COMMENT

ELIZABETH WARREN WANTS TO BREAK UP BIG TECH. CAN SHE?

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CONTENTS

I. ABSTRACT

Senator Elizabeth Warren's plan to "Break Up Big Tech" has two parts: first, to designate any platform with annual global revenue in excess of $25 billion as "Platform Utilities" and thus prevent those companies from owning any participant on the platform and second, to designate regulators to unwind mergers deemed to be illegal and anti-competitive. The purpose of her plan is to protect consumers and small businesses from the wrath of technology conglomerates, preventing the big companies from controlling swaths of the American economy and eliminating competitive options for many consumers seeking various goods and services.

First, the purpose of the Sherman Act is not to guarantee fair success to all participants in any given marketplace. The Sherman Act was enacted to protect the public from a market failure, and to prevent one company or multiple companies from engaging in activities that will cause market failures. Additionally, the anticompetitive acts

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prohibited in the Sherman Act are those that cause actual monopolization by one firm, not acts that seem unfair or predatory. So, the acts of acquiring competitors in the online retail marketplace, while they may seem predatory, do not rise to the level of anticompetitive required by the Act. Also, another issue Senator Warren has with Amazon's tactics is that they copy retail products and sell their own brand for less money on the market. But, isn't this good? As a consumer, one would assume that a cheaper version of a product similar in quality would be the best.

Over the past few decades, the technology industry, referred to as "Big Tech" or "Silicon Valley" has grown tremendously, with Apple, Microsoft, Alphabet and Amazon currently holding the four largest market caps in the United States. Senator Warren claims that three companies in particular — Amazon, Google, and Facebook — have achieved their market power illegally and seeks to correct these problems. This note discusses the viability of her assertions, and potential solutions to these companies she deems problematic.

II. BACKGROUND

Democratic Senator and presidential candidate Elizabeth Warren made waves across America in March 2019 when she announced her plan to "Break Up Big Tech." Senator Warren maintains that the tech giants in today's economy, namely Amazon, Facebook, and Google, have too much power.[2] Senator Warren's plan is twofold: first, she wants to first pass legislation that designates large tech platforms as "Platform Utilities" and requires those platforms to be separated from any participant on the platform, and second, she wants to appoint regulators to reverse illegal and anticompetitive mergers.[3]

The senator's legal basis for breaking up big tech has both used mergers to limit competition and proprietary marketplaces to limit competition.[4] Accusations against the tech giants can be found throughout the proposal; the senator claims government regulators[5] are to blame for the anticompetitive mergers, because "[r]ather than blocking these transactions for their negative long-term effects on competition and innovation, government regulators have waved them through."[6] Senator Warren's plan also says Amazon simply copies successful goods sold on its platform and then sells those goods under the Amazon brand, and that Google "allegedly snuffed out a competing small search engine by demoting its content on its search algorithm, and it has favored its own restaurant ratings over those of Yelp."[7]

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[2] Elizabeth Warren, *Here's how we Can break up big tech*, MEDIUM (Mar. 8, 2019), https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

[3] *Id.*

[4] *Id.*

[5] *Id.* This article does not address this issue, but the implication of this blame seems to be that as executive administrations change, so too will antitrust enforcement. The next President could simply instruct regulators to re-approve the mergers, and thus the antitrust jurisprudence would be in constant flux. Another important point not addressed is that independent regulatory agencies are supposed to be independent. The idea of a President undoing mergers she dislikes threatens the very integrity of the administrative state. It is worth noting, though, that Presidents will undo and redo regulations pretty often. Take, for example, net neutrality, which has been reversed multiple times since 1990. One may have a problem with a President acting in this way, but again, this paper will not discuss this particular issue in detail.

[6] *Id.* 2

[7] *Id.*

As an initial matter, Google is constantly dealing with complaints from smaller companies over what is called "PageRank," which corresponds to how easily a user can find a certain site's webpage. It is important to note, however, that in 2017 the European Union fined Google $2.7 billion for antitrust violations relating to its shopping search comparison service.[8] In that case, the European Union found that Google had gone beyond steering shoppers to its products based on actual quality; Google was systematically favoring its own products in shopping comparison searches without regard to the quality and that Google simply used its power to promote its products above those of competitors.[9]

While a fine in Europe does not necessarily mean that Google is in violation of American antitrust law, it certainly serves as a bit of a red flag for those coming to Google's defense. Senator Warren's plan does not contain any information that unveils the factual bases for her claims against the tech giants, though it is hard to imagine the European Union suits did not play a role.[10] In any event, Senator Warren's plan hinges not only on a finding the mergers listed, such as Amazon purchasing Whole Foods and Facebook purchasing Instagram, were illegal and are reversible, but also on a willingness in Congress to pass legislation that would separate the major platforms from any of the participants on their platforms.[11] While it is a very important and interesting endeavor to consider things like the constitutionality of antitrust laws and the legal ability of federal regulators to unwind mergers that were previously given the requisite regulatory approval, this note solely focuses on the antitrust issues involved with the Senator's plan. Because the senator's plan characterizes these companies as monopolies and focuses specifically on mergers and acquisitions, the correct analysis of her plan must be conducted in a Sherman Act framework. The Sherman Act is the cornerstone of US antitrust law.

The Sherman Act was enacted in 1890 to prevent anticompetitive agreements between companies and to prevent unilateral conduct that monopolizes or attempts to monopolize a market.[12] The Sherman Act, which was the first measure passed by Congress to prevent companies from unreasonably restraining trade[13], is often thought of as the most important part of modern American antitrust law, but the Federal Trade Commission Act (FTCA) and the Clayton Act also play significant roles in the prevention of monopolization or anticompetitive acts. The Clayton Act regulates general practices that may be detrimental to fair competition, including price discrimination, exclusive dealing contracts, tying agreements, or requirement contracts; mergers and acquisitions; and interlocking

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[8] Natasha Lomas, *Google Fined $2.7BN for EU Antitrust Violations*, TECHCRUNCH (June 27, 2017), https://techcrunch.com/2017/06/27/google-fined-e2-42bn-for-eu-antitrust-violations-over-shopping-searches/.

[9] *Id.*

[10] Google has also been penalized twice more since 2017 by the EU for antitrust violations. *See* Nitasha Tiku, *The EU Hits Google With a Third Billion-Dollar Fine. So What?*, WIRED (Mar. 20, 2019), https://www.wired.com/story/eu-hits-google-third-billion-dollar-fine-so-what/; *see also* Warren, *supra* note 2.

[11] Warren, *supra* note 2.

[12] *Sherman Antitrust Act*, LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/sherman_antitrust_act (last visited May 11, 2020).

[13] *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited May 11, 2020).

directorates.[14] The Clayton Act is a more effective means of enforcement for the government, because the Sherman Act only outlawed monopolies whereas the Clayton Act outlaws specific business practices.

The Federal Trade Commission (FTC) typically finds anticompetitive conduct to be violations of Section 5 of the FTCA, which bans "unfair methods of competition" and "unfair or deceptive acts or practices."[15] The Sherman Act says any "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States" will be deemed a felony.[16] That section of the Sherman Act was clearly intended to prohibit anticompetitive behavior between multiple corporations in the furtherance of a restraint of commerce. The Supreme Court of the United States has also held that all violations of the Sherman Act also violate the FTCA, which is technically the basis for FTC enforcement.[17]

Section 2 of the Sherman Act, though, states that any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States" will also be subject to felony conviction.[18] The latter section of the Sherman Act will be a main focus of this note, as Senator Elizabeth Warren has declared tech giants like Amazon, Facebook, and Google have violated antitrust laws and must be broken up.[19] According to the Supreme Court, the purpose of the Sherman Act is "not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[20] The language used here is important to consider because it clearly shows the Clayton Act is a forward-looking law that attempts to prevent anticompetitive effects in the future. Senator Warren's plan[21], by contrast, is to appoint regulators to unwind mergers and acquisitions that have already occurred, and thus seek to unwind what she considers anticompetitive effects.

The Sherman Act, the FTCA and the Clayton Act all play an important role in modern antitrust enforcement. The Clayton Act is relevant to this note's analysis, as it prohibits mergers and acquisitions whose effect "may be substantially to lessen competition, or to tend to create a monopoly."[22] The FTC again provides insight as to the analysis the agency will undertake, noting that "[t]he key question the agency asks is whether the proposed merger is likely to create or enhance market power or facilitate its

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[14] Patricia Gima, *What are the Sherman Antitrust and Clayton Acts?*, FREEADVICE BUSINESS LAW, https://business-law.freeadvice.com/business-law/trade_regulation/anti_trust_act.htm (last visited May 11, 2020).

[15] *Anticompetitive Practice*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/anticompetitive-practices (last visited May 11, 2020).

[16] 15 U.S.C. § 1 (2004). This section of the Sherman Act, though, focuses on horizontal conduct between two or more firms. This note is focused more on monopolies and the actions of a single entity in the marketplace.

[17] *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited May 11, 2020).

[18] 15 U.S.C. § 2 (2004).

[19] Warren, *supra* note 2.

[20] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[21] Warren, *supra* note 2.

[22] 15 U.S.C. § 18 (1996).

exercise."[23] It does not seem problematic that antitrust enforcement will not change somewhat alongside changes in the White House. For example, since President Trump took office, his administration has challenged and blocked a number of mergers and acquisitions.[24]

However, in February of 2019, the FTC announced that it was launching a new "Technology Task Force" (TTF) dedicated to "monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted."[25] According to the FTC, the primary purpose of the TTF is to identify and investigate both anticompetitive conduct and consummated mergers in digital technology markets.[26] This is troubling in the sense that the socioeconomic effect of allowing the current administrative state to simply disband some of the largest, most profitable, and most innovative companies based on mergers that were approved by the prior administration are difficult to fathom and even more difficult to understate. To be sure, if any of those firms are *currently* violating §2 of the Sherman Act, the issues dissipate, but without present violations of law, the ability to undo, and in the future re-do, these mergers could have profound impacts on the economy and consumers.

There is an important distinction that need be addressed before moving forward. Simply having a monopoly in a market is *not* enough to be liable for antitrust violations. The FTC elaborates, stating that

> "[i]t is important to note that it is not illegal for a company to have a monopoly, to charge 'high prices,' or to try to achieve a monopoly position by aggressive methods. A company violates the law only if it tries to maintain or acquire a monopoly through unreasonable methods."[27]

So, it seems as though the analysis must focus on the means by which Amazon, Facebook, and Google obtained their incredible market power, and not on the fact that those companies have such market power. The first step in that analysis is to analyze the kinds of actions courts have deemed to be anticompetitive in the past, and then to apply those rules to the behavior of Amazon, Facebook, and Google.

One might think that because the Sherman Act is, in theory, designed to prevent future anticompetitive conduct, remedies should not be punitive in nature. However, per the FTC, "[T]he maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million."[28] So, if a company is found guilty of violating the

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[23] *Mergers*, FED TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (last visited May 11, 2020).

[24] Daniel Hemli & Jacqueline R. Java, *The Trump Effect on Antitrust M&A Enforcement*, BUSINESS LAW TODAY (July 16, 2018), https://businesslawtoday.org/2018/07/trump-effect-antitrust-ma-enforcement/.

[25] Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019) https://www.ftc.gov/news-events/press-releases/2019/02/ftcs-bureau-competition-launches-task-force-monitor-technology.

[26] Alexis J. Gilman & Akhil Sheth, *INSIGHT: The FTC Tech Task Force—Answers to Important Questions*, BLOOMBERG LAW (Sept. 10, 2019) https://news.bloomberglaw.com/us-law-week/insight-the-ftc-tech-task-force-answers-to-important-questions.

[27] *Anticompetitive Practices*, FED. TRADE COMM'N, https://www.ftc.gov/enforcement/anticompetitive-practices (last visited May 12, 2020).

[28] *The Antitrust Laws*, *supra* note 17.

Sherman Act, the main remedy will be monetary damages. However, the Clayton Act goes further, and also allows "private parties to sue for triple damages when they have been harmed by conduct that violates either the Sherman or Clayton Act and to obtain a court order prohibiting the anticompetitive practice in the future."[29] Here, the fact that a court can issue an order prohibiting anticompetitive practices in the future indicates the progression of antitrust law as a forward-looking mechanism, with more remedies than just damages to punish a firm for undertaking some form of anticompetitive action. So, courts can and will grant injunctions to prevent a firm from engaging in the same or similar conduct in the future. Courts, such as the *Grinnell* court, will also sometimes order a company to divest itself of ownership of certain companies, the ownership of which was deemed by the court to be anticompetitive.[30]

This note will first address the current doctrine in the antitrust law regime. The next section will discuss the platform utilities solution offered by Senator Warren as applied to Amazon and Google, and then will analyze the senator's plan to reverse illegal mergers completed years ago by Amazon, Google, and Facebook. Finally, this note will offer potential solutions to these complex issues, some falling in line with the senator's plans and others being arguably more efficient alternatives.

III. WHAT IS ANTICOMPETITIVE BEHAVIOR?

To be able to effectively analyze the actions of Amazon, Google, and the like, a detailed review of the development of antitrust law in the United States is necessary. The Sherman Act was passed in 1890, and the Clayton Act was passed in 1914; it follows that the current state of the law — and of the economic markets the law intends to regulate — are much different than they were at the time of passage. However, new laws have not been enacted to cope with these changes. Similar to most other areas of the law, the interpretations and meanings of the law have been adjusted to fit the demands of society.[31] The first inquiry that guides the following analysis is: What is anticompetitive behavior? The FTC again provides some guidance as a threshold matter: "Anticompetitive conduct is conduct without legitimate business purpose that makes sense only because it eliminates competition."[32] So long as a legitimate business motive exists for a corporation's decisions, courts will decline to punish the corporation where a reduction in competition is a side effect.[33]

However, anticompetitive conduct is too context-dependent to fit into one all-encompassing definition.[34] The Supreme Court has found conduct to be anticompetitive in the single-firm context where a company has, for example, manufactured plumbing supplies and fire sprinkler systems while also owning 76%, 87% and 100% of stock in three different companies engaged in burglary and fire protection services.[35] At the time, those companies accounted for roughly 87% of total business in the central service station

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[29] *Id.*
[30] *Grinnell*, infra note 35, at 578.
[31] Though this note does not discuss it, an interesting potential solution to these and similar issues could be to enact new laws that are better geared toward handling the current state of the economy.
[32] HDC Medical, Inc. v. Minntech Corp., 474 F.3d 543, 549 (8th Cir. 2007)
[33] Midwest Radio Co. v. Forum Publishing Co., 942 F.2d 1294, 1297-98 (8th Cir. 1991).
[34] *See, e.g.*, Dodge Data & Analytics, L.L.C. v. iSqFt, Inc., 183 F. Supp. 3d 855, 865-67 (S.D. Ohio 2016).
[35] United States v. Grinnell Corp., 384 U.S. 563, 566 (1966).

market.[36] In addition, one of the companies that Grinnell Corp. owned stock in, ADT, had also purchased the stock or assets of 27 other companies in the market.[37] The Supreme Court had no trouble finding that the defendant corporation had sufficient market power to be considered a monopoly because the corporation had acquired the market power through purchasing competitors as opposed to offering higher quality services.[38] *U.S. v. Grinnell* represents the classic framework that courts deploy to analyze a set of facts for a § 2 Sherman Act violation. Ultimately, the Supreme Court upheld a decree requiring the defendant corporation to divest itself of its holding in the three competitor corporations.[39] The court's analysis in that case again reinforces the idea that possession of a large share of market power alone is not enough to support a finding of a Sherman Act violation; courts must look to the means employed by a corporation to obtain that market share, and if the means themselves are anticompetitive in nature, a court will find a violation. Put another way, courts will only find a corporation has violated § 2 if it has obtained or maintained such market share through "unreasonable" methods.[40] This rule directly relates to the legitimate business justification rule.[41]

One other rule should be highlighted. There are certain kinds of acts which alone are so harmful to competition that they almost always lend themselves to a finding of antitrust violations. These include, the FTC points out, arrangements among competitors to fix prices, divide markets, or rig bids.[42]

Shifting to the Clayton Act approach to determine the legality of a merger or acquisition, it bears repeating that the FTC and courts will look forward to the potential effects of a merger or acquisition to determine whether or not the transaction will likely result in a reduction in competition.[43] Courts have construed the Clayton Act with a very broad application, interpreting the statute as not only preventing mergers and acquisitions within a corporation's own market, but also mergers and acquisitions that might restrain commerce in any sector or tend to create a monopoly over any line of commerce.[44] The Supreme Court elaborates further that a monopoly inherently includes the power to lessen competition and that the substantiality of the lessening of competition can only be determined in terms of the effects of the asset or stock purchase on the relevant market.[45] The final requirements for a Clayton Act violation, as provided by the court, are that the market affected must be substantial, and the government must establish a likelihood that competition may be foreclosed in a substantial share of that market.[46] It should be noted that the government, through producing evidence of relevant market power and of efforts

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[36] *Id.*
[37] *Id.*
[38] *Id.* at 576.
[39] *Id.* at 580.
[40] *Single Firm Conduct*, FED TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct (last visited May 11, 2020).
[41] Midwest Radio Co., *supra* note 3333.
[42] *The Antitrust Laws*, FED TRADE COMMN, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited May 11, 2020).
[43] *Mergers*, FED TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers (last visited May 11, 2020).
[44] U.S. v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 592 (1957).
[45] *Id.* at 593.
[46] *Id.* at 595.

to maintain or acquire that power, can establish prima facie anticompetitive conduct.[47] The plaintiff in a monopolization case bears the burden of proof and must "demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect."[48] However, if the plaintiff is able to establish a prima facie Sherman Act violation, "the monopolist may proffer a 'procompetitive justification' for its conduct,"[49] essentially the same as an affirmative defense in a different kind of civil proceeding.

In sum, a legitimate business motive for a particular decision that leads to anticompetitive effects often is enough of a reason for courts to decline to allow an antitrust claim to proceed, though the determination of whether an action is propelled by a legitimate business motive or simply to eliminate competition is highly fact-dependent. Merely possessing a large market share is not enough to hold a company liable for a Sherman Act violation. Additionally, the Clayton Act is typically construed broadly, and can be used to prevent mergers and acquisitions that will affect any sector of the economy substantially, not just the sector(s) in which the parties to the transaction conduct business.

IV. SENATOR WARREN'S PLAN

A. Step 1: Platform Utilities

The first step of Senator Warren's two-step plan to break up big tech is to pass legislation that requires companies with an annual global revenue of $25 billion or more and that offer a public marketplace or platform for connecting third parties to be deemed a "platform utility."[50] This designation would then require the platform company itself to be separated from any participant on its platform.[51] For example, Amazon would not be able to both own its website and own any single participant on its own platform.[52] It would even be precluded from owning the Amazon Marketplace (the Amazon website) and Amazon Basics (the brand under which Amazon sells its own products on its website).[53] Senator Warren claims, as support for her position, that Amazon extinguishes competitors by copying the products they sell on Amazon and then selling its own branded version for a lower price.[54] In addition, Google's ad exchange would be legally required to be completely separate from any business that uses the ad exchange.[55] Senator Warren goes on to say that her plan would also require both platform utilities and smaller companies ($90 million to $25 billion in annual global revenue) to meet a standard of "fair, reasonable, and nondiscriminatory dealing with users."[56]

i. Amazon: Can it own the marketplace and be a vendor?

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[47] *See, e.g.*, U.S. v. Cont'l Can Co., 378 U.S. 441, 466 (1964).
[48] U.S. v. Microsoft Corp., 253 F.3d 34, 58-59 (3rd Cir. 2001).
[49] *Id.* at 59.
[50] Warren, *supra* note 2.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*

The main argument Senator Warren makes regarding Amazon Marketplace and Amazon Basics[57] is that the platform company has access to all sorts of sales and product data through ownership of the platform that no other competitor has, and thus the platform is able to unfairly use that data to simply create its own name-brand products to replace those of their competitors, then favor their own products on their platform.[58]

Now, an easy counterargument to make would simply be: So what? Amazon's entire business model is predicated on being more efficient than that of any of its competitors. For example, Amazon, for the most part, has much lower operating costs than competitors because Amazon does not have to pay to operate and maintain storefronts.[59] Another common sentiment regarding Amazon is that the company will just simply buy a smaller company if that company presents any kind of competitive threat to Amazon. Amazon, though, actually does not engage in very many acquisitions compared to its tech rivals.[60]

Additionally, Amazon has enormously positive impacts on thousands of small businesses across all retail sectors: Small businesses, by simply listing their products on Amazon, are able to increase their customer reach without needing to provide their own delivery and distribution infrastructure.[61] Amazon, in a 2018 "Small Business Impact Report," announced that over 20,000 small and medium-sized businesses on Amazon across the world surpassed $1 million in sales in 2017.[62] As a matter of fact, almost half of all internet users in the United States live in a household with an Amazon Prime membership, and Amazon's website gets more than 2 billion visitors every month.[63] With such market power, it seems obvious Amazon could use its market share to simply increase prices and force consumers to pay those higher prices without the ability to turn to other retailers for the goods they seek. But, with Amazon providing such extensive customer reach to so many small and medium-sized businesses, and until Amazon actually attempts to manipulate prices in this way, it seems a bit of a stretch to say that Amazon has actually injured small businesses or consumers.

Now, it is important to reaffirm one of the FTC's main points with regard to monopoly-like companies: it is *not* illegal for a company to simply acquire so much market power so as to be considered a monopoly.[64] So, it is not enough to simply say that Amazon is an illegal monopoly based on the sheer internet traffic it receives on a monthly basis. Rather, the actions Amazon has undertaken to acquire that power must be examined. This

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[57] *Id.*

[58] *See* Alexis J. Gilman & Akhil Sheth, *The FTC Tech Task Force-Answers to Important Questions*, BLOOMBERG LAW (Sept. 10, 2019), https://news.bloomberglaw.com/us-law-week/insight-the-ftc-tech-task-force-answers-to-important-questions (explaining how platforms "self-preferenc[e]").

[59] Mrinalini Krishna, *The Amazon Effect on the U.S. Economy*, INVESTOPEDIA (July 29, 2019), https://www.investopedia.com/insights/amazon-effect-us-economy/.

[60] *See Infographic: Amazon's Biggest Acquisitions*, CB INSIGHTS (June 19, 2019), https://www.cbinsights.com/research/amazon-biggest-acquisitions-infographic/ (last visited May 10, 2020).

[61] Brock Blake, *Amazon: Small Business Friend or Foe?*, FORBES (Sep. 23, 2019), https://www.forbes.com/sites/brockblake/2019/09/23/amazon-friend-or-foe/#415d91e17367.

[62] *Amazon Introduces First-Ever Small Business Impact Report*, BUSINESSWIRE (May 3, 2018), https://www.businesswire.com/news/home/20180503005604/en/Amazon-Introduces-First-Ever-Small-Business-Impact-Report.

[63] Rachel Segal, *Is Amazon Good or Bad for the Shopping Industry?*, THE PERSPECTIVE (2019), https://www.theperspective.com/debates/businessandtechnology/amazon-good-bad-shopping-industry/.

[64] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

is where both a Sherman Act and a Clayton Act analysis are required to determine whether Amazon has impermissibly maintained or acquired its market power, and whether the mergers and acquisitions in which Amazon has engaged are also impermissible.

It is important to remember that §2 of the Sherman Act states that any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States"[65] will be subject to prosecution for antitrust violations. Courts will look to a variety of factors to determine whether or not a firm has the requisite market power to be considered a monopoly.[66] District courts have changed their approach over the years as the economy has become more globalized and complex, and recently have considered things such as reasonable interchangeability and cross-elasticity of demand,[67] availability of close substitute products, and the definition of the proper geographic market.[68]

To illustrate a basic analysis at the motion-to-dismiss stage, a district court allowed a plaintiff's monopolization claims to proceed where the plaintiff manufactured the only memory card compatible with defendant corporation's system other than that which defendant corporation produced, and the defendant corporation issued a software upgrade that rendered the plaintiff's memory card completely incompatible with defendant's system.[69] The district court there reasoned that although single brand markets do not typically constitute a relevant market for an antitrust claim, because customers had not contractually agreed with the defendant on aftermarket restrictions.[70] The court further found that the single brand market was the relevant market and, viewing the allegations in the light most favorable to the plaintiff, that the plaintiff had stated a plausible monopolization claim based on the conduct of the defendant, which in effect eliminated substitute products in the relevant market.[71]

With regard to proving monopolization of the relevant market, direct evidence of monopoly power is often nearly impossible to produce. Courts will, however, allow plaintiffs to demonstrate monopoly power by circumstantial evidence.[72] "To prove monopoly power by circumstantial evidence a plaintiff must: (i) define the relevant market, (ii) show that the defendant holds a dominant share of that market, and (iii) show that there are significant barriers to entry."[73] A significant piece of circumstantial evidence to be evaluated in this analysis is market share.[74]

Shifting to Amazon, the first step of this analysis is to determine the relevant market. This issue has been debated vigorously among scholars and the media. For example, 2008 Nobel Prize winner for economics Paul Krugman argued in a 2014 opinion

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[65] 15 U.S.C. § 2 (2004).
[66] AMERICAN BAR ASS'N, 2010 ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS, 45-46 (ABA Publishing , 2011) [hereinafter 2010 Ann. Rev. Antitrust L. Dev.].
[67] Adam Hayes, *Cross Elacticity of Demand*, INVESTOPEDIA, https://www.investopedia.com/terms/c/cross-elasticity-demand.asp. Cross-elasticity of demand is an economic concept that is used to measure the change in demand for one good as a response to a change in the price of another good (last visited Apr. 30, 2020).
[68] 2010 Ann. Rev. Antitrust L. Dev., *supra* note 66 at 45-46.
[69] Datel Holdings v. Microsoft Corp., 712 F. Supp. 2d 974 (N.D. Cal. 2010).
[70] *Id.* at 990.
[71] *Id.*
[72] *See* 2010 Ann. Rev. Antitrust L. Dev., *supra* note 66 at 49.
[73] *Id.*
[74] *Id.*

editorial that Amazon is a monopsonist,[75] which is a single buyer of labor in a given market, not a monopolist at all. Others argue that Amazon competes in the e-commerce sales market, where Amazon has a 15 percent market share worldwide.[76] In the United States, though, that market share is projected to hover right around 38 percent of total e-commerce sales.[77] Worthy of note in the United States e-commerce market is that the three companies directly behind Amazon in the United States e-commerce market, eBay, Walmart, and Apple, have 6.1 percent, 4.7 percent, and 3.8 percent market shares respectively.[78]

Based on the staggering statistics above, and accepting for the purposes of the note that Amazon is in the e-commerce market, it seems likely that a court, applying the principles from *U.S. v. Grinnell*[79] would find that Amazon has the requisite market share to establish at least a prima facie case of monopoly power in the relevant market. Again, though, it is important to note that Amazon's possession of monopoly power in the e-commerce market is not enough to hold Amazon liable for Sherman Act violations. A compelling argument can be made in favor of not finding Amazon liable for any Sherman Act violations.

Remember that the purpose of the Sherman Act is "not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct, which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[80] So, the fact that Amazon has been more successful than any other company in the e-commerce market should not offend the Sherman Act. In fact, consumers should be pleased that Amazon has such a broad reach. It is hard to imagine that Amazon would have such a reach if most consumers did not prefer Amazon to any other online retailer. Amazon has gained its market share by simply offering better products with a wider variety at a lower price with more efficient delivery service than any other e-commerce retailer.[81] In a sense, Amazon's monopoly-like power could be viewed as the ideal outcome of the competitive market — one company offered better prices on better products, and consumers took notice and diverted their business to Amazon. This seems to be in line with the purpose of the Sherman Act. Is simply having lower costs and offering lower prices to consumers behavior which unfairly tends to destroy competition itself?

Additionally, Senator Warren and Amazon's other critics take issue with Amazon allegedly using private sales data obtained through Amazon Marketplace to copy successful products and then sell those same products under the Amazon Basics brand, thus eliminating competition and acquiring additional power.[82] Amazon has also faced criticism

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[75] *Infra* note 114.

[76] Terra Hittson and William F. Cavanaugh, Jr., *What Is the Appropriate Market for Analyzing Amazon's Alleged Power?*, PATTERSON BELKNAP (Oct. 3, 2014), https://www.pbwt.com/antitrust-update-blog/what-is-appropriate-market-analyzing-amazons-alleged-power.

[77] Matt Day and Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% From 47%*, BLOOMBERG (June 13, 2019), https://www.bloomberg.com/news/articles/2019-06-13/emarketer-cuts-estimate-of-amazon-s-u-s-online-market-share.

[78] Thomas Barrabi, *Amazon's online market share may be smaller than previously thought*, FOXBUSINESS (June 14, 2019), https://www.foxbusiness.com/retail/amazon-market-share-ecommerce-sales.

[79] 35United States v. Grinnell Corp., 384 U.S. 563, 566 (1966).

[80] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

[81] *See* Alyssa Newcomb, *Amazon's Rise and How It Became Bigger Than Walmart*, ABC NEWS (July 24, 2015), https://abcnews.go.com/Technology/amazon-bigger-walmart/story?id=32661220.

[82] Warren, *supra* note 2.

on other fronts, namely regarding its digital assistant "Alexa."[83] This note, however, focuses solely on the antitrust criticisms that Senator Warren and others have expressed regarding Amazon. On its face, if Amazon were truly selling items it simply copied from other successful vendors on Amazon, it seems Amazon may have acted in violation of the Sherman Act by acting in a way that simply limits its competition. However, as an initial matter, this appears as more an intellectual property matter than an antitrust matter. The media in 2016 was swept up in a story about an aluminum laptop stand that was the best seller in its category on Amazon.[84] Amazon then released its own, very similar version of the laptop stand, much to the chagrin of the original vendor. At first glance, this appears to be predatory action on Amazon's part, but upon further investigation, the original stand is still the only laptop stand on Amazon with a five-star rating.[85] And, as the general manager of the company that made the original stand stated, "there's nothing we can do because they didn't violate the patent."[86] While not violating a patent certainly is not the same thing as not engaging in anticompetitive behavior, it seems that this issue creates a unique tension between intellectual property law and antitrust law. Intellectual property rights exist to encourage fair competition, and it follows that not violating a patent while creating a similar product avoids liability for intellectual property infringement. This note will not discuss the tension between these two areas of the law, but there should only be a very small sliver of cases in which a party can be liable for antitrust violations relating to creating similar products without also infringing intellectual property rights. It is hard to think of a sector of the economy in which successful products are not copied as closely as possible without patent violations. If, however, a certain company in a different sector did copy successful products, surely the injured party would seek an intellectual property remedy as opposed to filing suit for violation of antitrust law.

Companies in all sectors are constantly looking at the successful goods and services sold by competitors to attempt to simply produce a better or cheaper substitute. For example, grocery stores typically sell their own brand of all sorts of groceries, and often times the store brand versions are close to if not exactly the same as the others and are sold at a cheaper price. So, why then would that behavior be illegal when Amazon does it, but not when Costco does? I suppose, again, that the answer there is that Amazon both controls the online market through which the goods are sold and also sells its own products on that market. More specifically, Amazon possesses the analytical tools and access to product information necessary to simply monitor which goods are selling, look at how the product is made and how to make a similar product that will not violate any patents, and then to sell that product for a lower price because Amazon does not have to pay to have its own good sold on its own platform. But, in both an Amazon and grocery store context, a consumer looking for a generic product will typically be confronted with several brand options, to the point that it can be intimidating. It seems as though the real threat to the smaller, individual sellers of certain goods would be the tens or hundreds of other

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[83] *See, e.g.*, Ben Fox Rubin, *Amazon bolsters Alexa privacy after user trust takes a hit,* CNET (Sept. 30, 2019), https://www.cnet.com/news/amazon-bolsters-alexa-privacy-after-user-trust-takes-a-hit/.

[84] Spencer Soper, *Got a Hot Seller on Amazon? Prepare for E-Tailer to Make One Too*, BLOOMBERG (Apr. 20, 2016), https://www.bloomberg.com/news/articles/2016-04-20/got-a-hot-seller-on-amazon-prepare-for-e-tailer-to-make-one-too.

[85] Juozas Kaziukenas, *The Myth of Amazon Copying Best-Seller Products*, MARKETPLACE PULSE (Oct. 31, 2017), https://www.marketplacepulse.com/articles/the-myth-of-amazon-copying-best-seller-products.

[86] Soper, *supra* note 84.

companies that market similar or identical products and not the one brand that also owns the forum in which the consumer is shopping, as Amazon products typically do not perform very well.[87]

There is certainly a counterargument to be made for holding Amazon liable for monopolization through conduct which actually does destroy competition. Certainly, given Amazon's plethora of goods for sale and its sheer customer reach, there will be significant barriers to entry for competing firms in the e-commerce market. It could also be argued that Amazon's size suppresses innovation, because competitors are simply unwilling to undertake the seemingly impossible task of attempting to wean some of Amazon's market share. This seems, though, best left to consumers as opposed to courts. Maybe it is just a philosophical disagreement, but that Amazon has such high global annual revenue and attracts such tremendous internet traffic should not bother consumers because consumers are the very reason Amazon has been able to acquire such power. And, if Amazon were found to be liable for antitrust violations, a court would risk potentially harming a number of the more than 20,000 small or medium-sized businesses[88] who have benefitted so greatly from Amazon's size and power. The legitimate business motives for Amazon's strategic decisions outweigh any incidental anticompetitive effects on the market, and the economy and consumers are better off because of it.

ii. Google: Illegal promotion or merit-based attention?

Switching the focus from one tech giant to another, Google's main issues stem from the alleged systematic favoring of its own content, such as in comparison shopping services or restaurant reviews, over that of its competitors.[89] Senator Warren accuses Google of demoting a competing search engine's content on Google's search algorithm and favoring its own restaurant reviews over reviews from Yelp.[90] Google's case appears to be more straightforward than that of Amazon. Google has already been fined three separate times by the European Union for favoring its own content and ratings over those of its competitors.[91] Google also required independent websites that wanted to provide customers with access to a Google search bar through the third-party's website to display a disproportionate amount of Google text ads compared to ads from competing digital advertising services.

Under a Sherman Act analysis, Google's actions regarding advertisements and the favoring of its own content in comparison searches fall squarely within the conduct the Sherman Act seeks to prohibit. It is hard to concoct a legitimate business reason for Google's actions; it seems as though Google simply took these steps to harm and limit their own competition. It's important to note that while promoting Google's own reviews will

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[87] Spencer Soper, *Most Amazon Brands Are Duds, Not Disrupters, Study Finds*, BLOOMBERG (Mar. 18, 2019), https://www.bloomberg.com/news/articles/2019-03-18/most-amazon-brands-are-duds-not-disrupters-study-finds.

[88] *Amazon Introduces First-Ever Small Business Impact Report*, BUSINESSWIRE (May 3, 2018), https://www.businesswire.com/news/home/20180503005604/en/Amazon-Introduces-First-Ever-Small-Business-Impact-Report.

[89] Lomas, *supra* note 8.

[90] Warren, *supra* note 2.

[91] Charles Riley & Ivana Kottasová, *Europe hits Google with a third, $1.7 billion antitrust fine*, CNN BUSINESS (Mar. 20, 2019) https://www.cnn.com/2019/03/20/tech/google-eu-antitrust/index.html.

legitimately help increase Google's revenues, the purpose of the Sherman Act is to deter companies from promoting their own business through anticompetitive means. So, if Google's reviews were at the top of the search page simply because they had been used the most, that would be completely fine. But if Google is only able to experience higher traffic through anticompetitive means-demoting other company's reviews-then the legitimate business purpose defense will likely be of no avail. It seems counterintuitive to think that limiting competition could be used as a legitimate purpose for particular conduct. The issues Google has faced in Europe over the past few years[92] are also a useful instrument through which a potential issue becomes somewhat obvious, and they could very well be the inspiration for the first step of Senator Warren's plan. Tech critics are becoming increasingly worried about platforms' roles as both the overall platform and one or more competitor participating on that platform.[93] It seems as though this is one argument that Senator Warren may be correctly approaching.

B. Step 2: Reversing Illegal and Anticompetitive Mergers

The second step of Senator Warren's plan is to appoint regulators to reverse what she claims are illegal and anticompetitive mergers in the technology sector.[94] The Senator has named a few specific mergers she wants reversed: Amazon's purchases of Whole Foods and Zappos; Facebook's purchase of WhatsApp and Instagram; and Google's purchase of Waze, Nest, and DoubleClick.[95] According to the senator, those mergers have significantly reduced healthy competition in the tech market and have allowed companies to be worry less about competition when it comes to things such as privacy.[96]

One of the challenges in effectively analyzing the feasibility of such a plan is that the senator announced the plan under the assumption that her view of antitrust and anticompetition law was correct, and thus did not provide any form of legal basis in her announcement. Rather, her plan contains certain legal conclusions, such as that the mergers she laid out were in fact illegal and anticompetitive.[97] The one glaring issue with this assumption is, of course, that those mergers were already subject to a pre-merger notification and review process, in which the FTC examines documents and data concerning the companies' products or services, market conditions in the market(s) in which the firms operate, and the likely competitive effects of a merger.[98] To be perfectly clear, the senator is claiming that these mergers, which were examined and approved by the very agency created by Congress to handle exactly these matters with a high level of expertise and efficiency, were actually wrongfully approved and were both illegal and anticompetitive. What's more, the senator now wants to reverse the mergers and force the pre-existing separate companies to be separate once more.

Now, it is worth noting that agency capture could very well be what allowed these mergers to be approved in the first place. Agency capture refers to the phenomenon in

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[92] Lamas, *supra* note 8.
[93] Gilman and Sheth, *supra* note 58.
[94] Warren, *supra* note 2.
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Premerger Notification and the Merger Review Process*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/premerger-notification-merger-review.

which the governmental agency created to regulate a certain industry ultimately becomes an advocate for that industry and operates to protect the interests of the companies within that industry. So, there certainly could be an argument that agency capture occurred and that this allowed the mergers to be approved in the first place. But, it seems that in order to effectively reverse these mergers, the government would have to prove that these new firms are guilty of a §2 Sherman Act violation, and that the appropriate remedy for this violation would be to divest the new firm of the interest it acquired in the prior company through the merger.

It is worth noting that the FTC's Technology Task Force[99] has main focuses that closely resemble those of Senator Warren's plan. The TTF will potentially focus on (1) "killer acquisitions," whereby a large firm purchases a smaller rival firm that will arguably become the large firm's competitor, and (2) platform self-preferencing, whereby large platforms allegedly favor and promote their own products over those of their competitors who also use their platform.

i. Amazon: Smart Business Moves or Illegal Mergers?

Senator Warren also says that Amazon violated antitrust law when it purchased Whole Foods and Zappos.[100] Again, one of the challenges in evaluating the senator's plan is that she just simply claims that these acquisitions by Amazon were illegal and anticompetitive, without providing any sort of legal basis for those conclusions. And, academic scholars have consistently argued that Amazon's purchase of Whole Foods does not violate antitrust law. For example, one scholar at Juris Magazine at Duquesne Law argues that the Amazon-Whole Foods merger is perfectly legal, primarily pointing to the idea that Whole Foods only holds a 3.5% market share in the grocery market and arguing that that market share is simply not large enough to raise anticompetition concerns.[101] And, Senator Warren's claims of illegality and anticompetitive nature of the mergers are directly contradictory to the findings of the FTC from the Whole Foods merger.[102] The FTC reviewed the proposed merger between Amazon and Whole Foods and approved it after a finding that the deal would not substantially lessen competition or that the merger itself constituted an unfair method of competition.[103] Amazon arguably increased competition through this merger, both in the brick-and-mortar grocery store market and in the online grocery delivery service. By purchasing Whole Foods, Amazon's automated operating systems could theoretically cut the costs of operating a Whole Foods store, thus allowing the store to lower prices, which would increase competition in the market. As for online grocery delivery, equipping one grocery store with the incredible distribution infrastructure Amazon operates forced other stores, like Walmart and Kroger, to develop and innovate

[99] 15 U.S.C. § 18 (1996).
[100] Warren, *supra* note 2.
[101] Joseph Baublitz, *M&A Explained: The Amazon-Whole Foods Merger*, JURISMAGAZINE (Jan. 12, 2018), https://sites.law.duq.edu/juris/2018/01/12/ma-explained-the-amazon-whole-foods-merger/.
[102] David Shepardson & Jeffrey Dastin, *Amazon Deal for Whole Foods Wins U.S. Regulatory, Shareholder Approvals*, REUTERS (Aug. 23, 2017), https://www.reuters.com/article/us-whole-foods-m-a-amazon-com/amazon-deal-for-whole-foods-wins-u-s-regulatory-shareholder-approvals-idUSKCN1B31W6 ; *compare with* Warren, *supra* note 2.
[103] Shepardson & Dastin, *supra* note 102.

online grocery shopping services to avoid losing market share to the new Whole Foods.[104] It is also important to note that, though not a steadfast rule, mergers are most often challenged when they are horizontal mergers — mergers between two direct competitors.[105] Of course, if the purpose of the Clayton Act is to prevent mergers that may substantially lessen competition, it follows that mergers where one competitor is literally absorbed by another competitor in the same market is the most likely to violate the Clayton Act. Here, though, there was only a small level of overlap between Amazon and Whole Foods, as Amazon sold some groceries online, but did not compete with Whole Foods in any meaningful way.[106]

The biggest concern with the merger of the two companies had nothing to do with antitrust law at all: many people feared that Amazon's automated systems would end up providing a cheaper alternative to paying cashiers an hourly wage in the long run, which would allow Amazon to lower prices, which would in turn lead to Amazon's competitors attempting to do the same. Though potentially tragic, those side effects cannot rightfully be addressed through antitrust law.

ii. Google: Buying Better Software to Improve Efficiency

Senator Warren also alleges Google illegally merged with Waze and DoubleClick. The purchase of Waze, a GPS navigation software application, could easily be viewed as a horizontal merger. The argument, then, is that because Google already owned Google Maps, the company simply purchased Waze as a means of absorbing one of its competitors and reduced competition in the GPS navigation software market. This deal involved both antitrust and privacy concerns, as one of the primary reasons Google opted to purchase Waze was that Waze actually generates most of its maps by tracking the movements of its users, and allowing and encouraging users to share information about car accidents, traffic backups, and so on.[107] Additionally, given that the purpose of the Clayton Act is to prevent mergers that will substantially lessen competition, Google also may have violated the Clayton Act because it may have been motivated to purchase Waze simply to keep it out of the hands of its tech rivals, which also could be construed as lessening competition. Google's purchase of Waze could reasonably be construed as legal or illegal, but the FTC already approved the merger after massive document, data, and financial review, and Google likely does have legitimate business justifications for the merger.

Google's purchase of DoubleClick, which is an advertisement developer and servicing application, though, seems to be a more straightforward. Google made roughly $27 billion in advertising revenue in the fourth quarter of 2017. Though Google has its own advertisement software, Google Ads, the purchase of DoubleClick was not anticompetitive. Rather, Google bought DoubleClick in response to competitive pressure from other firms in Google's market, and Google had to outbid Microsoft in order to lock the merger down. The fact that the two main competitors in the market engaged in a bidding

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[104] *Id.*

[105] *Competitive Effects*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/competitive-effects.

[106] Shepardson & Dastin, *supra* note 102102.

[107] *How Does Waze Work?*, GOOGLE, https://support.google.com/waze/answer/6078702?hl=en.

war to purchase DoubleClick shows that this purchase actually served to *increase* competition, not lessen it.

iii. Facebook: Too Many Platforms to Post Pictures?

Arguably the most controversial of the mergers discussed in this note is that in which Facebook purchased Instagram. Facebook bought Instagram in 2012 for $1 billion. This merger, though it obtained the requisite regulatory approval prior to being completed, raises a Clayton Act concern. Remember that the Clayton Act specifically outlaws mergers and acquisitions that substantially lessen competition.[108] But, a look into the circumstances surrounding this acquisition is required to better understand the true nature of the deal.

Instagram already had 27 million registered users on iOS, with an Instagram for Android release priming the platform to reach 50 million users in the near future.[109] Put a different way, Instagram was clearly establishing itself as a major player in the social media market. Both Google and Facebook seriously considered purchasing Instagram, and in fact both companies previously tried to do so.[110] So, Facebook arguably paid a huge premium in order to snatch Instagram up before another company could.[111] Now, purchasing a company that competitors are also looking to purchase is not necessarily a violation of antitrust law. What makes this merger so suspicious, then, is the fact that Instagram and Facebook are almost direct competitors in the social networking market.[112] The main feature that Instagram offered at the time — the ability to share photos and tag other people in those photos — were also viewed by some as the very same features that made Facebook so wildly popular.[113]

In Facebook's case, there are multiple potential motivations. For example, with Twitter gaining such immense popularity among the masses, Facebook may have just been trying to solidify its market position as dominating the photo-sharing and tagging market. A much more suspicious motivation is entirely possible, though. One could reasonably argue that Facebook saw Instagram as a threat to its own market power and user reach, and rather than attempting to allow the market to work and trying to beat Instagram through offering a better, more innovative product, Facebook used its power and resources to simply buy Instagram and eliminate arguably its most dangerous competitor. At the very least, Facebook's acquisition of Instagram is fraught with the most suspicious circumstances of any of the mergers Senator Warren claims to be illegal. The Facebook-Instagram merger seems to be the best chance Senator Warren has at lawfully reversing a merger that had been approved by the FTC prior to her plan.

V. PROPOSALS

This note will actually include a different solution for each of the three tech giants Senator Warren names in her plan. While the term solution may not be a perfectly accurate

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[108] Gima, s*upra* note 14.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*

term to describe these proposals, I feel that these are better approaches to addressing these tech giants than those offered by Senator Warren. First, a solution for Amazon. Though Amazon has incredible market power, a relatively common argument is that Amazon is wrongfully labeled a monopoly. For example, Paul Krugman, who won the 2008 Nobel Prize for economics, in 2014 stated his belief that Amazon is actually a monopsony.[114] A monopsony is an economic market situation in which there is only one buyer.[115] Using book publishers as an example, Amazon has all but extinguished brick-and-mortar bookstores. Amazon simply offers lower prices, due to lower operating costs, and the physical bookstores could not compete. Because Amazon is such a prominent player in the book market, it essentially exercises a monopsonist power over book publishers; publishers know that they essentially either have to go through Amazon or face significantly lower sales numbers. Due to its power over book publishers, and as evidenced in Amazon's dispute with Hachette Books,[116] in which Amazon and Hachette fought over which entity would control the sales price of Hachette's books on Amazon's marketplace, Amazon can directly affect sales of books if the publisher does not agree to every single Amazon term. Amazon allegedly demanded a higher percentage of the sales price of Hachette's books sold on Amazon, and when the publisher refused, Amazon allegedly temporarily raised book prices and altered its search algorithm to direct customers to other publishers' books. The two have since reached an agreement which allows Hachette to continue to set its own book prices on Amazon, which Hachette contends is necessary to ensure its viability as a global publishing entity.[117]

Though the line between being a monopolist and monopsonist can be very unclear, the evidence, at least in some markets, seems to indicate that Amazon is the only buyer of goods as opposed to the only seller. Monopsonists can be regulated through antitrust enforcement, but a potential alternative is to regulate Amazon's wage policy. Simply put, monopsonies maximize profits by picking at an employment level where the marginal revenue of production is equal to the marginal cost.[118] However, because the monopsonist is the only buyer in the market, the monopsonist can essentially pay any wage it wants, because they are the main supplier of labor.[119] So, a monopsonist will pay a lower wage, at a point on the labor supply curve where the employment level is determined by marginal cost and marginal revenue of production.[120] By contrast, a firm in a competitive market would both pay a higher wage and employ more people at a point where labor supply is equal to marginal revenue of production.[121] By regulating the wage a monopsonist can pay employees, typically setting a minimum wage floor at a level higher than monopsony

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[114] Paul Krugman, *Amazon's Monopsony Is Not O.K.*, N.Y. TIMES (Oct. 19, 2014), https://www.nytimes.com/2014/10/20/opinion/paul-krugman-amazons-monopsony-is-not-ok.html?_r=0.

[115] Julie Young, *Monopsony*, INVESTOPEDIA (Feb. 3, 2020), https://www.investopedia.com/terms/m/monopsony.asp.

[116] Krugman, *supra* note 114.

[117] David Streitfeld, *Amazon and Hachette Resolve Dispute*, N.Y. TIMES (Nov. 13, 2014), https://www.nytimes.com/2014/11/14/technology/amazon-hachette-ebook-dispute.html.

[118] *See* CONG. BUDGET OFFICE, THE MINIMUM WAGE IN COMPETITIVE MARKETS AND MARKETS WITH MONOPSONY POWER—SUPPLEMENTAL MATERIAL FOR *THE EFFECTS ON EMPLOYMENT AND FAMILY INCOME OF INCREASING THE FEDERAL MINIMUM WAGE* 3 (2019).

[119] Young, *supra* note 115.

[120] *See* CONG. BUDGET OFFICE, *supra* note 118118.

[121] *Cf. id.* at 1–2 (stating that firms in competitive markets pay wages equal to the marginal revenue of production in order to compete for workers and avoid a decrease in the amount that they employ).

equilibrium, companies will be prohibited from paying wages that unfairly take advantage of the ability to lower prices with workers having to choose between the lower wage or no wage at all.[122] Generally speaking, a minimum wage in a monopsony has the opposite effect than it has in a perfectly competitive market — it could actually increase employment.[123]

Accepting, for the purpose of this proposal, that Amazon is a monopsony, the better solution as compared to Senator Warren's plan seems to be rather simple. Regulatory officials would need to keep an eye on Amazon's wage policies to prevent Amazon from simply lowering the wages paid to an unacceptable level. There is fear that Amazon could continually lower its cost of labor in an effort to maximize profits, and Amazon likely knows that its employees would be forced to work at lower wages as opposed to being unemployed. So, by setting an acceptable minimum wage floor, officials would be able to protect the laborers while preventing Amazon from exploiting its massive employment numbers through paying lower wages.

Additionally, though it is not a traditional form of "labor," Amazon has also been thought of as having monopsony power over certain markets, such as book publishers. The idea there is that because Amazon accounts for such a large percentage of total book sales, publishers essentially face the decision between accepting Amazon's prices and terms, or not selling many books. The same logic that applied to Amazon as a buyer of human labor applies here; because there is no other option, Amazon can charge the publishers whatever it deems necessary. The solution is the same, too.

Regulators simply need to monitor how Amazon does business with third party vendors that sell on its platform to ensure that Amazon is not exploiting its market power and charging absurd rates. Essentially, this would require the FTC to deem that using third-party vendor prices to Amazon's advantage is in and of itself anticompetitive, and thus recover damages from Amazon, but more importantly, get a court order preventing Amazon from using that same tactic in the future. These solutions for Amazon are forward-looking, which contrasts starkly with Senator Warren's plan. At this point, the best option may be to keep a watchful eye on Amazon's future business dealings to ensure that it continues to charge vendors fair rates, which leads to flooding a market with numerous product choices and ultimately lower prices. The FTC could, for example, ask Amazon to provide details regarding agreements with vendors and review those agreements to make sure that Amazon is not abusing its power, and work with Amazon to establish a somewhat uniform set of rules and guidelines for allowing vendors to sell products through the platform.

Now, looking at Google, the answer here seems much easier than antitrust enforcement. Rather than dealing with painstakingly long — not to mention expensive — litigation to determine if Google has committed antitrust violations, the FTC can simply promulgate a rule explicitly banning online platforms from using algorithms to systematically favor their own products over those of competitors. This likely would have to go through notice and comment rulemaking procedures, and would likely take time, but this is the sort of procedure that falls squarely within the FTC's jurisdiction. Before issuing sanctions, of course, the FTC would still have to engage in semi-adjudicatory proceedings

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[122] *See* Guillaume Rocheteau & Murat Tasci, *The Minimum Wage and the Labor Market*, FED. RES. BANK OF CLEVELAND ECON. COMMENT., May 1, 2007, at 2.

[123] CONG. BUDGET OFFICE, *supra* note 118118.

to put together a record of relevant facts necessary to determine if a violation occurred. But the FTC likely possesses a higher level of expertise with regard to anticompetition in the technology sector than a court does.

If Senator Warren's accusations are proven true, there is likely no way for Google to avoid some kind of sanctions from the FTC or a court of law for violating anticompetition law. Under the Sherman Act, Google seems to have engaged in anticompetitive conduct that served no purpose other than to limit its competition in online reviews. The EU penalties seem adequate, as do the punitive fines if Google is unable or unwilling to fix its business practice with regard to comparison shopping searches or online reviews.

One could argue, though, that assessing a fine of a few billion dollars to a company with a 2018 revenue of $136 billion is inadequate. But, that is why the EU courts also held that if Google failed to conform with acceptable business practices, the fines would continue to grow.[124]

Facebook's purchase of Instagram seems to be the merger that is most likely to substantially lessen competition. Facebook and Instagram offered social media outlets with different features, but it's hard to conceive of a legitimate argument in support of the idea that this merger was anything other than a horizontal merger. During the FTC's probe into Facebook's purchase of Instagram, a Facebook director testified to Congress that the company's acquisition strategy has fueled innovation and allowed separate firms to combine their complementary strengths. The FTC approved the merger, so they must have found that to be at least partially true. To be sure, Facebook had a business reason to purchase Instagram. But, this could also very easily be viewed as simply one company purchasing a direct competitor to limit competition. So, applying the *Grinnell* court's analysis, a solution here would be to actually follow Senator Warren's plan regarding this particular merger, and force Facebook to divest itself of ownership of Instagram.

VI. CONCLUSION

Ultimately, Senator Elizabeth Warren's plan is in large part either misguided or not feasible. The points on which she appears most likely to succeed are: (1) Google's demotion of competitor's content on its own search engine and (2) Facebook's purchase of Instagram. Senator Warren seems to have fallen victim to a virus that affects many of today's politicians; she promotes her own political agenda as correct and assumes that her interpretation of the law is correct.

Certainly, if she were to be elected, she would have the ability to appoint principal regulatory officials by and with the advice and consent of the Senate, giving her the ability to leave her fingerprint on the administrative state. However, there would certainly be a ridiculous amount of time and resources spent trying to figure out whether she can achieve her goals, and if so, how she could efficiently do so. This note attempts to offer more feasible and less disruptive alternatives to the Senator's plan.

For the most part, the sentiment that permeates throughout her proposal is a political distaste for large Silicon Valley companies. But she can have as strong a distaste for those companies as she likes. Simply put, a moral disagreement with companies having such

[124] Lomas, *supra* note 8.

ridiculous revenues and market shares does not equate to those companies violating antitrust law.