

# A PRIME TARGET



The Attack on  
Amazon in an Age of  
Weaponized Antitrust

**NetChoice**

By Chris Marchese and Trace Mitchell

# INTRODUCTION

Amazon got its start in 1994 when a relatively young Jeff Bezos moved to Seattle and launched Amazon.com from a corner in his garage. For years the site was nothing more than an online boutique bookstore. But Amazon bet big that online shopping would one day be just as popular as shopping in malls and invested heavily in making that a reality. In fact, Amazon did not post a profit until five years after it first launched as it continued to reinvest revenue and innovate.<sup>1</sup>

Largely as a result of its investment strategy and commitment to low prices, convenience, and customer satisfaction, Amazon now sells over 12 million products across different markets and competes against the nation's largest retailers, including Walmart, Target, and Home Depot. A significant majority of American households now have an Amazon Prime membership and hundreds of thousands of third-party sellers use Amazon and its distribution capabilities to sell their own products and services across the country and world.<sup>2</sup> Even so, Amazon continues to lag well behind Walmart, which enjoys nearly twice the sales revenue.

In recent years Amazon and the outsized benefits it creates for consumers have come under attack as “Big Tech” becomes a favorite punching bag for politicians and pundits alike. The emergence of this newfound hostility for the major digital platforms threatens to undermine the innovation that has occurred over the past several decades as a result of the United States’ light-touch approach to tech regulation.

Perhaps not surprisingly, much of the recent scrutiny against Amazon is the result of its substantial growth since its founding and efforts by corporate competitors who are seeing their dominance decline. To many critics from all sides, it is “too big.” And they see antitrust as a weapon to bring it down to size (what size, they never say). Just recently the House Judiciary Committee released an antitrust report (the Report) attacking Amazon and calling for aggressive enforcement aimed at, among other things, breaking it up.<sup>3</sup>

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1. Saul Hansell, *TECHNOLOGY: A Surprise From Amazon: Its First Profit*, N.Y. Times (Jan. 23, 2002)

<https://www.nytimes.com/2002/01/23/business/technology-a-surprise-from-amazon-its-first-profit.html>

2. Julia La Roche, *59% of US households are Amazon Prime members, according to analyst*, Yahoo Finance (Jul. 15, 2019),

[https://finance.yahoo.com/news/amazon-prime-members-59-percent-of-us-households-rbc-150743767.html?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce\\_referrer\\_sig=AQAAABlnfJv5JybGoN6nSbcMLzrb-50f7ZLptAhXPY5m45GczEq1LGnk4qNPWrs1znQ9PqmeHKOtD7aVWr-9nHbsf7jly0SL-B9XwqpVXurLDcqPow-kKkNdiIWDYbENiJz0zJh4DxYSqDJqBpPINFNwytkRgCcW7OQVv4vNEmKwL9lf](https://finance.yahoo.com/news/amazon-prime-members-59-percent-of-us-households-rbc-150743767.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLnNvbS8&guce_referrer_sig=AQAAABlnfJv5JybGoN6nSbcMLzrb-50f7ZLptAhXPY5m45GczEq1LGnk4qNPWrs1znQ9PqmeHKOtD7aVWr-9nHbsf7jly0SL-B9XwqpVXurLDcqPow-kKkNdiIWDYbENiJz0zJh4DxYSqDJqBpPINFNwytkRgCcW7OQVv4vNEmKwL9lf)

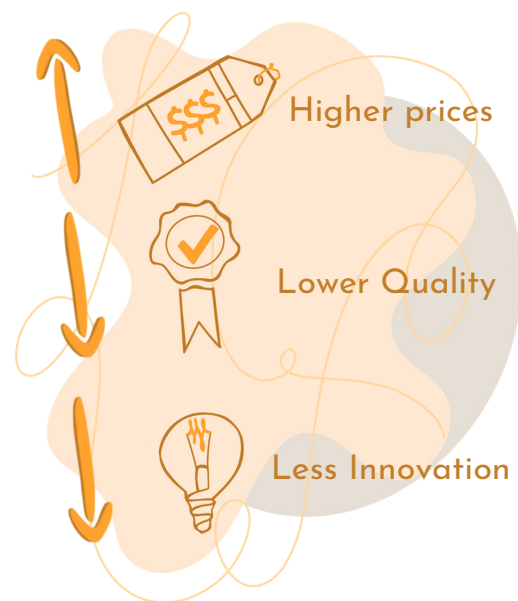
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3. U.S. House Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority staff Report and Recommendation* (2020).

But the Report, along with many of the other recent criticisms levied against Amazon, ignores or downplays inconvenient facts, including all the benefits Americans receive from Amazon and its online marketplace. The Report also ignores the devastating effect that aggressive antitrust enforcement can have on the broader economy. And although it claims to be a “deep dive” into digital markets, it’s riddled with factual mistakes, loaded rhetoric, and baseless accusations. Even worse, it proposes drastic changes to the country’s antitrust laws to protect corporate competitors, not American consumers.

Some policymakers and advocates would prefer antitrust law follow a “big is bad” subjective approach. Under this regime, large businesses like Amazon would be far more susceptible to antitrust litigation solely because their size itself would indicate unlawful behavior.

This approach, however, would harm both consumers and society by raising higher prices, lowering the quality of goods and services, and stifling innovation overall. It would also further politicize antitrust enforcement and open the door for misuse of the law by large corporations to advance their own interests and harm their competitors.



# PART I. SETTING THE SCENE: AMAZON'S BUSINESS MODEL, AMERICAN ANTITRUST LAW, & CONSUMER BENEFITS

## Amazon's Business Model

To understand current discussions regarding antitrust law, it's worth understanding Amazon's business model. At its core, Amazon is an online shopping center. In addition to selling its own inventory, Amazon's digital marketplace, which constitutes more than half of all of Amazon's sales,<sup>4</sup> connects hundreds of thousands of sellers and millions of buyers from across the United States and throughout the rest of the world. Unlike Craigslist and other websites that serve merely as a means of connecting people, Amazon also facilitates transactions between buyers and sellers. In all sales, for example, Amazon processes a buyer's payment information and collects any applicable sales taxes. It then deposits the proceeds in the seller's bank account. This escrow-type service frees sellers and buyers from having to individually navigate new and complex online sales rules.

For these services, Amazon collects fees. For small sellers selling fewer than 40 items per month, it charges \$0.99 per item.<sup>5</sup> Larger sellers pay a standard \$39.99 per month.<sup>6</sup> Amazon also charges a "referral fee" for each item sold which varies by product category but often falls between 8% and 15% of the total sales price.<sup>7</sup>

Beyond these basic functions, Amazon also offers sellers a menu of additional services. For example, many sign up for Fulfillment by Amazon (FBA). Instead of storing and shipping products themselves, sellers using FBA store their products in Amazon's fulfillment centers that then handle packing, shipping, and returns. FBA also qualifies products for Amazon Prime's free two-day shipping services,

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4. See, Statista, Percentage of paid units sold by third-party sellers on Amazon platform as of 4th quarter 2020, <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform>

5. Amazon, *Selling Plans*, <https://m.media-amazon.com/images/G/01/sell/pdf/selling-plans.pdf?initialSessionID=NSGoogle&Id=NSGoogle> (last visited Jan. 12, 2021).

6. *Id.*

7. Amazon, *Pricing: Let's Talk Numbers*, <https://sell.amazon.com/pricing.html> (last visited Jan. 12, 2021).

which provides sellers a cost-effective way to satisfy customer demand for fast shipping.

For buyers, Amazon offers Amazon Prime, a membership service. For a fee—now set at \$119 per year or \$12.99 per month—buyers get access to a growing list of benefits and perks. The most popular include:

- Free two-day and same-day shipping
- Prime Video (a streaming service with thousands of TV shows and movies)
- Prime Music (a streaming service with 2 million ad-free songs)
- Amazon Fresh (free delivery on groceries over \$50)
- Prime Now (2-hour delivery on thousands of common household, grocery, and Amazon products)
- Prime-Exclusive Discounts (deals on Amazon products and services)<sup>8</sup>



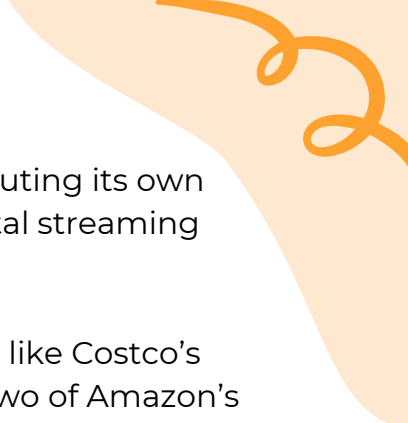
In economic terms, Amazon's services for buyers and sellers makes its Marketplace a "two-sided platform." On one side, Amazon competes to attract sellers to use its website (platform). And on the other, it competes for buyers to buy from its website.<sup>9</sup> Because Amazon must appeal to both buyers and sellers, it has to balance what's attractive to buyers with what's attractive to sellers. In most cases, all benefit. The more products Amazon Marketplace sells, the more choices for buyers. The more choices for buyers, the more buyers are likely to visit the site. And, the more buyers visit the site, the more potential sales for sellers.

But because Amazon faces competition for both buyers and sellers, it must keep innovating. It's done just that. Most obviously, it's grown from selling books and other consumer goods to running a full third-party marketplace that sells almost everything imaginable. Amazon has also focused on improving the user

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8. Connie Chen & Tercius Bufete, *25 Useful Amazon Prime Benefits that Go Beyond Free 2-Day Shipping & Prime Day Deals Access*, Bus. Insider (Oct. 2, 2020), <https://www.businessinsider.com/amazon-prime-benefits-what-is-included#entertainment>.

9. See David S. Evans & Michael Noel, *Defining Antitrust Markets When Firms Operate Two-Sided Platforms*, 2005 COLUM. BUS. L. REV. 667 (2005).



experience by launching Amazon Prime, manufacturing and distributing its own products, integrating groceries, and entering new markets like digital streaming and personal assistants.

Amazon also makes and distributes its own generic products. Much like Costco's Kirkland Signature brand and Walmart's Great Value product line—two of Amazon's largest competitors—Amazon provides in-house offerings under a number of unique private labels. The clearest way in which Amazon's in-house offerings benefits consumers is through the consumption of these goods themselves. Amazon's products are typically offered at a lower price point than those of its competitors. These private labels are thus an attractive option for many price-conscious consumers. Indeed, many Americans would rather buy a generic product from Amazon at a lower price than pay a premium for a name-brand one. Providing customers with affordable alternatives is valuable for consumers, especially low-income and financially strapped Americans. Lower-price products mean their money goes further and means they aren't priced out of the market.

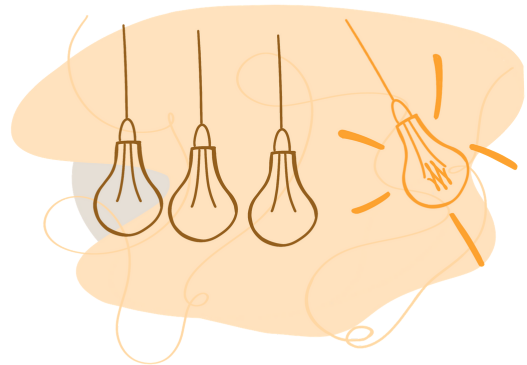
These in-house offerings also create benefits for consumers outside of Amazon Marketplace by increasing competition in retail markets. By providing its own offerings at a lower price point, Amazon encourages other sellers to either lower their prices or improve their products to justify charging a premium. In this way, consumers benefit from Amazon's competitive offerings even if they never actually interact with or buy from Amazon itself. And because Amazon provides users with a breakdown of comparable products, their prices, and customer reviews, it's easier than ever before for customers to shop around, compare multiple offerings, and find the product that best serves their specific needs.

But none of these services makes Amazon invincible. It may have had the benefit of being among the first businesses to harness the internet's potential for commerce when it got its start. But as each year passes, more and more businesses are moving online and expanding their offerings. Likewise, more and more businesses are popping up to challenge both Amazon's matchmaker and manufacturer roles. Most notably, Walmart has invested heavily in creating a website that functions just as Amazon's does.

## Antitrust Law in a Nutshell

With that in mind, we turn to the nuts and bolts of antitrust law. In the United States, the purpose of antitrust is to protect consumers and the benefits they receive from the competitive process. Known as the “consumer welfare standard,” this understanding of antitrust is straightforward—business practices that benefit consumers are usually lawful while practices that hurt them aren’t.

This consumer-focused framework prevents private parties and the government from misusing antitrust law to advance special interests. By tying antitrust analysis to consumer welfare, it lets businesses focus on doing their job—creating valuable products and services for their customers—while giving courts and enforcement agencies an objective metric to decide when they’ve broken the rules and deserve punishment. And by aligning the law’s goals with consumers’ interests, this framework gives businesses the clarity they need to grow, invest, and innovate. So long as they are benefiting consumers, they needn’t fret disrupting the status quo or competing aggressively.



This wasn’t always the case. Before the consumer welfare standard, antitrust tried to do too many things—and none of them well. In its early years, for example, the Court used antitrust law to protect only “worthy men and small dealers” from competition even though the purpose of the law was to promote competition and even though it meant consumers paid higher prices.

Now that antitrust is tied to objective, measurable outcomes and the use of economic evidence, we ensure that our market-oriented economic system delivers the benefits that it promises. We also minimize the chance that large corporate interests can abuse the law to further their aims and attack their competitors. The consumer welfare standard thus advances both economic prosperity and the rule of law.

Procompetitive behavior—what the law calls business actions that benefit consumers—isn’t always pleasant. Because American law prioritizes consumer

wellbeing, it does not shield businesses from competition.<sup>10</sup> So if a business's competitors succeed more than it does in the market, antitrust doesn't intervene even if that business is forced to close its doors. Competition can indeed be cut-throat. Remember Blockbuster? Netflix and other streaming services made it obsolete. Remember Myspace? Facebook and Youtube came along with superior alternatives.

On the other hand, antitrust law does intervene when a business engages in anticompetitive conduct, or "[a]ggressive, exclusionary conduct [that] is deleterious to consumers."<sup>11</sup> This is the sort of conduct that softens the market's sharp edges and reduces pressure on a company to innovate.<sup>12</sup> Put differently, this means the offending company is shielded from "competition on the merits."<sup>13</sup> Anticompetitive conduct prevents competitors from entering or growing in a market, which means the market is artificially kept stagnant and consumers are robbed of the benefits competition brings like lower prices, higher-quality products, new innovations, and so on. The goal of antitrust enforcement is to keep this from happening.

## The Billion Dollar Question: Is Amazon a Monopoly?

As critics point out, Amazon's Marketplace is very popular with American consumers. But that popularity does not make it a monopoly, in spite of what the Report might suggest.<sup>14</sup> In reality, Amazon is facing an ever-increasing level of competition from all sides. Amazon's relentless focus on anticipating what customers want has inspired fierce competition and in turn fierce criticism from those who resent its success. Claims that Amazon is dominant—or even a monopoly—in the online shopping market are increasingly rampant in political discourse and have even found syndication in policymaking circles.<sup>15</sup> This is

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10. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) ("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. It does so not out of solicitude for private concerns but out of concern for the public interest.")

11. Frank H. Easterbrook, *When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?*, 2003 COLUM. BUS. L. REV. 345, 345 (2003).

12. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001).

13. *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 605 n.32 (1985).

14. The Report describes Amazon as having "significant and durable market power in the U.S. online retail market." In antitrust, the term monopoly is often used as shorthand for "significant and durable market power." See Federal Trade Commission, *Monopolization Defined*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> ("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."); It also says that Amazon "has monopoly power over most third-party sellers and many of its suppliers." U.S. House Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 254–55* (2020).

15. Id.; Matt Stoller, *At last, the regime that enabled Amazon's monopoly power is crumbling*, *The Guardian* (Feb. 4, 2021) <https://www.theguardian.com/commentisfree/2021/feb/04/amazon-jeff-bezos-monopoly-power-antitrust>; Juozas Kaziukenas, *Amazon Is a Monopoly, an Interview With Sally Hubbard*, *Marketplace Pulse* (Aug. 6, 2019) <https://www.marketplacepulse.com/articles/amazon-is-a-monopoly-an-interview-with-sally-hubbard> (describing Amazon as a monopoly); Abha Bhattarai, *Trump targets Amazon and its taxes in Twitter attack*, *Wash. Post* (Mar. 29, 2019) <https://docs.google.com/document/d/1JjvJcC5pqgbqIU4X3Cawc3lxeHeQbrDz7ZcpJlwwHY/edit>.



important because, all else equal, businesses with no competitors can more easily engage in anticompetitive conduct that our antitrust laws are designed to address.

But what critics argue, evidence debunks. Amazon is not a monopoly—it's not even dominant. Remember that Amazon Marketplace connects buyers and sellers? As buyers, Americans use Amazon to buy products that range from ready-to-assemble furniture and toothpaste to sewing needles and lawnmowers. As sellers, Americans use Amazon to reach larger audiences and distribute their products throughout the country. And while many businesses sell on Amazon, this is typically not their only storefront. Research shows that 80% of Amazon third-party sellers sell their products elsewhere.<sup>16</sup>

The same is true for buyers. Imagine a recent college graduate looking to buy affordable furniture for their first apartment. They can buy the same or a similar coffee table on Amazon or competing online marketplaces that also sell furniture and home improvement products like Wayfair and Overstock. Or she can buy from Target, Macy's, Walmart, and even Home Depot and Lowe's. The same scenario plays out across the board: Students can buy or rent their textbooks from the usually overpriced college bookstore or from Amazon, Barnes & Noble, Booksamillion, and others. Likewise, homeowners can buy lawn equipment from Amazon, or from Home Depot, Ace Hardware, Lowe's, Target, and countless others.

Ignoring this reality, Amazon's critics claim that these brick-and-mortar retailers do not compete with Amazon. In antitrust terms, these critics try to define Amazon's relevant market narrowly so that Amazon looks like a behemoth without any competitive threats. In their view, because Amazon sells mostly online and operates only a few physical stores, it isn't a retailer like Macy's or Target or Costco even though it sells the same products to the same consumers.

Even consumers' actual shopping behavior counters the critics' narrative. Consumers view Amazon and these other retailers as close substitutes, which puts them in the same market. Consumers buy products from physical stores and from the internet. Plus, an increasing number of retailers are expanding online,

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16. Rani Molla & Jason Del Rey, *A Fifth of Professional Amazon Merchants Sell More Than \$1 Million a Year—Double the Share From Last Year*, Vox (May 23, 2018), <https://www.vox.com/2018/5/23/17380088/amazon-sellers-survey-third-party-marketplace-walmart-ebay>.

even as they maintain their physical stores. To be sure, American consumers may associate “online shopping” with Amazon, but in practice use many websites and in-person stores to shop around and buy products from thousands of different retailers.

Because buyers can shop at physical retail stores as well as on other websites and sellers can sell at physical retail stores as well as on other websites, Amazon’s relevant market is retail. Comparing Amazon’s sales to all retail sales shows that, as of 2019, Amazon has a market share of about 6%.<sup>17</sup> Even under a narrower market definition—e-commerce—Amazon has only 24% market share.<sup>18</sup> Amazon is thus not a monopoly. (For context, a monopoly generally controls 75% or more of a market.)



Even if those numbers don’t persuade you, another clue that Amazon isn’t a monopoly is how Amazon’s competitors have grown their market shares rapidly. Walmart, Best Buy, Target, Kroger, and Costco are all likely to see their e-commerce sales grow more than 80% this year.<sup>19</sup> In practical terms, as Americans dramatically increased their online shopping, they turned to many of Amazon’s competitors.

Formalities aside, a “big” business does not necessarily have monopoly power over consumers simply because it’s big. In fact, given Amazon’s focus on retail, it has very little market power. Thousands, if not millions, of sellers exert control and pressure over Amazon’s pricing model. From a consumer’s perspective, this means declining prices. The more retailers find ways to cut costs and thus cut prices, the more Amazon must do the same. In this competitive retail environment, Amazon’s market share only reflects that it has managed to keep up with external forces by maintaining low prices and high-quality offerings.

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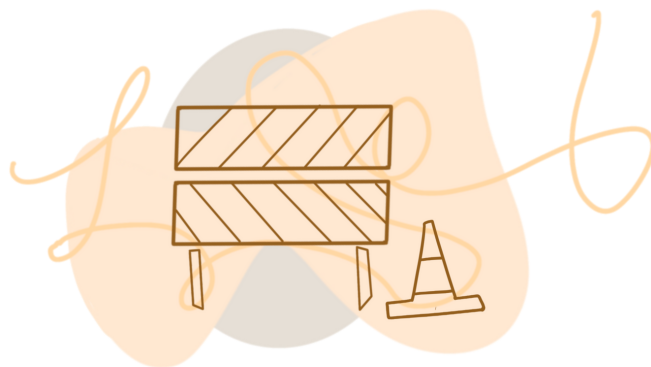
17. Benedict Evans, *What’s Amazon’s Market Share?*, Benedict Evans (Dec. 19, 2019), <https://www.benedict-evans.com/benedictevans/2019/12/amazons-market-share19>.

18. Don Davis, *Amazon’s Share of U.S. Online Retail Revenue Dips Slightly in Q3*, Digital Commerce 365 (Nov. 3, 2020), <https://www.digitalcommerce360.com/2020/11/03/amazons-share-of-us-online-retail-revenue-dips-slightly-in-q3/>.

19. *Id.*

Nor is Amazon protected by barriers to entry—obstacles that prevent new businesses from entering the retail market and competing against Amazon.

Barriers to entry are high when entering a market requires major investment in things like physical infrastructure and high-cost machinery before a business can even offer its product or service to the consumer. Barriers to entry are important in antitrust analysis because the higher they are in a given market, the more the businesses in that market are protected from future competition, giving them greater ability to raise prices and lower quality without losing sales.



But when it comes to digital marketplaces, barriers to entry are low. A new competitor can launch a website and set up shop tomorrow without spending too much money. Take Walmart's entrance into e-commerce. After launching a competing marketplace just a few years ago, Walmart is already the number two e-commerce website and saw 97% sales growth this year alone.<sup>20</sup> New online marketplaces are popping up all the time and consumers are increasingly demanding an omnichannel experience where online and offline shopping are no longer disconnected.

Competition in retail, whether defined broadly or narrowly, is alive and growing. Amazon is popular, but it is not invincible. As more retailers move online and expand their operations, Amazon's market share is likely to tick down even further. The pressure on Amazon to innovate will thus grow only stronger in years to come. And if history is any indicator, Amazon will do just that

## Amazon's Effect on Consumers

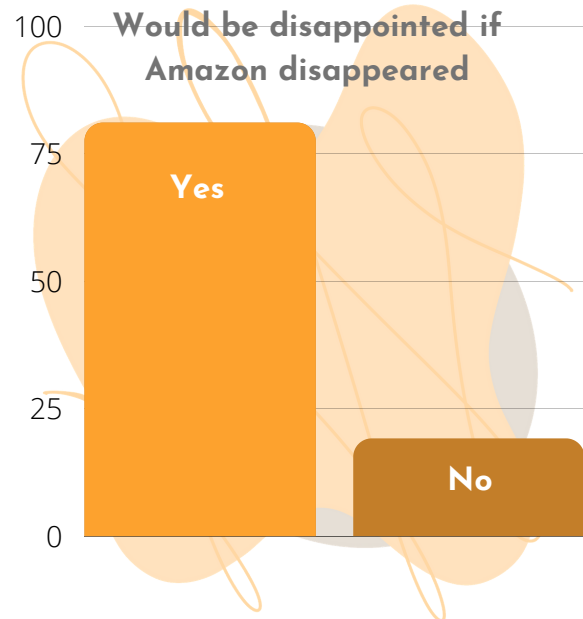
As mentioned above, the very heart of antitrust analysis is consumer welfare. When consumers are made better off, we tend not to find an antitrust violation. When they are made worse off, antitrust analysis wants us to take a closer look. When it comes to Amazon, there is no doubt that the business is wildly popular

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20. Shelley E. Kohan, *Walmart's E-Commerce Grows 97% Compared to Industry's 27%*, *Forbes* (Aug. 19, 2020), <https://www.forbes.com/sites/shelleykohan/2020/08/19/walmarts-e-commerce-grows-97-compared-to-industrys-27/?sh=263f5d7128ca>.

with American consumers. So much so that about 71.3 million households in the United States had an Amazon Prime account last year.<sup>21</sup> Common sense suggests that Amazon attracts a majority of Americans because they find value in its services. But to Amazon's critics, this popularity suggests unlawfulness. Only through anticompetitive means, they claim, could Amazon boast such numbers.<sup>22</sup>

The evidence says otherwise. Americans use Amazon not because they have to, but because it benefits them. In fact, polling from 2020 found that a whopping 91% of Americans have a favorable opinion of Amazon, 70% believe Amazon has a positive effect on society, and 81% would be disappointed if Amazon disappeared.<sup>23</sup> These findings support an earlier poll from Georgetown University that found Americans have more confidence in Amazon than in every public institution bar the military.<sup>24</sup>



It's not hard to see why. Amazon Marketplace offers consumers hundreds of thousands of products to choose from and makes it easy to compare products. It also offers members benefits like free two-day and same-day shipping.

These benefits flow from Amazon's pricey investments. For a decade, Amazon has focused on building out its logistics infrastructure. It's spent billions building warehouses all over the country and in distribution channels. With this infrastructure in place, Amazon has been able to meaningfully scale what customers want more of—choice. By growing its seller marketplace through offerings such as its FBA service, Amazon ensures a growing number of consumers have more and more choices for quick delivery. FBA also benefits sellers, many of whom see an increase in sales when using FBA.

21. Statista, *Total Number of U.S. Households with an Amazon Prime Subscription, 2018-2022*, <https://www.statista.com/statistics/861060/total-number-of-households-amazon-prime-subscription-usa/> (last visited Jan. 17, 2020)  
22. U.S. House Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 297* (2020).  
23. Casey Newton, *The Verge Tech Survey 2020*, The Verge (Mar. 2, 2020), <https://www.theverge.com/2020/3/2/21144680/verge-tech-survey-2020-trust-privacy-security-facebook-amazon-google-apple>.  
24. Jonathan M. Ladd, Joshua A. Tucker, & Sean Kates, *2018 American Institutional Confidence Poll*, Geo. Univ. (2018), <http://aicpoll.com/>.

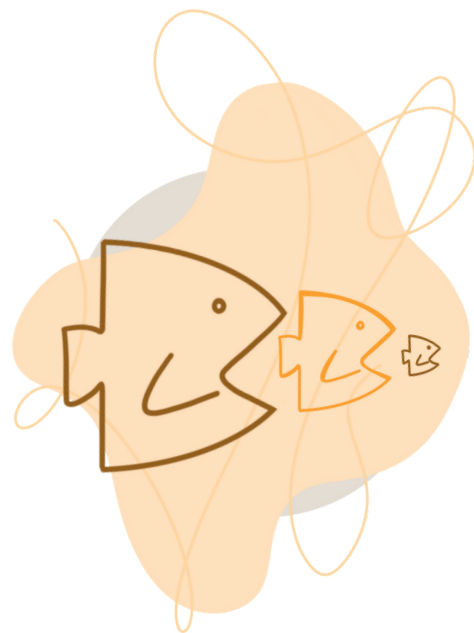
According to critics, Amazon increases competition too much. Because Amazon has the scale to make, sell, and distribute many goods for less, competitors are forced to do the same. And while Amazon expands market opportunities ensuring Americans can buy products from anywhere, some sellers can't keep up. This has been particularly true for Big Box stores that were slow to adapt to online shopping. Critics suggest that because some businesses have struggled to survive, there is evidence enough that the government must step in and shield them from competition.

Protecting Amazon's competitors would harm all consumers, especially cash-strapped Americans. For many academics, price increases of a few dollars are worthwhile effects in the pursuit of a lofty political goal, but the consequences of these ambitions are borne by real Americans. But to those living paycheck to paycheck, every dollar counts. So if prices increase because of less competition, the Americans who can least afford the cost would be harmed the most.

## PART II. CLAIMS OF UNLAWFUL BEHAVIOR

### **Predatory Pricing**

Critics incorrectly argue that Amazon harms consumers by engaging in predatory pricing, mainly through its premium subscription model known as Amazon Prime. Predatory pricing is when a business charges prices at such a low level that it drives its competitors out of the market to theoretically allow the business to raise prices above where they would be in a competitive market and earn monopoly profits. This is harmful because it can inhibit competition and harm consumers through higher prices and lower quality goods and services.



In particular, the Report argues that “[a]s part of its business strategy, Amazon has historically placed a higher premium on long-term growth at the expense of

short-term profitability” and that “[c]onsistent with this trend, Amazon has adopted a predatory-pricing strategy across multiple business lines at various stages in the company’s history.”<sup>25</sup> It finds that its strategy of predation allows them to “lock customers into Amazon’s full marketplace ecosystem” and that “[o]nce a customer is locked in, they are less likely to change their behavior even when Amazon’s pricing is not competitive.”<sup>26</sup>

As previously mentioned, critics cite Amazon’s incredibly popular membership program, Amazon Prime, as “[t]he most prominent example of Amazon’s use of strategic losses to lock customers into the platform’s ecosystem.”<sup>27</sup> The Report points out that “[d]espite Amazon Prime’s popularity and wide membership base, it is a loss-leader for the company.”<sup>28</sup> But what the Report and its fellow critics fail to appreciate is the many ways in which Amazon Prime creates significant benefits for consumers, how difficult it is for a business to successfully engage in a predatory pricing scheme that is ultimately profitable, and the dangers inherent in potentially deterring vigorous price competition.

The only thing critics get right is that Amazon Prime is an extremely popular service that enjoys a very wide membership base. Amazon Prime provides users with free expedited delivery for a large number of products, free video and music streaming capabilities, exclusive deals on both Amazon and Whole Foods’ products, and a variety of other benefits, all for one low annual fee. These are services that Amazon’s customers place a great deal of value on.

And at the beginning of 2020, Amazon announced that it had reached over 150 million paid subscribers to its Prime service.<sup>29</sup> Further, Amazon has a higher customer satisfaction rating than any other online retailer and is tied with the highest rated brick-and-mortar department store, Costco.<sup>30</sup> But skeptics seem willing to sacrifice these incredible consumer benefits out of fear that they



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25. U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 297 (2020).

26. *Id.*

27. *Id.*

28. *Id.* at 298.

29. Todd Spangler, *Amazon Prime Tops 150 Million Members*, Variety (Jan. 30, 2020) <https://variety.com/2020/digital/news/amazon-150-million-prime-members-1203487355/>.

30. American Customer Satisfaction Index Retail and Consumer Shipping Report 2019-2020 (Feb. 25, 2020).

help entrench Amazon's alleged market dominance. This is more aligned with the "big is bad," structuralist approach that was common during the early days of antitrust enforcement than it is the consumer welfare approach that courts and administrative agencies use today.

For example, the Report is quick to levy a charge of predatory pricing against Amazon without engaging with the well-established body of both theoretical and empirical economic evidence that suggests it is incredibly difficult for a business to successfully execute a profitable predatory pricing strategy. Even if Amazon wanted to engage in predatory pricing, it would almost certainly not be able to. A number of different scholars and commentators have called into question many of the economic presumptions underlying the classical theory of predation and helped show us that it is near impossible for a business to engage in a successful predatory pricing strategy.<sup>31</sup> Based on the incredibly low probability of success and huge downside risk, any attempt by Amazon to engage in predatory pricing would have been greatly ill-advised. And based on the evidence, if Amazon did ever hope to engage in a predatory pricing strategy, it has failed handsomely in doing so.

A business hoping to gain from a predation strategy needs to contend with a number of different and difficult-to-meet criteria. First, they need to suffer the losses brought on by low prices until they are able to drive each of their competitors out of the market. They also need to justify these losses to their stakeholders, based entirely on the highly speculative and never-guaranteed prospect of future earnings. Then they'd have to raise prices to a level sufficient to both recoup their losses and earn the additional monopolistic profits they were hoping to gain in the first place. They must do all of this without driving away enough customers to offset any additional profits they might earn or sacrificing too much good will to the detriment of their reputation. This is an incredibly difficult thing to do, especially because their customers become accustomed to the low prices driving the predation scheme and are likely to search for alternatives in the event of a significant price increase.

Finally to make all of this successful, a business has to keep any potential competitors or entrants out of the market until they are able to earn monopoly profits sufficient to make the strategy worthwhile. This particular step may be possible in markets with higher barriers to entry but, as discussed above, barriers to entry in digital markets are relatively low.

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31. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chicago L. Rev. 263, 63-64 (1981).



As you might imagine, both theoretical and empirical economic evidence suggests that successful predation is almost impossible to accomplish in reality. In the words of former FTC commissioner Joshua Wright and Assistant Texas Solicitor General Judd Stone, “[e]mpirical examples are rare - so rare, in fact, that observing real-life anticompetitive price predation has become the holy grail of industrial organization economists.”<sup>32</sup>

Considering Amazon Prime has been in existence since February 2005—if the Report is correct that Amazon is using it as a tool to engage in predation, it would need to charge exorbitant prices for a considerable period of time to even hope to earn monopoly profits sufficient to offset any losses it has incurred.<sup>33</sup> This is especially true considering Amazon is nowhere close to driving all of its competitors out of the market. In fact, Walmart, one of the largest and most powerful retailers in the world, just recently announced that it is launching a new, experimental program to compete against Amazon Prime called Walmart Plus.<sup>34</sup> With over 15 years behind them and no end in sight it is an incredibly risky and costly gambit if Amazon is employing a predation strategy through its Amazon Prime service.

Further, the Report does not take into account the serious concern that overly aggressive enforcement aimed at combating predatory pricing can greatly deter vigorous price competition. Competing with rivals in a way that leads to lower prices for consumers is at the very heart of consumer welfare and anything that has the potential to significantly inhibit this kind of competition should be approached with great caution and humility. By sheer volume and probability, we are more likely to punish conduct that actually benefits consumers than we are conduct that harms them.<sup>35</sup> Our market-oriented economic system is far better equipped to correct problems of monopoly than it is judicial and administrative errors.<sup>36</sup> New businesses can enter the market and quickly address any problems that might result from one company having a large amount of market power. The same is not true of bad policy decisions. Once a practice is condemned by a governmental body, there is no natural mechanism working toward its exoneration. Condemned practices are likely to stay condemned, regardless of

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32. Joshua D. Wright & Judd E. Stone II, *Still Rare Like a Unicorn - The Case of Behavioral Predatory Pricing*, 8 J. L. Econ. & Pol’y, 859 (2011).

33. Kaya Yurieff, Everything Amazon has added to Prime over the years, CNN Business (Apr. 28, 2018) <https://money.cnn.com/2018/04/28/technology/amazon-prime-timeline/index.html>.

34. *Walmart launching Walmart Plus to compete with Amazon Prime*, CBS (Sept. 2, 2020) <https://www.cbsnews.com/news/walmart-plus-launch-amazon-prime-competitor/>.

35. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chicago L. Rev. 263, 63-64 (1981).

36. *Id.*



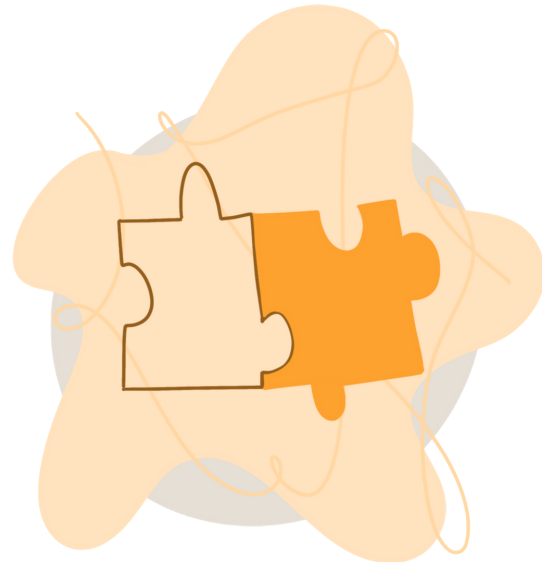
their actual impact on competition. All of this is especially true for new, innovative practices with which we are less familiar.<sup>37</sup>

By leveling allegations of predatory pricing against Amazon without considering the potential downside for consumers, the Report risks undermining the incredible consumer benefits that have resulted from the aggressive price competition that occurs in digital markets. Potentially more concerning, this chilling effect has the potential to reach far beyond the digital markets currently in question.

## Mergers and Acquisitions

Critics point to Amazon's merger strategy as additional evidence of its anticompetitive behavior and harm to consumers.

Mergers occur when two businesses combine into one new business and acquisitions occur when one business purchases another. The Report argues that Amazon helped obtain and protect its sizable market share, in part through "purchasing its competitors and companies that operate in adjacent markets, providing access to additional valuable customer data" and pointed out that "[o]ver the past two decades, Amazon has acquired at least 100 companies."<sup>38</sup>



It specifically highlights the acquisitions of Zappos, Quidsi, Diapers.com, Soap.com, Whole Foods, Blink, Ring, Kiva, and PillPack as some of the most important for expanding Amazon's market share and protecting its dominance.<sup>39</sup> It claims that Amazon's strategy of acquiring competitors "has effectively protected and expanded Amazon's market power in e-commerce and helped Amazon

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37. See Geoffrey A. Manne, *Innovation and the Limits of Antitrust*, 6 J. Comp. L. & Econ. 153, 161 (2010) ("Immediately, one can see the importance of the fundamental insight from *The Limits of Antitrust* that Type 1 errors are likely to be more costly than Type 2 errors because market forces place some constraints on the latter but not on the former. Indeed, this insight becomes more and not less important as our collective economic wisdom about a new business practice decreases—when, in other words, a challenged practice or setting is innovative.")

38. U.S. House Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority staff Report and Recommendation* 261 (2020).

39. *Id.* at 261-267.

extend that power to other markets.”<sup>40</sup> However, Amazon’s critics overwhelmingly ignore the procompetitive justifications for Amazon’s merger strategy and the ways in which these acquisitions actually serve to benefit consumers.

Many who are skeptical of large businesses tend to look at the combination of two firms and assume the goal must be to reduce competition, thereby giving them the ability to raise prices for consumers. On the contrary, mergers and acquisitions often serve to benefit consumers through better quality products, increased innovation, and in many cases lower prices. This is particularly true when it comes to upstream and downstream firms—businesses at different stages in the production process. In fact, the Federal Trade Commission had advanced notice of each of the transactions mentioned in the Report, investigated several of them, and ultimately declined to challenge or block even a single one.<sup>41</sup>

## **The Benefits of Mergers and Acquisitions**

One of the clearest ways in which the combination of two businesses can benefit consumers is through gained efficiencies and the development of new, innovative capabilities that would not have been possible in a pre-merger world. Take the 13.7 billion dollar Amazon-Whole Foods acquisition that took place in 2017.<sup>42</sup> This partnership sparked incredible innovation, much of which has been particularly important during the ongoing COVID-19 pandemic. From at-home delivery to pick-up lockers that minimize the need for interpersonal contact, Whole Foods was able to develop and integrate a number of new services that would have been unthinkable just five years ago. Many consumers have even seen fairly significant price decreases since the acquisition, as a result of continuous pricing cutting and Whole Foods’ post-merger Amazon Prime discounting program.<sup>43</sup>

PillPack is another great example of a merger that resulted in an innovative new service being able to employ Amazon’s superior distribution capabilities to meet the needs of consumers far more efficiently and safely during these uncertain times. While these innovative new products and services create enormous value

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40. *Id.* at 261.

41. *Id.* at 267.

42. Paul R. La Monica & Chris Isidore, *Amazon is buying Whole Foods for \$13.7 billion*, CNN (Jun. 16, 2017) <https://money.cnn.com/2017/06/16/investing/amazon-buying-whole-foods/index.html>.

43. Shannon Liao, *Amazon Prime members can now get Whole Foods discounts nationwide*, The Verge (Jun. 25, 2018) <https://www.theverge.com/2018/6/25/17500576/amazon-prime-whole-foods-discounts-nationwide>; Sarah Perez, *Amazon again slashes Whole Foods prices, doubles Prime member weekly deals*, (Apr. 2, 2019); Eugene Kim, *Amazon appears to be cutting prices at Whole Foods again*, CNBC (Aug. 27, 2019) <https://www.cnbc.com/2019/08/27/amazon-cutting-prices-at-whole-foods-in-last-6-months-morgan-stanley.html>; Hope Ngo, *Whole Foods just made a surprising announcement about its prices*, Mashed (Sept. 25, 2020) <https://www.mashed.com/252228/whole-foods-just-made-a-surprising-announcement-about-its-prices>.

for downstream customers during normal times, the magnitude of their importance becomes all too clear during a crisis like the pandemic we are currently dealing with.

Mergers allow firms to utilize each other's comparative advantages to create even better products and services for consumers. Acquisitions and mergers are about far more than just acquiring another business—they're about gaining infrastructure, talent, intellectual property, and a variety of other capabilities that can help both businesses provide better products and services to consumers going forward.

This mutually beneficial nature of mergers and acquisitions can be seen clearly when it comes to Amazon's acquisition of Ring in 2018 for 1.2 billion dollars.<sup>44</sup> Amazon developed, owns, and operates a product called Alexa, one of the most popular virtual assistant AI voice recognition systems currently in existence.<sup>45</sup> Alexa pairs itself with other wireless devices so that users can ask it to do a variety of tasks across multiple appliances and systems. Ring is a smart home business that connects cameras, alarms, lighting, and other home security measures in one integrated network.<sup>46</sup>



As a result of the merger, Ring and Amazon users are able to access their Ring home security system through Alexa. Amazon was even able to combine Ring and Alexa with their Amazon Key system, a product that allows consumers to control their various locks, accept in-home package deliveries, open their garage,

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44. U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 262 (2020).

45. Michael Bizzaco, Erika Rawes & Kim Wetzel, *What is Amazon's Alexa, and what can it do?*, Digitaltrends (Nov. 25, 2020) <https://www.digitaltrends.com/home/what-is-amazons-alexa-and-what-can-it-do/>.

46. Amanda Derrick, *What Is the Ring Doorbell and How Does It Work?*, Lifewire (May 8, 2020) <https://www.lifewire.com/how-ring-doorbell-works-4583925>.

and track entries remotely through a smartphone app.<sup>47</sup> The interconnected nature of smart products is one of their main selling points and consumers benefit more when a greater number of these products are able to interact with each other effectively. By merging with Ring, Amazon was able to create a highly innovative, far more integrated smart home ecosystem that yields significant benefits for their consumers.

It would be near impossible for critics to dismiss the positive impact that mergers can have on consumer welfare. Even the Report itself at least tacitly acknowledges the consumer benefits that have resulted from Amazon's mergers. When discussing the Amazon-Zappos merger, the report specifically highlights how the acquisition "enabled Amazon to add significant selection to its category of shoes and other fashion-related items" while expanding "access to 'hold-out' brands, which had previously refused to sell on Amazon.com."<sup>48</sup> It also noted that "Zappos' unique approach to customer service, marked by 'a deeply felt connection with customers,' added an emotional and psychological element to Amazon's relationship with consumers."<sup>49</sup>

Both of these additional capabilities allow Amazon to meet a wider variety of their customers' needs more effectively. While the Report attempts to characterize these outcomes as anticompetitive, it is clear that a large number of consumers are made better off by the increase in selection and quality of customer service that Amazon was able to obtain from its merger with Zappos.

But mergers and acquisitions also create benefits for consumers in a more fundamental way. While many critics allege mergers are a tool for stifling innovation, it is important to remember that they can also be one of the most powerful forces for spurring innovation. The potential of being purchased by a larger, more well-established business provides a major financial incentive for up-and-coming entrepreneurs to engage in innovative activities.<sup>50</sup> It allows for greater specialization and creates incentives for entrepreneurs to invest in narrowly focused but ultimately value-enhancing ventures without having to stand up an

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47. Gia Liu, Amazon Key: Everything you need to know, Digitaltrends (Mar. 6, 2018) <https://www.digitaltrends.com/home/what-is-amazon-key/>.

48. U.S. House Committee on the Judiciary, Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 263 (2020).

49. *Id.*

50. Michael Mandel & Diana G. Carew, *Innovation by Acquisition: New Dynamics of High-Tech Competition*, Progressive Policy Institute (Nov. 2011) [https://www.progressivepolicy.org/wp-content/uploads/2011/11/2011-Mandel\\_Carew-Innovation\\_by\\_Acquisition-New\\_Dynamics\\_of\\_Hightech\\_Competition.pdf](https://www.progressivepolicy.org/wp-content/uploads/2011/11/2011-Mandel_Carew-Innovation_by_Acquisition-New_Dynamics_of_Hightech_Competition.pdf).

entire corporate infrastructure to bring their innovative product or service to fruition. In fact, many entrepreneurs now begin innovative undertakings with the explicit goal of being acquired by one of the larger players, and venture capitalists often invest with an eye toward this possibility.<sup>51</sup> Businesses only agree to merge or sell if they and their stakeholders feel it will ultimately be beneficial.

Critics also point to data as a critical tool for obtaining market power in digital markets. The Report alleges that Amazon's acquisition of a "significant stockpile of consumer data" creates a "self reinforcing cycle" that allows Amazon to outcompete other businesses.<sup>52</sup> But the truth is, data does this by giving businesses the information necessary to create better, more innovative products and services for consumers, often at a lower price.

Businesses, especially digital platforms, use data to improve their algorithms, identify areas for development, gauge consumer preferences, and tailor their products to meet the needs of specific users. This not only benefits the actual end user of the product, but also the third-party consumers on the other side of the platform.

The entire point of antitrust law is to prevent businesses from taking actions that harm consumers while promoting procompetitive behavior. To hold that Amazon's use of data to create better products and services for consumers is somehow a violation of antitrust law would be to turn the policy on its head and protect Amazon's corporate competitors to the detriment of its actual customers.

## CONCLUSION

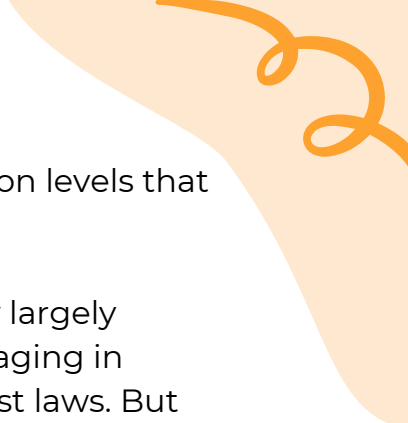
Amazon's story is one of a small business that was able to grow because it continually invested in innovative and long-term strategies aimed at creating better goods and services to the benefit of itself, its customers, and society more broadly.

Refusing to rest on its laurels, Amazon continually sought out new ways to provide superior products to its consumers. As such, it has since become one of

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51. Gordon Phillips & Alexei Zhdanov, *Venture Capital Investments and Merger and Acquisition Activity around the World*, Harvard Law School Forum on Corporate Governance (Dec. 29, 2017) <https://corpgov.law.harvard.edu/2017/12/29/venture-capital-investments-and-merger-and-acquisition-activity-around-the-world/#:~:text=Most%20venture%20capital%20investments%20are,strategy%2C%20but%20increasingly%20less%20so.>

52. U.S. House Committee on the Judiciary, *Investigation of Competition in Digital Markets: Majority staff Report and Recommendation 262* (2020).



the most popular companies in existence with customer satisfaction levels that are virtually unmatched.

Unfortunately, many critics are attempting to rewrite its history by largely ignoring the incredible value it has created and accusing it of engaging in harmful, anticompetitive practices that violate our nation's antitrust laws. But most of the claims made by critics simply do not hold up to scrutiny. And by calling for aggressive antitrust enforcement when it is unwarranted, these critics threaten to jeopardize the incredible innovation that has made our lives and economy so much better over the past several decades.

Worse yet, this threat extends far beyond the digital markets currently being scrutinized and could negatively impact the entire United States' economy for years to come.