEC. CAL. L. ASSOC. 52 (2020).

[15] Timothy J. Murtis & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of United States v. A&P,* ANTONIN SCALIA L. SCH. J. OF L., ECON., & POLITICS (June 11, 2018), https://ssrn.com/abstract=3186569.

[16] *Id.*

[17] *Id.*

against big technology companies like Amazon.[18] The writers also assert that not only is Amazon not anti-competitive—it is actually a pro-competitive business.[19] The article concluded "antitrust doctrine does not need an overhaul. It is shaped by many economic perspectives, follows no one 'School,' and is flexible enough to address any monopoly abuses in today's economy."[20] This mindset is popular, making the tension between traditional antitrust and hipster antitrust theory increasingly contentious.

The crux of the debate rests on whether traditional antitrust laws are sufficient to cope with big technology companies. Traditional antitrust theorists assert that they are sufficient.[21] Hipster antitrust theorists distinguish companies like Amazon from trusts, which have previously been regulated by antitrust laws, arguing that because of these differences current laws cannot adequately regulate modern big tech companies.[22] This article concludes that big tech companies are distinguishable from the firms antitrust laws were designed to mitigate because their business models allow them to attain monopoly status, domineer marketplaces, and undercut competitors while simultaneously catering to consumer welfare. This is possible in part because, unlike firms like A&P and Microsoft (during the 1990s), modern day technology companies can make

[18] *Id.* Beginning with A&P, expanding to "big box" stores, and now to online retailers like Amazon, retailers over the past several decades have lowered prices and increased convenience, challenging "traditional retail models." *Id.*

[19] *Id.* "Procompetitive" businesses occur when a firm provides a competitive force to drive other firms into collaboration with more businesses to create a thriving marketplace. *Dealings with Competitors,* FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors (last visited Mar. 31, 2022).

[20] Murtis & Nuechterlein, *supra* note 15. The writers added that current antitrust laws are "well-calibrated" to serve its central goal, promoting consumer welfare. *Id.* While the writers concede that antitrust is still a work in progress, they maintained, "it is far superior to any alternative the critics propose." *Id.*

[21] *Id.*

[22] Khan, *supra* note 7.

income from other sources than consumers.[23] Alternative sources of income include selling user data to third parties[24] and advertising on web and app-based platforms.[25] In other words, the consumers themselves are the money-makers, so it is entirely feasible to keep costs to consumers low while still achieving a monopoly undercutting smaller businesses.[26] Firms from the late 1800s and early 1900s did not have access to these methods.

This article will focus on two of the multiple companies that became targets of antitrust inquiry in 2020: Oracle and Amazon. This article will analyze each company under three potential frameworks for antitrust inquiry—traditional antitrust theory, hipster antitrust theory, and a proposed alternative solution—to assess whether they would violate antitrust laws through the lens of each proposal.

This article agrees with Khan that the focus on consumer welfare as the bar for improper conduct since the 1970s is inherently flawed in today's online marketplace, and the FTC should focus more on predatory pricing; however, Khan's extreme proposal of a change from traditional antitrust theory is likely not warranted. [27] Rather, this article suggests an adaptation of today's laws to focus not only on consumer welfare but also on the welfare of small businesses within the marketplace in addition to consumer welfare. The United States has always been a champion of small businesses, and taking action to prevent big tech companies from squashing out "mom

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[23] *See* Khan, *supra* note 7.

[24] William Poundstone, *How Do Tech Companies Make Money from Our Personal Data?* FORBES (June 27, 2019, 11:20 AM), https://www.forbes.com/sites/quora/2019/06/27/how-do-tech-companies-make-money-from-our-personal-data/.

[25] *How the Big Five Tech Companies Make Money, Visualized*, DIGG (June 10, 2019, 9:15 AM) https://digg.com/2019/tech-companies-main-revenue-stream-data-visualization.

[26] *See* Khan, *supra* note 7 (analyzing Amazon).

[27] *Id.*

and pop" establishments like local bookstores and restaurants will serve to further the American ideal of a free marketplace where any business can succeed. This shift will encourage the FTC to consider how the monopolistic actions of these massive companies impact the small businesses forced to work with and through them. This article also suggests developing a greater focus on predatory pricing and, rather than only occasionally examining such issues, lowering the bar so the FTC can preemptively examine pricing tactics that may result in harm to consumers.[28] If the FTC simultaneously considered consumer welfare and the welfare of small businesses while adjusting the definition of and preemptively reviewing predatory pricing tactics, big tech companies like Amazon and Oracle could continue to assert their influence and be competitive in the marketplace while still allowing potential competitors to thrive.

II. HISTORICAL BACKGROUND OF ANTITRUST LAW

In the 1800s, there were several huge businesses called "trusts" which asserted control over entire sections of the economy, including steel, railroads, oil, and sugar.[29] "Two of the most famous trusts were U.S. Steel and Standard Oil; they were monopolies that controlled the supply of their product—as well as the price."[30] Because single companies were puppeteering entire industries, there was no competition, and consumers thereby had no choice whom to buy from.[31] Increased prices and low quality "caused hardship and threatened the new American

[28] *See Anticompetitive Practices*, *supra* note 5 (explaining anticompetitive practices).

[29] *FTC Fact Sheet: Antitrust Laws: A Brief History*, FED. TRADE COMM'N, https://www.consumer.ftc.gov/sites/default/files/games/off-site/youarehere/pages/pdf/FTC-Competition_Antitrust-Laws.pdf (last visited Mar. 31, 2022).

[30] *Id.*

[31] *Id.*

prosperity."[32] President Theodore Roosevelt created what later became antitrust laws and broke up many trusts, promoting competition and protecting consumers in the marketplace.[33]

Congress passed several laws to outlaw unfair competition, including The Sherman Act, The Clayton Act, and the Federal Trade Commission Act.[34] Congress passed the Sherman Act in 1890 and declared it illegal for competitors to come to agreements with each other—placing limits on competition.[35] The Clayton Act, which Congress passed in 1914, supplemented the Sherman Act by preventing companies from merging to control production and pricing within their industries—as some companies were doing as a way to form a trust without actually forming a trust.[36] Congress passed the Federal Trade Commission Act in 1914 to create the Federal Trade Commission and tasked the agency with watching for unfair business practices; Congress also gave the agency authority to investigate companies and enforce antitrust laws to stop deceptive practices and unfair competition.[37]

The "Golden Era" of antitrust took place from the 1940s until the late 1970s.[38] After Congress passed the Clayton and Federal Trade Commission Acts, 1900 until 1920 ushered in

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* The Sherman Act outlawed price-fixing and made it illegal for businesses to maintain monopoly status through cheating or unfair competition. *Id.*

[36] *Id.* Such mergers and acquisitions may stifle competition. *Id.*

[37] *Id.*

[38] Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

antitrust action to prevent trusts and monopolies from forming.[39] Then, through the 1920s and 30s, antitrust action diminished as the New Deal and a focus on industry-government cooperation yielded a deemphasis on antitrust enforcement.[40] The lull did not last long. From the 1940s through the late 1970s, the FTC saw competition as an "antidote to fascism, and antitrust as the enabler of that competition."[41] Thus, during the "Golden Age" of antitrust, "antitrust policy was a central condition necessary for effective competition."[42] Applying the laws enacted only a few decades before, the Department of Justice civilly and criminally prosecuted monopolistic abuses and unfair business practices.[43] Europe and Japan adopted this approach after World War Two.[44]

The late 1970s arrived and brought with it the Chicago School of Economics and its belief in self-correcting markets—causing antitrust enforcement to wane.[45] "The government rarely challenged mergers among competitors. Challenges of vertical mergers were even rarer, with the last one litigated in 1979."[46] The gap between antitrust enforcement and public concern

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[39] *Id.*

[40] *Id.*

[41] *Id.* With fascism spreading throughout Europe, the Middle East, and much of Asia and Africa, the United States perceived the "competition ideal" as under attack. *Id.* The competition ideal expressed the belief that dispersal of economic power to the many rather than the hands of a few would foster more opportunities to compete and improve. *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.* "By the Obama administration, we had neither a popular antitrust *movement* nor many significant antitrust prosecutions." *Id.*

broadened as antitrust law became increasingly complicated, the FTC abandoned their original noneconomic goals in favor of a "consumer welfare" standard.[47] Antitrust concerns faded due to the widespread belief that "there was no need for robust antitrust enforcement to *create* or *maintain* the *conditions* necessary to make competition effective" because market forces would naturally resolve issues of market power.[48]

Recently, a group of young scholars investigating whether there have been actual benefits from allowing antitrust regulation-free competition have spurred on "an emerging progressive, anti-monopoly" belief system.[49] These scholars warn that meager competition is not benefitting consumers, arguing that the current competition laws are beneficial to few at the expense of the majority.[50] This new school's primary focus is on innovation, investment, and avoidance of chilling competition—the question is the degree to which the FTC should promote enforcement.[51]

III. ANTITRUST: TRADITIONAL ANTITRUST THEORY, HIPSTER ANTITRUST THEORY, AND A PROPOSED SOLUTION

a. TRADITIONAL ANTITRUST THEORY

The Federal Trade Commission (FTC) is the administrative agency dedicated to antitrust regulation and enforcement.[52] The agency specifically regulates anticompetitive practices such as

[47] *Id.*

[48] *Id.* And, supposedly, far better than government intervention.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Anticompetitive Practices*, *supra* note 5. "The FTC takes action to stop and prevent unfair business practices that are likely to reduce competition and lead to higher prices, reduced quality or levels of service, or less innovation." *Id.*

group boycotts, price fixing, and "exclusionary exclusive dealing contracts or trade association rules."[53] There are two types of unfair competition according to the FTC: "Horizontal Conduct," which refers to agreements between competitors in a way that limits competition, and "single firm conduct," which refers to monopolization by excluding competitors and blocking potential competitors from entering the marketplace.[54] This article is concerned primarily with single firm conduct.

Section two of the Sherman Act prohibits companies from monopolizing or attempting to monopolize commerce or trade.[55] "As that law has been interpreted, it is not illegal for a company to have a monopoly, to charge 'high prices,' or to try to achieve a monopoly position by what might be viewed by some as particularly aggressive methods."[56] Rather, firms only violate the law if they employ unreasonable methods in maintaining or acquiring a monopoly; or to achieve such a position through particularly aggressive measures.[57]

When evaluating a monopoly, the FTC begins with a two-step inquiry: first, it asks whether the firm has "monopoly power" in a marketplace, which "requires [an] in-depth study of the products sold by the leading firm," as well as alternative sources of products, which

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[53] *Id.*

[54] *Id.*

[55] *Single Firm Conduct*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct (last visited Mar. 31, 2022).

[56] *Id.*

[57] *Id.* "A key factor in determining what is unreasonable is whether the practice has a legitimate business justification." *Id.*

consumers would use if the dominant company raised prices; second, it investigates whether a company used improper conduct to attain a leading position.[58]

To assess whether a company qualifies as a monopoly, courts apply the rules for single firm conduct and, even if a company has not become a literal monopoly, the FTC may regulate the firm as long as the firm has "significant and durable market power," or "the long term ability to raise price or exclude competitors."[59] Often, courts will not find monopoly power unless more than fifty percent of product or service sales in a single geographic area are made by the firm or "group of firms acting in concert."[60] Further, this monopolizing position "must be sustainable over time" such that no new firms could enter and "discipline the conduct of the leading firm."[61]

Regulators must then evaluate whether the firm used improper conduct to attain its level of success.[62] Improper conduct refers to conduct other than producing a superior product, operating with better management, or participating in a "historic accident."[63] Evaluating monopolistic conduct requires an in-depth analysis of both the marketplace and the method engaged to achieve and maintain a monopoly.[64] "Obtaining a monopoly by superior products, innovation, or business acumen is legal; however, the same result achieved by exclusionary or

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[58] *Monopolization Defined*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined (last visited Mar. 31, 2022).

[59] *Id.* "Monopolists" are firms who hold "significant and durable market power." *Id.*

[60] *Id.* Some courts have required even higher percentages. Further, the position of power must be sustainable such that if new, competitive firms could enter the market and control the leading firm the courts would not find the firm to be a monopoly. *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

predatory acts may raise antitrust concerns."[65] Such tactics may involve tying, predatory pricing, exclusive supply or purchase agreements, and refusal to deal.[66] A monopolist may prevent other businesses from succeeding in the marketplace through legitimate business actions; examples include presenting unique products and services in a way that benefits consumers or promoting greater efficiency.[67] Courts must ultimately determine whether the monopolist's success is the result of anticompetitive practices as opposed to the natural growth and development which comes from "a superior product, business acumen, or historic accident."[68]

As an example of unfair business practices, the FTC cited a 1999 case in which "Microsoft was found to have a monopoly over operating systems software for IBM-compatible personal computers."[69] Through their dominant industry position, Microsoft was actively excluding other computer manufacturers from "installing [any] non-Microsoft browser software" on Microsoft's operating system software.[70] In this case, the court found that Microsoft prevented "rivals from using the lowest-cost means of taking market share away from Microsoft."[71] In order to settle the case, Microsoft committed to end "certain conduct that was preventing the development of competing browser software."[72]

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[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* Microsoft deliberately included Internet Explorer (Microsoft's browser system) on every Windows operating system sold to computer makers and made it difficult to use any non-Microsoft browsers. *Id.* The company also discouraged development of add-on software for non-Microsoft browsers. *Id.*

[71] *Id.*

[72] *Id.*

What if a company formed a monopoly and did so through unfair business practices, yet kept prices low? Is it possible for prices to be too low? "The short answer is yes, but not very often. Generally, low prices benefit consumers. Consumers are harmed only if below-cost 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."[73] A company's decision to keep prices at a level below its expenses does not harm competition, but rather may be an example of a thriving and vigorous marketplace.[74] Although the FTC reviews predatory price claims carefully, courts are generally very skeptical.[75] Some experts fear Amazon is engaging in pre-predatory pricing behaviors by keeping prices low for consumers in order to knock competitors out of the marketplace.[76] The company has maintained low costs and hemorrhaged money for many years and, as a result, has grown expansively; and they have not yet raised their prices for consumers.[77] However, critics fear the company will eventually use its influence to raise prices once competitors are out of the picture.[78]

One of the most unsettled concepts in antitrust law involves the duty of firms to deal with competitors: refusal to deal may be considered an unfair business practice, but firms generally do

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[73] *Predatory or Below-Cost Pricing*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost (last visited Mar. 31, 2022).

[74] *Id.* "Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare," *Id.*

[75] *Id.*

[76] *See generally* Khan, *supra* note 7.

[77] *Id.*

[78] *Id.*

not have any duty to deal with their competitors.[79] Nonetheless, courts have found that there is sometimes an antitrust violation when a firm with substantial market power declines to do business or negotiate with a competitor.[80] This area of the law is continuing to develop.[81]

Under traditional antitrust theory, it is unlikely either Amazon or Oracle would be considered monopolies engaging in improper business practices.

b. HIPSTER ANTITRUST THEORY

In early 2017, Lina M. Khan published *Amazon's Antitrust Paradox* in the Yale Law Journal, and her article began an insurgence against the recognized consensus within antitrust circles that had existed since the 1970s.[82] This article kickstarted the "hipster antitrust" movement, which advocates that the current system of measuring competition, which does so through companies' price and output, causes incomprehensible harm to America's competitive marketplace.[83] Hipster antitrust doctrine argues for a greater appreciation of predatory pricing risks and a better understanding of "how integration across distinct business lines may prove anticompetitive."[84] According to Khan, online platforms are of particular concern because (1) "the economics of platform markets create incentives for a company to pursue growth over

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[79] *Refusal to Deal*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/refusal-deal (last visited Mar. 31, 2022).

[80] *Id.* For example, "if the monopolist refuses to sell a product or service to a competitor that it makes available to others, or if the monopolist has done business with the competitor and then stops, the monopolist needs a legitimate business reason for its policies." *Id.*

[81] *Id.*

[82] *See* Streitfeld, *supra* note 10. Notably, the 1970s marked the shift in antitrust regulation to focus on consumer welfare (i.e. price). *Id.* According to Khan, this theory has allowed Amazon to evade federal intervention because it is famous for its cut-rate pricing system. *Id.*

[83] Khan, *supra* note 7.

[84] *Id.* at 710.

profits," and (2) online platforms integrate between businesses through serving as critical intermediaries, which allows them to create and control a central infrastructure which rivals depend on.[85]

Khan and other hipster antitrust theorists suggest two potential alternative antitrust regimes to the current theories: (1) return to traditional antitrust principles from prior to the 1970s to prevent the emergence of dominance, limit the scope of such dominance, or both, or (2) adopt regulations neutering a firm's ability to exploit its superior position, which some firms do by taking advantage of economies of scale through "applying common carrier obligations and duties."[86] According to Khan, the "key is deciding whether we want to govern online platform markets through competition, or want to accept that they are inherently monopolistic or oligopolistic and regulate them instead."[87]

Under the first suggestion, Khan argues for revising FTC predatory pricing regulations to be more "robust" and to more strongly monitor and police the types of vertical integration firms could employ to anticompetitive ends.[88] Although predatory pricing is still illegal, "courts now require proof that the alleged predator would be able to raise prices and recoup its losses[,]" making it exceedingly difficult to succeed on predatory pricing claims.[89] Platform markets like Amazon currently allow investors to back firms such that the firms can hemorrhage money for

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[85] *Id.*

[86] *Id.* at 717.

[87] *Id.* at 790.

[88] *Id.* "Importantly, each of these doctrinal areas should be reformulated so that it is sensitive to preserving the competitive process and limiting conflicts of interest that may incentivize anticompetitive conduct." *Id.* at 791.

[89] *Id.*

years without failing; as a result, predatory pricing does not become a problem until well after the monopoly has been established.[90] First, the predatory pricing doctrine must abandon the recoupment requirement[91] in cases involving platform markets.[92] Second, the FTC must introduce a competition based approach to create a "presumption of predation for dominant platforms found to be pricing products below cost."[93] To address the issue of vertical integration giving rise to anticompetitive conflicts of interest, Khan suggests scrutinizing mergers to prevent firms from acquiring "valuable data and cross-leverag[ing] it"[94] or, alternatively, "introducing a prophylactic ban on mergers that would give rise to conflicts of interest."[95]

Under the second suggestion, Khan recommends regulating the dominant platforms as monopolies by limiting how the monopoly may use its power in exchange for accepting the benefits of being a monopoly, as is often the model for public utility regulations and common

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[90] *Id.*

[91] *Id.* at 729–30. Recoupment has been at the center of predatory pricing requirements since *Brooke Group v. Brown & Williamson Tobacco Corp.* was decided by the Supreme Court in 1993. *Id.* at 729. "Today, succeeding on a predatory pricing claim requires a plaintiff to meet the *Brooke Group* recoupment test by showing that the defendant would be able to recoup its losses through sustaining supercompetitive prices." *Id.*

[92] *Id.*

[93] *Id.* at 791. "Introducing a presumption of predation would involve identifying when a price is below cost, a subject of much debate." *Id.* Khan did not take a position on the correct metric for identifying below-cost pricing. *Id.*

[94] *Id.* at 792. "Under this regime, Facebook's purchases of WhatsApp and Instagram, for instance, would have received greater scrutiny from the antitrust agencies, in recognition of how acquiring data can deeply implicate competition." *Id.* at 792–93.

[95] *Id.* at 792. Prophylactic limits on the vertical integration of platform markets would be a stricter approach, preventing businesses from direct competition with those businesses dependent on the market platform. *Id.* at 793. "In the case of Amazon, for example, this prophylactic approach would prohibit the company from running *both* a dominant retail platform and a dominant platform for third-party sellers." *Id.* at 793–94.

carrier duties.[96] As Amazon serves as a form of "essential infrastructure across the internet economy," the elements of public utility regulations could be applied: "(1) requiring nondiscrimination in price and service, (2) setting limits on rate-setting, and (3) imposing capitalization and investment requirements."[97]

To narrow down which solution would be best, Khan suggested determining whether the goal was to promote competition through governance of online platform markets, or "accept that they are inherently monopolistic" and take a regulatory approach instead.[98] Khan ultimately suggests that if "we accept dominant online platforms as natural monopolies or oligopolies, then applying elements of a public utility regime or essential facilities obligations would maintain the benefits of scale while limiting the ability of dominant platforms to abuse the power that comes with it."[99]

Khan is not alone in advocating for "hipster antitrust" and favoring placing stronger regulations on big technology companies like Amazon.[100] The FTC itself is actively considering

[96] *Id.* at 797. Industries which historically are regulated as utilities include commodities like water and electric power, transportation (e.g. railroads), and communications (e.g. telephones). *Id.*

[97] *Id.* at 798. Khan added that nondiscrimination would make the most sense to implement, while the others would be both difficult and not directly address the deficiency. *Id.*

[98] *Id.* at 790. Taking the former approach would call for reforming current antitrust laws to limit the scope of market dominance, while taking the latter approach would require diminishing these large business's ability to exploit their dominance while still taking advantage of their benefits. *Id.*

[99] *Id.* at 803. "In order to capture these anticompetitive concerns, we should replace the consumer welfare framework with an approach oriented around preserving a competitive process and market structure." *Id.*

[100] Streitfield, *supra* note 9. After publishing her article, Khan "abruptly went from an outsider proposing reform to an insider formulating policy. Rohit Chopra, a new Democratic commissioner at the FTC, pulled her in as a temporary adviser in July [of 2018], at a time when urgent questions about privacy, data, competition and antitrust were suddenly in the air." *Id.*

whether to tighten or further enforce antitrust regulations[101] against these companies, and even the House Judiciary Committee Antitrust Subcommittee became involved in antitrust regulation in 2020.[102] In February 2020, the FTC "ordered Amazon, Apple, Facebook, Alphabet and Microsoft to turn over a decade's worth of information on small acquisitions."[103] By requesting the information on hundreds of small deals these companies made over the last ten years, the FTC hopes it will discover any previously unreported antitrust abuses, given that these big tech companies have successfully acquired dozens of small tech companies worth less than one hundred million dollars over the years.[104] Particularly, this tactic examines whether these acquisitions qualify as "killer acquisitions" utilized to choke off competition; "[u]nder that strategy, the large tech companies buy a nascent competitor to protect their dominance and prevent the smaller company from growing into a bigger threat."[105] On October 20, 2020, the Department of Justice filed a lawsuit against Google for illegally maintaining a monopoly over both online searching and search advertising by "throttling competition through exclusive business contracts and agreements."[106]

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[101] Cecilia Kang & David McCabe, *F.T.C. Broadens Review of Tech Giants, Homing In on Their Deals,* N.Y. TIMES (Sept. 19, 2020), https://www.nytimes.com/2020/02/11/technology/ftc-tech-giants-acquisitions.html.

[102] Cecilia Kang & David McCabe, *Lawmakers, United in Their Ire, Lash Out at Big Tech's Leaders*, N.Y. TIMES (July 31, 2020), https://www.nytimes.com/2020/07/29/technology/big-tech-hearing-apple-amazon-facebook-google.html. "The chiefs of Amazon, Apple, Google[,] and Facebook faced withering questions from Democrats about anti-competitive practices and from Republicans about anti-conservative bias" in July at hearings focused on evaluating these companies' market dominance and tactics in achieving such astounding success. *Id.*

[103] Kang, *supra* note 101.

[104] *Id.*

[105] *Id.*

[106] Cecilia Kang, David McCabe, & Daisuke Wakabayashi, *U.S. Accuses Google of Illegally Protecting Monopoly*, N.Y. TIMES (Oct. 20, 2020, 6:46 PM), https://www.nytimes.com/2020/10/20/technology/google-antitrust.html. This lawsuit is the government's

Under the hipster antitrust framework, Amazon would be considered a monopoly employing improper business practices,[107] but likely not Oracle.[108]

c. A PROPOSED SOLUTION

My proposed solution has two components. First, I agree with Khan that the focus on consumer welfare, which has been the bar for improper conduct since the 1970s, is inherently flawed in today's online marketplace and we should place more focus on predatory pricing; however, we should perhaps not make as extreme a change from traditional antitrust theory as Khan proposes.[109] Rather, I suggest that today's laws adapt to focus on consumer and small business welfare within the marketplace.[110] This shift in perspective will consider how these companies' monopolistic actions impact the small businesses who are forced to work with and through them. Second, I suggest focusing more on, and lowering the bar for, predatory pricing so the FTC can examine pricing tactics preemptively and address them before they harm the market.[111] By simultaneously considering consumer and small business welfare while adjusting

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most notable challenge to a big technology company's market power in a generation. *Id.* Such a lawsuit may kickstart a "cascade of other antitrust lawsuits from state attorneys general." *Id.*

[107] Khan, *supra* note 7, at 805.

[108] Jordan Novet, *Oracle Is a Distant Laggard in Cloud Infrastructure Market Even After TikTok Deal*, CNBC (Sept. 22, 2020, 7:39 AM), https://www.cnbc.com/2020/09/22/oracle-remains-laggard-in-cloud-infrastructure-even-after-tiktok-deal.html. "Oracle's market share sits at around 2%, based on data from Gartner, Synergy Research Group and Canalys, and ranks no higher than sixth globally." *Id.*

[109] *See Monopolization Defined*, *supra* note 58 (explaining predatory pricing); *see also* Khan, *supra* note 7 (elaborating on Khan's proposed theory).

[110] *See Anti-Dumping: The Basics*, EUR. COMM'N (Feb. 20, 2006), https://ec.europa.eu/commission/presscorner/detail/en/MEMO_06_85. This principle is well-established in European "anti-dumping" principles, which refer to the practice of selling products at less than their normal value to put competitors out of business. *Id.*

[111] *Id.* The European anti-dumping principles allow the government to investigate predatory pricing practices before companies hike their prices, focusing instead on how the low prices impact other businesses. *Id.*

the definition of, and preemptively reviewing, predatory pricing tactics,[112] the FTC would allow big tech companies like Amazon and Oracle to continue to assert their influence and be competitive while also allowing potential competitors to thrive.

The FTC created the consumer welfare bar for antitrust inquiry in the 1970s, to allow large companies to expand as long as their expansion was beneficial to consumers.[113] This standard has become antiquated, however, as the move to online marketplaces has allowed substantial price cutting while simultaneously offering more, higher quality products as increased quantity of excellent products is possible through low cost of business and ease of expansion.[114] By focusing entirely on the present day impact on consumers at the exclusion of other companies (especially small businesses), this standard could allow companies like Amazon, Microsoft, and Google to eliminate competitors and become the only option for consumers.[115] At which point Amazon, Microsoft, and Google could easily raise prices and leave consumers with no option but to pay.[116] Thus, this article advises against a *reactionary* approach that waits for inevitable problems to arise and instead suggests preemptively addressing these anticompetitive practices by focusing on the way those practices currently impact competitors and small businesses.

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[112] The idea that predatory pricing laws should regulate companies keeping prices low to drive out competitors who have not yet raised prices is not novel; in fact, the World Trade Organization passed an act prohibiting predatory dumping (also known as predatory pricing) in 1916. *United States – Anti-Dumping Act of 1916*, WORLD TRADE ORG. (Mar. 31, 2000), https://www.wto.org/english/tratop_e/dispu_e/7542d.pdf. Anti-dumping rules regulating predatory dumping have become increasingly restrictive internationally. *Id.*

[113] *See* Streitfeld, *supra* note 10 (explaining that the 1970s marked the shift in antitrust regulation to focus on consumer welfare).

[114] *See* Khan, *supra* note 7.

[115] *See id.*

[116] *See id.*

Particularly for a company like Amazon, which runs an online marketplace for which it is both the operator and a retailer, it is easy to sell goods for less money while expanding its reach into all corners of the retail space.[117] Amazon has grown to dominate in a wide variety of industries and, as both the marketplace host and a retailer, it has the power to force small businesses to sell on its platform and can then undercut the small businesses on prices for the same products.[118] Although the low prices benefit consumers now, will they in the long run? This article asserts they will not because Amazon will undercut small businesses and make it all but impossible for them to earn a profit. These practices give Amazon far too much industry control, and over time use of such practices has slowly led to the elimination or acquisition of direct competitors.[119]

Similarly, altering the predatory pricing definition and investigatory practices is warranted because the current practices are reactive rather than proactive and are rarely employed.[120] Predatory pricing currently regulates companies which keep prices low to squash competition and then raise prices substantially once competitors have been eliminated.[121] This is rarely reviewed by the FTC or the Department of Justice (DOJ), in part because companies have

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[117] *See id.; see also* Dana Mattioli, *Amazon Accused of Using Monopoly Power as E-Commerce 'Gatekeeper'*, WALL STREET J. (Oct. 7, 2020, 11:22 AM ET), https://www.wsj.com/articles/amazon-accused-of-using-monopoly-power-in-rise-as-e-commerce-gatekeeper-11602084168.

[118] Khan, *supra* note 7.

[119] *See* Khan, *supra* note 7, at 768; *see also* Streitfeld, *supra* note 10; *cf.* Myers, *supra* note 14.

[120] *See Predatory or Below-Cost Pricing*, *supra* note 73 (defining existing predatory pricing laws). "Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare." *Id.*; *see generally* Khan, *supra* note 6 (explaining why predatory pricing doctrine in the United States is reactionary rather than proactive).

[121] *Predatory or Below-Cost Pricing*, *supra* note 73.

to *actually raise prices for the purpose of eliminating competition* in order to be investigated.[122] However, this is a flawed system because once the competitors have been undercut and the prices have been raised the harm has already been done.[123] Rather than waiting for the harm to occur, the investigation into predatory pricing tactics should take place when companies are actively keeping prices low to gain an advantage and eliminate competitors.[124]

The FTC and DOJ should begin an investigation of a company as soon as they detect predatory pricing. Predatory pricing alone would not be enough to justify antitrust enforcement; rather, once the FTC has detected predatory pricing they should conduct a full investigation into the company and its business practices.[125] If the company qualifies as a monopoly, is engaging in predatory pricing, and is creating harm to small businesses, then the FTC should enforce antitrust regulations and the company should be forced to eliminate its anticompetitive practices.[126]

IV. ABOUT ORACLE AND AMAZON

a. AMAZON

Amazon has four core principles: "customer obsession rather than competitor focus, passion for invention, commitment to operational excellence, and long-term thinking."[127]

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[122] *See id.*

[123] *See generally* Khan, *supra* note 7.

[124] *See Anti-Dumping: The Basics*, *supra* note 110.

[125] *Id.* (explaining the World Trade Organization version of predatory pricing). "It is only possible to categorically identify dumping by undertaking a detailed analysis of the conditions in which exports are produced." *Id.*

[126] *See generally Monopolization Defined*, *supra* note 58 (explaining requirements to qualify as a monopoly); *Predatory or Below-Cost Pricing*, *supra* note 73 (defining predatory pricing); *Anti-Dumping: The Basics*, *supra* note 110 (explaining European predatory pricing doctrine).

[127] *Who We Are*, AMAZON, https://www.aboutamazon.com/about-us (last visited Mar. 31, 2022).

Amazon claims to focus on customers and to be a champion of small businesses,[128] but does the tech giant really prioritize customers and small businesses?

Lina M. Khan would say no. Rather than a goal of championing consumers and small businesses, Khan argues Amazon's strategy has allowed the company to avoid antitrust inquiry through "fervently devoting its business strategy and rhetoric to reducing prices for consumers."[129] Some call Khan a radical, but her critiques ring true with a far wider audience.[130] In summer of 2020, the Senate held several hearings to interrogate Amazon, along with several other major tech companies, to see whether Amazon and businesses like it engage in anticompetitive business practices.[131] Though the hearings had little result, they have fueled investigations into the tech companies by administrative agencies, including the Justice Department, the Federal Trade Commission, and the state attorneys general.[132] In early 2020, the FTC independently "ordered Amazon, Apple, Facebook, Alphabet and Microsoft to turn over a decade's worth of information on small acquisitions" to assess whether the companies were

[128] *Id.*

[129] Khan, *supra* note 7, at 716. "It is as if Bezos charted the company's growth by first drawing a map of antitrust laws, and then devising routes to smoothly bypass them." *Id.*

[130] *See* Streitfeld, *supra* note 10.

[131] Kang & McCabe, *supra* note 101. Apple, Amazon, Facebook, and Google responded to questioning from both Democratic and Republican lawmakers over anti-competitive practices in July of 2020. *Id.* The tech companies faced "withering questions" over the "market dominance" they have attained and the tactics they employed to reach their superior positions. *Id.*

[132] *Id.* "When lawmakers asked Mr. Bezos if Amazon had bullied small merchants, he said that it was 'not how we operate the business'—before being confronted by an audio recording of a bookseller begging him directly for relief." *Id.*

engaging in antitrust abuses.[133] When confronted with these criticisms, Amazon says "it welcomes regulatory scrutiny."[134]

From the beginning, Amazon's strategy has touted patience.[135] In an interview with Amazon CEO Jeff Bezos, *Harvard Business Review* reported that Bezos' strategy centers around planting seeds and being willing to wait patiently for the seeds to grow into trees.[136] In 1997, Bezos developed his philosophy against focusing on competition when his staff became fearful of Barnes & Noble squashing Amazon out of existence as a book seller.[137] Bezos told his employees, "Yes, you should wake up every morning terrified with your sheets drenched in sweat, but not because you're afraid of our competitors. Be afraid of our customers, because those are the folks who have the money."[138]

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[133] Kang & McCabe, *supra* note 102. The FTC claims it requested information on acquisitions of dozens of small technology firms throughout the past decade. Law does not require this information to be reported to regulators and may, therefore, provide insight into potential antitrust abuses. *Id.* Specifically, the FTC was looking into "killer acquisitions," which is a strategy used to "choke off competition" through buying nascent competitors in order to prevent them "from growing into a bigger threat." *Id.*

[134] Mattioli, *supra* note 117. In a blog post, Amazon addressed the Congressional report from July's criticism by saying, "All large organizations attract the attention of regulators, and we welcome that scrutiny. But large companies are not dominant by definition, and the presumption that success can only be the result of anti-competitive behavior is simply wrong." *Id.*

[135] Julia Kirby and Thomas A. Stewart, *The Institutional Yes,* HARV. BUS. REV. (Oct. 2007), https://hbr.org/2007/10/the-institutional-yes.

[136] *Id.* Bezos explained that they do not always know when a seed they've planted will turn into an oak, but they know it could turn into something that big. *Id.* They pick the courses of action where they can say, "if we can get this to work, it will be big." *Id.* Bezos claims it takes five to seven years for a planted seed to become beneficial economically for the company, in general. *Id.*

[137] *Id.*

[138] *Id.* Bezos claims that from that time on, Amazon has made decisions for the benefit of customers such as free shipping, Amazon Prime, and constantly lowering prices. *Id.* Critics, analysts, and journalists questioned all of these decisions, and through each instance where it worked, Amazon gained credibility. *Id.*

When Jeff Bezos conceptualized Amazon.com in 1994, he chose the name Amazon "because it began with the first letter of the alphabet and because of its association with the vast South American river."[139] From his research, Bezos concluded the most logical product for online retail was initially books.[140] Amazon, which became available on the World Wide Web in July of 1995, kicked off by offering to the public 24/7 shopping 365 days per year and an unprecedented book selection.[141] By 1998, the company had expanded to offer music, video, and gifts, all available for one-click shopping with lowered prices.[142] Each year thereafter, Amazon expanded its product lines to offer more and more products.[143] In 2002, Amazon created Amazon Web Services to function as server space.[144] By 2005, Amazon had created Amazon Prime to offer unprecedented express shipping for $79 per year.[145] Today, even Amazon's rivals, like Netflix, use Amazon Web Services as cloud server space for their "competing video streaming service."[146]

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[139] Mark Hall, *Amazon.com*, BRITANNICA, https://www.britannica.com/topic/Amazoncom (last visited Mar. 31, 2022).

[140] *Id.* "Amazon.com was not the first company to do so," but Amazon's promise "was to deliver any book to any reader anywhere." *Id.*

[141] Kirby and Stewart, *supra* note 135.

[142] *Id.* At that point, Amazon had also partnered with major traffic aggregates like Yahoo and AOL and expanded to markets in the United Kingdom and Germany. *Id.*

[143] *Id.* By 2000, Amazon had expanded its offerings to include consumer electronics, toys, videogames, software, cars, kitchen supplies, health and beauty aids, and more. *Id.*

[144] *Id.*

[145] *Id.*

[146] Hall, *supra* note 139. In 2006, Amazon added the Elastic Compute Cloud (EC2) to their AWS portfolio, "which rents out computer processing power." *Id.* In the same year, Amazon released Simple Storage Service (S3) to lease data storage via the internet. *Id.* Netflix employs both S3 and EC2 for video streaming. *Id.*

Amazon continues to expand into more markets with each passing year. In 2017, Amazon entered the grocery store market when it purchased Whole Foods.[147] This foray into food retail expanded further in 2020 when Amazon opened the Amazon Fresh grocery store employing the Alexa virtual-assistant technology to "help customers manage shopping lists and navigate aisles" and the "Go" technology to allow customers to shop checkout-free.[148] The company also recently "rolled out Amazon Halo, a health and wellness tracker that the company said also tracks its users' emotions."[149] Further, in 2020 Amazon unveiled a new home drone security system involving an in-home drone with a camera which flies around and monitors activity within the owner's home.[150] Amazon recently put out a cloud-gaming service called "Luna" to allow users to "stream videogames over the internet" using mobile devices, computers, or the Fire TV at the initial cost of $5.99 per month.[151] In 2020, Amazon created a multifunctional oven incorporating

[147] *Id.*

[148] Dave Sebastian, *Amazon Rolls Out Halo, a Wellness Tracker That It Says Can Also Sense Moods*, WALL ST. J. (Aug. 27, 2020), https://www.wsj.com/articles/amazon-rolls-out-halo-a-wellness-tracker-that-it-says-can-also-sense-moods-11598543692.

[149] *Id.* The wristband and associated app monitor sleep, body fat percentage, heart rate, activity, and the users' social and emotional well-being. *Id.* Additionally, the product's battery defeats other wearable technologies, as the battery charge for the device lasts up to seven days and may be fully recharged within ninety minutes. *Id.* The price of the Amazon Halo is also competitive; the Halo Band and a six-month membership initially costs $64.99 and automatically renews for $3.99 per month after the first six months after purchase. *Id.* For comparison, FitBits start at $69.95, and the Apple Watch retails for $399 or more. *Id.*

[150] Sebastian Herrera, *Amazon Event: Tech Titan Unveils New Home Drone, Speakers, Gaming Service*, WALL ST. J. (Sept. 24, 2020), https://www.wsj.com/articles/amazon-expected-to-unveil-more-alexa-smart-home-devices-11600945201. The security system also includes car alarms and a car camera. *Id.*

[151] *Id.* The subscription provides a library of fifty games and users may spend $50 to purchase an associated custom controller. *Id.*

the "Alexa" technology and doubling as a motion sensor, microwave, earbuds, and air fryer.[152] Indeed, "there are few consumer categories in which Amazon is absent."[153]

b. ORACLE

Oracle, a cloud computing company, provides an infrastructure platform for other enterprises in need of "higher performance computing" and a complete suite of integrated cloud applications to help businesses streamline their processes.[154] Oracle works in a wide variety of industries, including communications, healthcare, hospitality, banking, insurance, life sciences, retail, and more.[155] Oracle has also increasingly entered the big data, data science, and artificial intelligence fields,[156] where they provide artificial intelligence[157] and data science services to gather information and assist clients through promotion of data-driven business.[158]

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[152] Sebastian, *supra* note 148.

[153] Herrera, *supra* note 143.

[154] *See Oracle Cloud Infrastructure*, ORACLE, https://www.oracle.com/index.html&source=:so:tw:pay::rc_emmk190514p00006:yttfy19_ge_un_ha_tw_sa_c58_q11_vi1_ad_ar&sc=:so:tw:pay::rc_emmk190514p00006:yttfy19_ge_un_ha_tw_sa_c58_q11_vi1_ad_ar&pcode=emmk190514p00006?bcid=5858503130001&shareURL=http (last visited Mar. 31, 2022).

[155] *Oracle Products*, ORACLE, https://www.oracle.com/products/ (last visited Mar. 31, 2022).

[156] *Id.*

[157] *Oracle Artificial Intelligence (AI)*, ORACLE, https://www.oracle.com/artificial-intelligence/ (last visited Mar. 31, 2022). Oracle helps enterprises build intelligent systems utilizing pre-built artificial intelligence to automate their operations, promote innovation, and securely make smarter decisions through elimination of human error and better business insights. *Id.*

[158] *Oracle Data Science Platform*, ORACLE, https://www.oracle.com/data-science/ (last visited Mar. 31, 2022). Oracle employs artificial intelligence and experts to help build data science platforms within their businesses to promote unparalleled productivity. *Id.* This improved data collection and integration recommends the best business algorithms and aids in machine learning and data processing. *Id. See also Oracle Big Data*, ORACLE, https://www.oracle.com/big-data/ (last visited Mar. 31, 2022) (explaining how Oracle's big data services help businesses and professionals catalog and process large quantities of raw data).

In order to further develop its strength in the cloud computing and data science fields, Oracle (joined by Walmart) entered into a partnership with rapidly-growing social media app TikTok's parent company, ByteDance, in September of 2020.[159] Through the deal, Oracle became a 12.5% owner of TikTok Global and TikTok announced that the company selected Oracle as their "secure cloud technology provider."[160] Oracle benefits from this partnership in two key ways: first, TikTok making the move to Oracle's cloud computing space will likely boost the tech company's presence and promote competition with other cloud computing giants like Amazon, Microsoft, and Google; and second, Oracle's tech platform includes ad tech and marketing tech products with tools for analyzing audiences and the success of ad campaigns, so TikTok's wealth of user data might solve the problem and provide better data to marketers using the platform.[161]

Oracle Corporation began as "Software Development Laboratories" in 1977, when Bob Miner and Larry Ellison founded it.[162] Their goal was to develop a relational database model designed to organize large quantities of data "in a way that allowed for efficient storage and quick retrieval."[163] In 1979, Oracle was released as "the earliest commercial relational database

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[159] Nina Goetzen, *What Oracle and TikTok Stand to Gain From a Partnership*, BUS. INSIDER (Sept. 15, 2020), https://www.businessinsider.com/oracle-tiktok-both-stand-to-benefit-from-partnership-2020-9. *See also* Deborah Hellinger, *Oracle Chosen as TikTok's Secure Cloud Provider*, ORACLE (Sept. 19, 2020), https://www.oracle.com/news/announcement/oracle-chosen-as-tiktok-secure-cloud-provider-091920.html.

[160] Hellinger, *supra* note 159.

[161] Goetzen, *supra* note 159.

[162] Mark Hall, *Oracle Corporation*, BRITANNICA, https://www.britannica.com/topic/Oracle-Corporation (last visited Mar. 31, 2022). Oracle went by "Software Development Laboratories" from 1977–79, "Relational Software Inc." from 1979–82, and "Oracle Systems Corporation" from 1982–95, when it became "Oracle Corporation." *Id.*

[163] *Id.*

program to use Structured Query Language (SQL), and it quickly became popular."[164] Oracle became known for aggressive marketing and innovation, and in 1987 it became the biggest database management company globally.[165] A majority of Oracle's growth "has come through its aggressive acquisitions of software companies with products for a range of business and technology applications," and among the scores of companies bought by Oracle were PeopleSoft, Sun Microsystems, and NetSuite.[166]

Oracle has developed into an industry-leading powerhouse providing both software and information management services globally for decades.[167] "Oracle technology can be found in nearly every industry and in the data centers of 98 of the Fortune 100 companies."[168] Today, it is "the world's second-largest independent software company."[169]

V. WHY ARE ORACLE AND AMAZON DIFFERENT FROM FIRMS THAT ANTITRUST LAWS WERE DESIGNED TO REGULATE?

This article asserts that antitrust laws are not sufficient to handle modern-day big technology companies, which are distinguishable from the firms that antitrust laws were designed to mitigate in the late 1800s and early 1900s. Technology companies like Amazon have business models which allow them to attain monopoly status, domineer marketplaces, and undercut competitors while simultaneously catering to consumer welfare by keeping prices low

[164] *Id.* The U.S. Air Force was Oracle's first customer. *Id.*

[165] *Id.*

[166] *Id.* Sun Microsystems previously owned Java, a popular computer programming language, and Solaris, an operating system. *Id.*

[167] *Oracle*, SILICON VALLEY HISTORICAL ASS'N, https://www.siliconvalleyhistorical.org/oracle-history (last visited Mar. 31, 2022).

[168] *Id.*

[169] *Id.*

and increasing convenience for consumers. This is possible primarily because, unlike firms like A&P and Microsoft (as recently as the 1990s), modern-day technology companies are able to make income through selling user data to third parties[170] and advertising on web and app-based platforms.[171] In other words, the consumers themselves are the money-makers, so the tech companies can keep costs to consumers low (or free, in the case of websites like Google and Facebook) while still achieving a monopoly dominance and undercutting smaller businesses. Such monetization methods did not exist in the late 1800s and early 1900s, and lawmakers more than one hundred years ago could not have fathomed something like today's modern technology. Thus, antitrust laws should adapt as the businesses they regulate continue to advance.

VI. AMAZON CASE STUDY

Amazon likely could be held liable for antitrust violations under two out of the three antitrust theories presented in this article. Under the traditional antitrust theory, Amazon likely would not be considered a monopoly engaging in anticompetitive practices because its practices benefit consumers. Under the hipster antitrust theory, Amazon would be considered a monopoly engaging in anticompetitive practices because, though Amazon's low prices benefit consumers, it engages in traditionally anticompetitive practices to the detriment of other businesses. Lastly, under the proposed antitrust theory, Amazon would likely be considered a monopoly engaging in anticompetitive practices because it engages in predatory pricing and single firm conduct, which squashes out competitors and causes harm to small businesses.

[170] *See* Poundstone, *supra* note 24.

[171] *See How The Big Five Tech Companies Make Money, Visualized*, *supra* note 25.

a. TRADITIONAL ANTITRUST THEORY

Traditional antitrust theory would likely not deem Amazon an impermissible monopoly employing unfair business practices. The FTC evaluates monopolies using a two-step inquiry: first, it asks whether the firm has "monopoly power" in a marketplace, which "requires [an] in-depth study of the products sold by the leading firm" as well as alternative sources of products which consumers would use if the dominant company raised prices; second, it investigates whether the company used improper conduct to attain a leading position.[172]

In evaluating whether a company qualifies as a monopoly, courts will apply the rules for single firm conduct, even if a company has not become a literal monopoly, as long as the firm has "significant and durable market power" or "the long term ability to raise price or exclude competitors."[173] Courts will often not find monopoly power unless a firm or group of firms acting in concert make more than 50% of product or service sales in a single geographic area.[174] Further, the firm must be able to sustain this monopolizing position over time, such that no new company could enter the picture and discipline the company's conduct.[175] Here, Amazon has significant and durable market power because it controls around 50% of the online retail sales in the United States and it has maintained its role as a prominent online retailer for decades.[176] Further, Amazon has gone beyond online retail and has delved into other industries like grocery

[172] *Monopolization Defined*, *supra* note 58.

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] Thomas, Reagan, *Watch Out Retailers. This Is Just How Big Amazon Is Becoming*, CNBC (July 13, 2018), https://www.cnbc.com/2018/07/12/amazon-to-take-almost-50-percent-of-us-e-commerce-market-by-years-end.html (stating Amazon was expected to control around 50% of the United States e-commerce market in 2018).

stores, technological devices, and more.[177] Indeed, it is hard to fathom a company with the power to enter the market and discipline Amazon's conduct. Thus, it likely is a literal monopoly with the long-term ability to raise prices or exclude competitors.

Improper conduct analysis requires an in-depth analysis of the marketplace and the method engaged to achieve and maintain a monopoly.[178] "Obtaining a monopoly by superior products, innovation, or business acumen is legal; however, the same result achieved by exclusionary or predatory acts may raise antitrust concerns."[179] Such tactics may include tying, predatory pricing, exclusive supply or purchase agreements, and refusal to deal.[180] A monopolist may prevent other businesses from succeeding in the marketplace due to a legitimate business justification, like if the monopolist competes in a way that benefits consumers by presenting unique products and services or promoting greater efficiency.[181] Here, Amazon prevents other businesses from succeeding because it has dominated the marketplace and keeps its prices lower than its competitors.[182] Further, Amazon often acquires competitors. Thus, it prevents other businesses from succeeding in the marketplace. Nonetheless, Amazon probably has a legitimate business justification to prevent other businesses from succeeding because Amazon benefits consumers through presenting unique products and lowering price while increasing efficiency. There is no evidence that Amazon refuses to deal with other companies, nor that the company

[177] Herrera, *supra* note 143.

[178] *Monopolization Defined*, *supra* note 58.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Khan, *supra* note 7, at 716.

uses exclusive supply and purchase agreements. It is possible Amazon utilizes predatory pricing, but the standard for predatory pricing is very high and rarely evaluated or enforced.

"Generally, low prices benefit consumers. Consumers are harmed only if below-cost 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."[183] The decision to keep prices at a level below its own expenses not only does not harm competition but rather may be an example of thriving and vigorous competition within the marketplace.[184] In spite of the FTC reviewing predatory pricing claims, courts generally view predatory pricing claims with great skepticism.[185] Some fear Amazon heads toward predatory pricing—the company has maintained low costs and hemorrhaged money for many years now and as a result has grown expansively.[186] The company may eventually raise its prices once it has spread its reach far enough and stamped out alternative options for consumers.[187] The FTC (or the courts) cannot hold Amazon liable for predatory pricing currently because the company has not raised its prices and has given no indication that they intend to raise prices. Thus, the predatory pricing improper business practice could become relevant at some point, but the allegations currently remain insufficient to subject Amazon to antitrust litigation.

Thus, under the traditional antitrust framework, Amazon has not violated antitrust regulations and therefore is not subject to enforcement by the courts or the FTC.

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[183] *Predatory or Below-Cost Pricing*, *supra* note 73.

[184] *Id.* "Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare." *Id.*

[185] *Id.*

[186] Khan, *supra* note 7, at 716.

[187] *See id.*

b. HIPSTER ANTITRUST THEORY

Under hipster antitrust theory, Amazon would likely qualify as a monopoly employing anticompetitive practices. Khan and other hipster antitrust theorists suggest two potential alternative antitrust regimes to the current theories: first, stepping back and returning to traditional antitrust principles from prior to the 1970s to prevent the emergence of dominance and/or limit the scope of such dominance; or second, adopt regulations neutering a firm's ability to exploit its superior position while taking advantage of economies of scale through "applying common carrier obligations and duties."[188] Under both alternative antitrust regimes suggested by Khan, Amazon's current practices would be subject to regulation.[189]

i. KHAN'S FIRST SUGGESTED ALTERNATIVE ANTITRUST THEORY

Under Khan's first suggested alternative antitrust theory, the predatory pricing doctrine would be revised to abandon the recoupment requirement and focus instead on whether the pricing is below cost.[190] Amazon is famous for its low prices and, under the hipster antitrust theory, it would likely rise to the level of predatory pricing because the firm has deliberately kept its prices low with the intent to continue expanding aggressively into multiple business lines.[191] Amazon has consistently deeply cut prices and invested instead in growing its operations, foregoing profits in favor of growth, which undercuts the premise that predatory pricing is irrational because firms tend to emphasize profits rather than growth.[192] This behavior under the

[188] *Id.*, at 717.

[189] *See id.*

[190] *Id.* at 729–30, 791.

[191] *Id.* at 754.

[192] *Id.* at 753.

hipster antitrust theory, without the influence of the recoupment requirement, would squarely qualify as anticompetitive behavior.

Additionally, under the first suggested alternative antitrust theory, the issue of vertical integration giving rise to anticompetitive conflicts of interest should be addressed through either scrutinizing and preventing mergers or placing a prophylactic ban giving rise to any mergers that would create a conflict of interest.[193] In either scenario, Amazon's consistent behavior engaging in mergers and acquiring smaller companies would violate this portion of the hipster antitrust theory. For example, Amazon acquired Whole foods through a merger, allowing Amazon to increase its dominance in the world of grocery shopping, which Amazon has a hand in already both via the internet (where groceries may be purchased and shipped) and in Amazon's own grocery store locations.[194] Khan's regulations would prevent similar future acquisitions.

ii. KHAN'S SECOND SUGGESTED ALTERNATIVE ANTITRUST THEORY

Under the second suggestion, Khan recommends treating the dominant platforms as monopolies and regulating them accordingly through accepting the benefits of the monopoly and limiting how the monopoly may use its power—as is often the model for public utility regulations and common carrier duties.[195] Since Amazon serves as a form of essential infrastructure in the internet economy, the elements of public utility regulations could be applied: "(1) requiring nondiscrimination in price and service, (2) setting limits on rate-setting, and (3)

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[193] *Id.* at 792.

[194] Hall, *supra* note 139.

[195] Khan, *supra* note 7 at 797.

imposing capitalization and investment requirements."[196] Under this theory, the FTC would treat Amazon as a monopoly and regulate it in the way it can use its power—in the same manner as a public utility.[197] In particular, the nondiscrimination component would come into play and limit Amazon's future activity in terms of price and service to prevent future anticompetitive behaviors.[198] As it exists now, Amazon would likely violate these requirements as the company remains largely unregulated.[199]

Thus, under either of Khan's proposed alternative antitrust theories, Amazon would not be able to continue as it is now without committing antitrust violations.[200]

c. PROPOSED ANTITRUST THEORY

This article's proposed antitrust solution has two components. First, it proposes an adaptation of today's laws to focus not only on consumer welfare but also on the welfare of small businesses within the marketplace. This shift would allow for consideration of how the monopolistic actions of these massive companies impact the small businesses forced to work with and through them and encourage a healthy marketplace. Second, it proposes developing a greater focus on predatory pricing. It also suggests, rather than only occasionally examining such issues, lowering the bar for predatory pricing, so pricing tactics may be examined prior to prices being raised to preemptively address predatory pricing tactics before they result in harm to

[196] *Id.* at 798.

[197] *Id.*

[198] *See id.*

[199] *See id.*

[200] *See id.*

consumers. Aside from these two changes, the analysis will be similar to the traditional antitrust analysis presented above.

Amazon likely qualifies as a monopoly because it has significant and durable market power, and it controls around fifty percent of the online retail sales in the United States.[201] Amazon has maintained its role as a prominent online retailer for decades.[202] Further, Amazon has entered into more areas than just online retail and has also delved into other industries like grocery stores, technological devices, and more.[203] Thus, it likely is a literal monopoly with the long-term ability to raise prices or exclude competitors.[204] Further, it is hard to fathom a company with the power to enter the market and discipline Amazon's conduct.[205] Thus, because Amazon is a monopoly, the second part of the analysis—investigating whether Amazon employs improper conduct—applies.

Amazon prevents other businesses from succeeding because it dominates the marketplace and keeps its prices lower than its competitors.[206] Further, Amazon often acquires competitors.[207] Under traditional antitrust theory, Amazon has a legitimate business justification for these practices because the resulting low prices and convenience benefits consumers. However, under the proposed alternative antitrust framework, the focus is not just on whether Amazon's conduct

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[201] *Monopolization Defined*, *supra* note 58 (explaining fifty percent rule). *See also* Thomas, Reagan, *supra* note 176.

[202] *See* Thomas, Reagan, *supra* note 176.

[203] Hall, *supra* note 139.

[204] *See* Khan, *supra* note 7, at 716.

[205] *See Id.*

[206] Khan, *supra* note 7, at 716.

[207] *See id.*

benefits consumers but also on whether it benefits small businesses engaging in the marketplace.[208] An argument could be made that Amazon's practices promote competition and innovation, and that it supports small businesses through allowing them to sell their products on the Amazon website.[209] However, because Amazon both owns the retail platform and competes on the platform, it has the ability to price its own items below those of its competitors and allows Amazon to gather valuable data about its competitors. These practices likely do not benefit small businesses. In fact, many of Amazon's business practices probably hurt small businesses.

There is no evidence that Amazon refuses to deal with other companies, nor that the company uses exclusive supply and purchase agreements. However, under the proposed antitrust framework, it is likely that Amazon is engaging in predatory pricing. Amazon has consistently kept its prices lower than those of its competitors while continuously expanding the company into new areas.[210] Much of the time, this low pricing has resulted in Amazon hemorrhaging money.[211] Amazon has begun to make up ground in this area through entering more marketplaces, which has been lucrative. However, Amazon has not yet raised prices as critics fear it will.[212] Nonetheless, cutting costs to maintain prices below competitors, to undercut competition, has resulted in the elimination of most of Amazon's competitors and has allowed

[208] *See id.* at 710.

[209] *See Id.*

[210] *Amazon Business Model: Three Consumer Value Propositions*, INNOVATIONTACTICS, https://innovationtactics.com/amazon-business-model-part-2/ (last visited Mar. 31, 2022).

[211] *Id.*

[212] Khan, *supra* note 7, at 716.

Amazon to acquire a massive share of the online retail industry.[213] Though Amazon has yet to substantially raise its prices, that is not to say that it has not yet raised prices at all; in 2018, Amazon hiked the yearly price of Amazon Prime to $119/year from $99/year.[214] Thus, under the proposed alternative antitrust framework, antitrust enforcers should critically examine Amazon's price-cutting behavior now rather than wait for the company to raise prices later.

Thus, under the proposed antitrust framework, Amazon has violated antitrust regulations and therefore would be subject to enforcement by the courts or the FTC.

VII. ORACLE CASE STUDY

Oracle would likely not be held liable for antitrust violations under any of the three antitrust frameworks. Under the traditional antitrust theory, the FTC would not consider Oracle a monopoly because it does not dominate a sufficient portion of the marketplace; and if the FTC considered it to be a monopoly, the FTC would not consider Oracle as anticompetitive because its low costs and network of resources benefit consumers. Under the hipster antitrust theory, Oracle would likely not be considered a monopoly and therefore not subject to antitrust scrutiny because it does not dominate enough of the marketplace; however, if it were considered a monopoly it would still not violate antitrust regulations because it has not employed anti-competitive practices like predatory pricing, single firm conduct, or refusal to deal. Under the final theory, Oracle would not be considered a monopoly due to its lack of market dominance; however, if it were considered a monopoly, it has likely not engaged in any anticompetitive practices like price fixing, and there does not seem to be evidence that Oracle's practices have

[213] Palmer & Novet, *Amazon Bullies Partners and Vendors, Says Antitrust Subcommittee*, CNBC (Oct. 6, 2020, 8:58 PM), https://www.cnbc.com/2020/10/06/amazon-bullies-partners-and-vendors-says-antitrust-subcommittee.html.

[214] *Amazon Prime Price Change*, AMAZON, https://www.amazon.com/gp/help/customer/display.html?nodeId=202213110 (last visited Mar. 31, 2022).

harmed small businesses. Thus, Oracle would not be subject to antitrust scrutiny under any antitrust theory's framework.

a. TRADITIONAL ANTITRUST THEORY

Under traditional antitrust theory, it is unlikely Oracle would be considered an impermissible monopoly employing unfair business practices. The FTC evaluates monopolies using a two-step inquiry: first, it asks whether the firm has "monopoly power" in a marketplace, which "requires [an] in-depth study of the products sold by the leading firm" as well as alternative sources of products which consumers would use if prices were raised by the dominant company. Second, they investigate whether the firm used improper conduct to attain a leading position.[215]

In evaluating whether a company qualifies as a monopoly, courts will apply the rules for single firm conduct, even if a company has not become a literal monopoly, as long as the firm has "significant and durable market power" or "the long term ability to raise price or exclude competitors."[216] Courts will often not find monopoly power, unless the firm, or group of firms acting in concert, has made more than 50% of the product or service sales in a single geographic area.[217] Further, this monopolizing position must be sustainable over time, such that no new company could enter the picture and discipline the company's conduct.[218] Oracle likely does not have significant and durable market power because its primary industry, cloud computing, is

[215] *Monopolization Defined*, *supra* note 58.

[216] *Id.*

[217] *Id.*

[218] *Id.*

dominated by its competitor, Amazon.[219] Additionally, though Oracle has acquired TikTok and thereby has expanded its data and data analytics power, it likely still does not dominate enough of this marketplace to be considered a monopoly.[220] Further, competitors like Amazon could discipline its conduct. Thus, it is unlikely Oracle is a literal monopoly with the long-term ability to raise prices or exclude competitors.

However, if Oracle *were* considered a monopoly, then investigators must determine whether the company has engaged in improper conduct.[221] Improper conduct analysis requires an in-depth analysis of the marketplace and the method engaged to achieve and maintain a monopoly.[222] "Obtaining a monopoly by superior products, innovation, or business acumen is legal; however, the same result achieved by exclusionary or predatory acts may raise antitrust concerns."[223] Such tactics may include tying, predatory pricing, exclusive supply or purchase agreements, and refusal to deal.[224] A monopolist may prevent other businesses from succeeding in the marketplace due to a legitimate business justification, like if the monopolist competes in a way that benefits consumers by presenting unique products and services or promoting greater

[219] Richter, *Amazon Leads $180-Billion Cloud Market*, Statista (Feb. 8, 2022), https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/. Amazon Web Services holds a 33% share of the cloud computing industry. *Id.*

[220] *See* Novet, Kimball, & Sherman, *Trump Agrees to TikTok Deal With Oracle and Walmart, Allowing App's U.S. Operations to Continue*, CNBC (Sept. 19, 2020, 5:30 PM), https://www.cnbc.com/2020/09/19/trump-says-he-has-approved-tiktok-oracle-deal-in-concept.html.

[221] *Monopolization Defined*, *supra* note 58.

[222] *Id.* (emphasizing that "Courts do not require a literal monopoly before applying rules for single firm conduct; that term is used as shorthand for a firm with significant and durable market power—that is, the long-term ability to raise price or exclude competitors.").

[223] *Id.*

[224] *Id.*

efficiency.[225] Oracle might prevent other businesses from succeeding because it has created a substantial presence in the cloud computing and data science fields and it keeps its prices competitive with its competitors.[226] Further, Oracle is known for acquiring its competitors and using these acquisitions to develop previously underdeveloped areas of the company.[227] Thus, it might prevent other businesses from succeeding in the marketplace by buying those who compete against them and increasing their suite such that consumers will not look to smaller competitors for their products.[228] Nonetheless, Oracle probably has a legitimate business justification to prevent other businesses from succeeding because it benefits consumers through presenting unique products and lowering price while increasing efficiency.[229] No evidence was found that Oracle refuses to deal with other companies, nor that the company uses exclusive supply and purchase agreements.[230] Further, there is no evidence of predatory pricing.[231]

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[225] *Id.*

[226] *See* Richter, *supra* note 219.

[227] *Oracle Strategic Acquisitions*, ORACLE, https://www.oracle.com/corporate/acquisitions/ (last visited Mar. 31, 2022). Oracle's strategic acquisitions have notably included Cerner, NetSuite, DataScience.com, CrowdTwist, and more. *Id.*

[228] *See id. See also Monopolization Defined*, *supra* note 58 (stating that the term single firm conduct is used as shorthand for a firm with significant and durable market power—that is, the long-term ability to raise price or exclude competitors.").

[229] *See* Louis Navellier, *Oracle Is Betting Its Cloud Services Will Continue Its Growth Story*, Nasdaq (Aug. 2, 2021, 4:43 PM), https://www.nasdaq.com/articles/oracle-is-betting-its-cloud-services-will-continue-its-growth-story-2021-08-02. Between November of 2020 and August of 202, Oracle's stock grew by 55%. *Id.* Further, in March of 2021, Oracle said the Cloud brings in annual revenue topping $2 billion. *Id.*

[230] *See Monopolization Defined*, *supra* note 58.

[231] *Id.*

Thus, Oracle has not violated antitrust regulations under the traditional antitrust framework and therefore is not subject to enforcement by the courts or the FTC.

b. HIPSTER ANTITRUST THEORY

Under hipster antitrust theory, it is unlikely Oracle would be considered an impermissible monopoly employing unfair business practices.[232] Khan and other hipster antitrust theorists suggest two potential alternative antitrust regimes to the current theories: first, stepping back and returning to traditional antitrust principles from prior to the 1970s to prevent the emergence of dominance and/or limit the scope of such dominance, or second, adopt regulations neutering a firm's ability to exploit its superior position while taking advantage of economies of scale through "applying common carrier obligations and duties."[233] Under both alternative antitrust regimes suggested by Khan, Oracle's current practices would probably not be subject to regulation.

i. KHAN'S FIRST SUGGESTED ALTERNATIVE ANTITRUST THEORY

Under Khan's first suggested alternative antitrust theory, predatory pricing doctrine would be revised to abandon the recoupment requirement and focus instead on whether the pricing is below cost.[234] Oracle does not seem to employ predatory pricing as a tactic because its rates are comparable to the rates of other, similarly situated businesses.[235]

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[232] Yeh, *supra* note 13.

[233] Khan, *supra* note 7, at 711.

[234] *Id.* at 792–93.

[235] *Oracle Competitors*, COMPARABLY, https://www.comparably.com/companies/oracle/competitors (last visited Mar. 31, 2022). Oracle ranks fourth in pricing compared to its competitors. *Id.*

Under the first suggested alternative antitrust theory, the issue of vertical integration giving rise to anticompetitive conflicts of interest should be addressed through either scrutinizing and preventing mergers or placing a "prophylactic ban on mergers that would give rise to conflicts of interest."[236] Oracle has acquired several notable businesses over the past decade which, under the hipster antitrust model, might be subject to regulation or at least scrutiny. Among these notable acquisitions are NetSuite, Peoplesoft, and BEA Systems.[237] Additionally, Oracle recently partnered with ByteDance in a merger in which Oracle acquired partial ownership of popular social media and data collection app, TikTok.[238] All of these merges and acquisitions might raise questions about vertical integration under Khan's model and thus would likely be subject to scrutiny or perhaps a future prophylactic ban on such mergers. For now, however, the mergers likely would not violate Khan's model because they have not risen to the level of firms like Amazon as addressed in Khan's article.

ii. KHAN'S SECOND SUGGESTED ALTERNATIVE ANTITRUST THEORY

Under the second suggestion, Khan recommends treating the dominant platforms as monopolies and regulating them accordingly by accepting the monopoly's benefits and simply limiting how the monopoly may use its power.[239] This approach would mirror that already adopted with public utility regulations and common carrier duties.[240] As Oracle serves as a form

[236] Khan, *supra* note 7, at 792.

[237] *Oracle Strategic Acquisitions*, ORACLE, https://www.oracle.com/corporate/acquisitions/ (last visited Mar. 31, 2022).

[238] Goetzen, *supra* note 159.

[239] Khan, *supra* note 7, at 797.

[240] *Id.*

of infrastructure in the internet economy (particularly in the realm of cloud computing and data science), the elements of public utility regulations could be applied: "(1) requiring nondiscrimination in price and service, (2) setting limits on rate-setting, and (3) imposing capitalization and investment requirements."[241] Under this theory, if Oracle rose to the level of a monopoly it would be treated as such and regulated in the way it can use its power in the same manner as a public utility.[242] However, Oracle does not currently rise to the level of a monopoly and thus would not fall under this model of regulation.[243]

c. PROPOSED ANTITRUST THEORY

This article suggests an adaptation of today's laws to center around both consumer welfare and the welfare of small businesses in the United States. Second, this article asserts that developing a greater focus on predatory pricing and lowering the bar for predatory pricing so pricing tactics may be examined before they result in harm to consumers will allow small businesses to thrive in the United States.

Oracle is likely not a monopoly because, although it has significant and durable market power, it has not acquired enough market power in any particular industry to be considered a monopoly.[244] Oracle's biggest industry is cloud computing, an industry in which it is overshadowed by Amazon's cloud computing platform, Amazon Web Services.[245] Oracle's

[241] *Id.* at 798.

[242] *Id.*

[243] *See id.*

[244] *See Monopolization Defined*, *supra* note 58 (explaining what qualifies a business as a monopoly); Palmer & Novet, *supra* note 213 (describing how Amazon bullies its competitors).

[245] *See* Richter, *supra* note 219.

acquisition of Tiktok has created an interesting turn of events in terms of Oracle's work in the data science industry. However, Oracle has still not risen to the level of comprising 50% or more of the market and thus it will not qualify as a monopoly.[246] If Oracle *were* to be considered a monopoly, however, an analysis of whether Oracle engaged in improper business practices would be necessary.

Oracle prevents other businesses from succeeding because it often purchases its competitors and uses their practices to improve itself and expand into other areas of the tech industry.[247] Oracle also maintains competitive prices and does little to promote small businesses or encourage competition.[248] Thus, in contemplating whether Oracle's practices benefit small businesses, it is likely Oracle's practices not only do not benefit small businesses, but in fact, harms them by inhibiting their ability to succeed in the marketplace.

However, there is no evidence that Oracle engages in improper business tactics. There is no evidence that Oracle refuses to deal with other companies; nor that the company uses exclusive supply and purchase agreements. Oracle also does not employ predatory pricing or tying.

Thus, under the proposed antitrust framework, Oracle has not violated antitrust regulations and therefore neither the court nor the FTC could subject them to enforcement.

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[246] *Id.*

[247] *See Oracle Strategic Acquisitions*, *supra* note 221.

[248] *See Oracle Competitors*, *supra* note 235.

VIII. THE FUTURE OF BIG TECH AND ANTITRUST LAW

The technology and online retail industries will continue to grow as technology becomes more prevalent in everyday life.[249] Increasing dependence on the few large companies that dominate this marketplace means these companies will continue to grow , and antitrust issues will remain a concern.[250] It is not a mystery why the past five years have wrought more antitrust inquiry than usual and why the subject increasingly becomes front-page news; the problem is growing bigger every year.[251] At some point, the United States will need to either decide that these practices are okay and allow big tech companies to dominate, or decide that they are not okay—at which point it would need to adjust regulations to address the issues, which current antitrust laws make next-to impossible.[252]

Some legal experts wonder if antitrust law is up to the task of regulating big tech companies in the first place; should the FTC consider a new framework of regulation?[253] Currently, antitrust regulation proceeds at a leisurely rate in the court system.[254] Given the rapid pace of change in the technology industry, the United States' regulatory industry must respond

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[249] *See* Steve Lohr, *Forget Antitrust Laws. To Limit Tech, Some Say a New Regulator Is Needed*, N.Y. TIMES (Oct. 22, 2020), https://www.nytimes.com/2020/10/22/technology/antitrust-laws-tech-new-regulator.html.

[250] *See id.*

[251] *See* Eavis & Lohr, *supra* note 1. "The growing importance of cloud computing, the digital engine rooms of the modern economy, shows how tech firms are building on their dominance." *Id.*; *see also* Kang, McCabe, & Wakabyashi, *supra* note 101 (discussing the FTC's new focus on big tech companies); *cf.* Myers, *supra* note 14 (alleging Amazon does not have an antitrust problem).

[252] *See* Khan, *supra* note 7 (arguing antitrust laws need to be revised); *cf.* Ceccio & Mufarrige, *supra* note 14 (arguing antitrust laws do not need to be revised).

[253] Lohr, *supra* note 249.

[254] *Id.*

far more rapidly.[255] Legal and economic specialists have suggested a potential solution: "a specialist regulator . . . [focusing] on . . . major tech companies. It would establish and enforce a set of basic rules of conduct, [including] not allowing the companies to favor their own services, exclude competitors[,] or acquire emerging rivals and require them to permit competitors access to their platforms . . . ."[256] This "digital markets unit" concept has already been implemented in the United Kingdom, the United Nations, and Australia, and would likely be its own agency or a "digital division" within the Federal Trade Commission.[257] This system would not be unheard of since the United States has many regulators specialized to monitor specific industries.[258] Still, legal scholars have critiqued this approach because the increased regulation might be "'an innovation killer'."[259]

One possible solution would be for the FTC to adopt the hipster antitrust theory to shift the focus of antitrust regulation away from harm to consumers and instead to businesses' anticompetitive practices, as the old framework did.[260] The FTC is not opposed to considering these theories, and the agency even hired Lina M. Khan as an advisor in its antitrust policy reform discussions in 2018.[261] Still, four years later, they have not adjusted their policies. It is

[255] *Id.*

[256] *Id.*

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *See* Khan, *supra* note 7.

[261] Streitfeld, *supra* note 10.

possible the FTC is in the process of formulating a new proposition for antitrust regulation which will serve as a hybrid between traditional and hipster regulation.

The FTC could also choose to maintain the status quo. Neither Congress nor the FTC have made efforts to substantially change antitrust regulation since the 1970s. The FTC brought the most recent successful, big antitrust lawsuit against Microsoft in the 1990s, but since then the government has done very little in the way of antitrust regulation and enforcement.[262] In 2021, the Department of Justice filed the biggest antitrust lawsuit since Microsoft against Google for its search engine dominance.[263] Additionally, in December of 2020, the FTC filed a lawsuit against Facebook for anticompetitive conduct, including anticompetitive acquisitions and anticompetitive platform conduct.[264] These lawsuits might mark a shift in the interpretation of traditional antitrust laws, and it is possible that these actions will resolve some of the issues with antitrust regulations, or perhaps create a new approach to analyzing antitrust with big tech companies. Still, courts will take years to resolve these lawsuits. At which point, where will the big tech companies be?

Thus, the future of antitrust law is an enigma certain to breed substantial controversy in the coming years unless the FTC makes substantial regulatory changes.

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[262] Lohr, *supra* note 249.

[263] James D. Walsh, *A Small Target in a Big Case. Scott Galloway on the Antitrust Case Against Google*, N.Y. MAG (Nov. 2, 2020), https://nymag.com/intelligencer/2020/11/antitrust-case-against-google.html. Google represents eighty percent of search engine searches in the United States, according to the complaint in the lawsuit. *Id.*

[264] *FTC Sues Facebook for Illegal Monopolization*, FED. TRADE COMM'N (Dec. 9, 2020), https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization. The lawsuit seeks to divest assets, which would include both WhatsApp and Instagram. *Id.*

IX. CONCLUSION

Systematic and thorough revision of the existing antitrust regulatory framework is necessary to ensure a healthy, competitive marketplace and to prevent big technology companies from dominating the technology and online retail industries. As it stands now, antitrust regulation has failed to prevent large tech companies from acquiring dominant, monopolistic positions within their industries through anticompetitive practices. Google controls an estimated eighty percent of search engine usage in the United States. Amazon commands close to half the online retail market and expands to more and more industries every year. Even Oracle, though it does not raise antitrust concerns currently, continues to grow in influence through the acquisition of smaller companies to help expand the services it provides and control of every side of the cloud computing and data analytics industries. If left unchecked, these big tech companies could continue to expand until they are full monopolies. If this occurs, breaking them up to comply with antitrust regulations may have far greater negative societal impact due to increased societal reliance upon them.

Traditional antitrust theory is not sufficient to handle these challenges. The future of antitrust law is uncertain, and whether the government will revise existing laws, employ new laws, revert to old laws, or create an entirely new set of non-antitrust regulations dedicated to regulating technology companies remains uncertain. Each potential solution presents a cascade of problems, and officials need to balance the need for free and unregulated competition, which promotes innovation, with the need to promote an industry where more than a few businesses can succeed in order to create a thriving marketplace of ideas.

This article asserts that an appropriate solution to the problem would be to revise antitrust laws to focus on harm to small businesses in addition–or as an alternative–to harm to consumers

as the bar for anticompetitive practices. Further, this article suggests a revision to the predatory pricing rules to allow for investigation and enforcement when companies use low prices to eliminate competition rather than waiting for the companies to kill off their competition and then raise prices later. This proactive rather than reactionary approach will yield far better results without drastically changing antitrust law.