Straight Past Go and Collect $200: A Look into the Clayton Act and Vertical Mergers within Corporate America

Natalie Brough
Suffolk University Law School
INTRODUCTION

In the game of Monopoly, the goal is to purchase and develop as much property as possible while forcing your competitors out of the real estate market. While Monopoly does not directly describe the concepts behind vertical mergers, the ideals of gaining power and merging to ensure ultimate market power are the same. A monopoly is a “market structure characterized by a single seller, selling a unique product in the market. . .in a monopoly market, the seller faces no competition, as he is the sole seller of goods with no close substitute.” Many view monopolies as anti-consumer, which inflict an overall negative effect on the economy because of their inherit ability to limit choice and, in turn, provide an inferior product due to the lack of competition. This fear has grown exponentially in the last few centuries, and the reality that only a select and powerful few control the wide economic market is now a major concern. When faced with the concept of monopolies, the prevailing thought is that one company controls a single industry; however, more commonly in the current climate,
companies are not only merging in their own industry but with industries outside their own, which creates powerful multi-industry empires.\(^6\)

Over a century ago, the United States Congress passed the Sherman Act of 1890 in an effort to combat growing public concern regarding the concentration of wealth and a single entity's economic power in a given market.\(^7\) To continue its efforts, twenty-four years later, Congress passed the Clayton Act of 1914 and the Federal Trade Commission Act.\(^8\) Subsequently, Congress passed the Robinson-Patman Act of 1936, the Celler-Kefauver Act of 1950, and the Hart–Scott–Rodino Antitrust Improvements Act of 1976.\(^9\)

When Congress began passing antitrust regulations, their focus was primarily on regulating the classic monopoly of direct competitors merging, and it was not until the Clayton Act when regulation on non-direct competitors was introduced.\(^10\) The current trend of using the Clayton Act in conjunction with the Sherman Act has led to further regulation of not only direct but indirect competitors.\(^11\) Three major concerns when two companies are allowed to vertically merge pertain to the possibility that: (1) it can lead to exclusionary effects by increasing rivals' costs of doing business and block ways of entry for emerging businesses; (2) it can lead to coordination

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\(^6\) See Jessica Roy, 4 Corporate Mergers Shot Down By the Government, SPLINTER NEWS, https://splinternews.com/4-corporate-mergers-shot-down-by-the-government-1793840916 (Feb. 26, 2014) (describing corporate mergers shot down). In recent years, several cases have been turned down in an effort to merge. Id. These denials have included companies with massive market power, for example, AT&T and Time Warner. Id.


Every 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, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

\(^8\) See Lamaj, supra note 2, at 156 (discussing history of Clayton Act and Federal Trade Commission). The Federal Trade Commission Act established the Federal Trade Commission as a branch under the U.S. Department of Justice in 1914 to prosecute injustices, unfair, and deceptive acts and/or practices in commerce. Id. The Federal Trade Commission has the power to investigate suspected violations of Antitrust laws. Id.

\(^9\) See Lamaj, supra note 2, at 156 (discussing growing antitrust legislation).


\(^11\) See Lamaj, supra note 2, at 161 (discussing Clayton Act evolution).
The Clayton Act and Vertical Mergers

Historically, vertical mergers have not been prosecuted at an equal rate as horizontal mergers. While the United States Department of Justice ("DOJ") tries around thirty horizontal merger cases a year, it was only recently that they attempted to block the vertical merger between AT&T and Comcast, a first for the DOJ within the last four decades. This extremely rare attempt to block the merger indicates a new initiative by the DOJ to regulate and scrutinize vertical mergers. As will be discussed in detail, the U.S. Court of Appeals of the D.C. Circuit's allowance of the AT&T and Time Warner merger creates conflict and confusion regarding the harm large vertical mergers can have on society and economic markets.

While there is significant case law and statutes regulating horizontal mergers, the same cannot be said for vertical mergers. Without clear guidelines, antitrust regulations, specifically the Clayton Act, cannot perform the purposes they were designed for. This note will examine the role of the Clayton Act in regulating vertical mergers and the implications of the AT&T and Time Warner merger on antitrust enforcement.

Historically, on an international level, the Sherman Act can be seen as a successful unification of disparate state antitrust standards, which replaced conflicting and ineffective regulations. However, the advantages of reducing costs by switching to a uniform federal antitrust system rather than disparate state antitrust systems could be lost if that federal system were no longer uniform. The costs of compliance are magnified when conforming to overlapping laws or different interpretations of the same law, as firms could struggle to correctly understand which actions are allowed and which are not according to different interpretations of conflicting laws.

12 See Riordan, supra note 10, at 519-20 (noting concerns with vertical merging).
13 See id. (discussing difference in horizontal and vertical mergers).
14 See id. at 515 (defining vertical mergers). The magnitude of power gained when companies vertically merge disrupts the markets in a similar way as horizontal mergers. Id.
16 See id. (explaining AT&T and Time Warner merger). The DOJ believed the merger would allow the single company to "leverage its distribution strengths to increase costs to its rivals for must-have cable and satellite television content." Id. The DOJ was unsuccessful in their efforts. Id.
17 See id. (discussing DOJ's previous lack of vertical merger prosecution).
18 See id. (criticizing lack of certainty in vertical merger decisions).
19 See Brumfield, supra note 15 (explaining Clayton Act's purpose). The Clayton Act of 1914 is one of the only pieces of legislation speaking to the regulation of vertical mergers. Id.

Id. at 384.
the legislative history and landmark cases to analyze the purpose of antitrust regulations; (II) analyze the current climate surrounding vertical mergers including recent merger decisions by the Federal Trade Commission; and (III) examine recent Supreme Court and circuit courts decisions regarding vertical mergers to evaluate whether stricter regulation is necessary.  

HISTORY

Antitrust regulation began when several goliath businesses, particularly in the railroad and steel industries, created common-law “trusts” that allowed businesses to centrally control an entire industry. While these “trusts” initially started in the steel and railroad industry, they gradually made their way to almost every industry in America, including oil, telephone, cotton, and whiskey. Americans grew very concerned with the power these trusts held, and Congress reacted by drafting the Sherman Act of 1890. In 1890, Congress passed The Sherman Act making it the first piece of United States legislation to regulate monopolies and antitrust behaviors.

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21 See infra Part I (examining history of antitrust cases); see infra Part II (analyzing vertical mergers today); see infra Part III (analyzing cases regarding vertical mergers).


23 See id. at 67-70 (discussing circumstances leading to Sherman Act).

24 See id. (Illustrating concern leading to Sherman Act). Antitrust laws were passed to encourage competition and market efficiency, but many believe it goes farther than that with “a number of social, moral, and political concerns” as well. Id. at 68. Senator John Sherman presented the bill, which had two key sections dealing with restraints of trade and monopolization. Id. at 84.


(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000 or by imprisonment not exceeding ten years, or by both said punishments, in the discretion of the court.

(2) Every 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, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Id.
Once passed, several questions arose regarding the constitutionality of the government’s regulation of businesses and commerce to the extent that the statute allowed. In the ground-breaking case, *Standard Oil v. United States*, the United States brought suit against Standard Oil Company of New Jersey for violating the Sherman Act. Along with ruling that Standard Oil did violate the Sherman Act by having an unreasonable restraint on trade, the Court also discussed whether Congress exceeded its constitutional power by enacting the Sherman Act in light of the Commerce Clause. The Commerce Clause is an enumerated power that allows the federal government to regulate foreign and domestic interstate trade. The Court held that Congress did not violate the Commerce Clause and did not exceed its authority to regulate commerce.

As the industrious growth in modern America began to exceed what the writers of the Sherman Act imagined, an amendment was needed, resulting in the Clayton Act in 1914. The Clayton Act amended the Sherman Act by including additional provisions. During this time in

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26 See *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 31 (1911) (holding defendant had violated Section One of Sherman Antitrust Act); see also U.S. Dep’t of Justice, *Sherman Anti Trust Act of 1890 Society for Human Resource Management*, SHRM.ORG (Apr. 21, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/sherman-anti-trust-act.aspx (discussing Standard Oil violation). The violation was based on “its excessive restrictions on trade, particularly its practices of eliminating competitors by buying them out directly and by driving them out of business by temporarily slashing prices in a given region.” *Id.*

27 See *Standard Oil Co.*, 221 U.S. at 70-74 (providing facts of Standard Oil’s violation). By essentially owning all of the oil companies throughout the United States, Standard Oil has put an unreasonable restrain on trade. *Id.* at 74.

28 See *id.* at 69-70 (illustrating Court’s differing opinion); *c.f.* United States v. E.C. Knight Co., 156 U.S. 1 (1895). The Court held that the American Sugar Refining Company had not violated the Sherman Act despite the fact that it controlled approximately ninety-eight percent of all sugar refining in the U.S. *Id.* The Court’s explained that the company’s control of manufacturing did not constitute control of trade. *Id.* at 12.

29 See U.S. CONST. art. I, § 8, cl. 3 (discussing Congress’s power to regulate commerce).

30 See *id.* (discussing power to regulate interstate commerce gives Congress power to regulate business agreements and mergers); see also *Standard Oil Co.*, 221 U.S. at 69-70 (discussing reasonable restraints on trade).


32 See 15 U.S.C. §§ 12-27 (1914) (providing restrictions on activities relating to interstate commerce and competition in market place). The provisions specifically attempted to eliminate
American history, businesses were growing at an unprecedented rate, and the Clayton Act sought to limit the horizontal combinations of businesses.\textsuperscript{33} The amendment also paid special attention to the regulation of "vertical mergers."\textsuperscript{34} Congress focused on vertical mergers because it became apparent that solely regulating horizontal mergers did not provide adequate consumer protection.\textsuperscript{35} As opposed to horizontal mergers, vertical mergers were previously unregulated deals, slowing market competition and stifling the innovation of goods and services in multiple industries rather than a singular market.\textsuperscript{36}

In 1914, Congress passed the Federal Trade Commission Act, which established a Commission to investigate and cease unfair business.\textsuperscript{37} The Federal Trade Commission is an independent agent with the United States Government, and within it sits the Bureau of Competition and the Department of Justice's Anti-Trust Division.\textsuperscript{38} The Commission works with three main goals in mind; (1) protect consumers; (2) maintain competition; and (3) advance organizational performance.\textsuperscript{39}

In recent decades, two additional amendments to the Clayton Antitrust Act have been the Robinson-Patman Act of 1936 and the Celler-Kefauver Act of 1950.\textsuperscript{40} The Robinson-Patman Act of 1936 focuses primarily on price discrimination.\textsuperscript{41} The Celler-Kefauver Act of 1950

\begin{itemize}
\item price discrimination, buying out competitors, and interlocking boards of directors. \textit{Id.; see also Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (explaining use of Sherman and Clayton Act).} In \textit{Brown Shoe Co.}, the government challenged the merger of two shoe manufacturers. \textit{Id.} at 296. The Supreme Court affirmed the lower court's decision ordering the defendant to completely divest from the stock, assets, and interests it held with the shoe company it merged with to avoid unfair business practices. \textit{Id.} at 344-46.
\item See \textit{Brown Shoe Co.}, 370 U.S. at 311-18 (discussing trends of businesses in early 19th Century that led to amending Sherman Act).
\item See \textit{id.} at 324 (Clayton Act does not render all vertical mergers unlawful). While the Court concluded vertical mergers are not immediately unlawful, certain mergers that substantially lessen competition or create monopolies across different industries are restricted. \textit{Id.}
\item See \textit{id.} at 317 (discussing Congress's vertical merger regulation).
\item See \textit{id.} (noting that without competition there would be no innovation).
\item See \textit{F.T.C. v. Procter & Gamble Co.}, 386 U.S. 568 (1967) (reviewing an order by Federal Trade Commission). The court analyzed a Federal Trade Commission order that required a manufacturer to divest itself of assets of liquid bleach company on grounds that the merger "might substantially lessen competition or tend to create a monopoly in the production and sale of household liquid bleaches." \textit{Id.} at 570.
\end{itemize}
regulates vertical mergers and was passed to prevent unfair acquisitions still permitted under the previous regulations, specifically firms that were not in direct competition with each other.\footnote{42} In United States v. Cont’1 Can Co., the Supreme Court held that a manufacturer of glass bottles and a manufacturer of metal cans could not merge even though their products were not in direct competition, finding that such a merger would violate the Clayton Act and Celler-Kefauver Act of 1950.\footnote{43} Finally, the most recent antitrust regulation went into effect with the Hart–Scott–Rodino Antitrust Improvements Act of 1976.\footnote{44} Signed into law by President Gerald Ford, this amendment “provides the FTC and the Department of Justice with information about large mergers and acquisitions before they occur. . .The parties to certain proposed transactions must submit premerger notification to the FTC and DOJ.”\footnote{45} Courts have historically used two methods to examine antitrust violations: the older notion of \textit{per se} illegality, and the Chicago-based \textit{rule

\textit{Id.; see also United States v. Morton Salt Co., 338 U.S. 632, 635-36 (1950) (analyzing case pertaining to salt prices).}

\textit{Proceedings under § 5 of the Federal Trade Commission Act culminated in a Commission order requiring respondents Morton Salt Company and International Salt Company, together with eighteen other salt producers and a trade association, to cease and desist from stated practices in connection with the pricing, producing and marketing of salt.}


\textit{Id.} at 447 (discussing merger violation). Justice White held that a merger between the second largest can producer and the third largest glass jar producer violated the Clayton Act despite the contention that specific containers produced by the companies did not substantially compete in the market. \textit{Id.} at 443-44.


The Chicago School of Thought or "competition theory" dates back to 1955 and can be attributed to Aaron Director. This theory focuses on a rule of reason approach, as opposed to the courts widely used per se illegality principal of a monopoly. While the per se rule is based off of black-and-white decision making, the Chicago theory centers around analyzing the possible efficiency and reasoning behind a business's monopolistic actions before declaring a violation. A groundbreaking rule of reason case came in 1899 with Addyston Pipe & Steel Co. v. United States, where the Supreme Court determined whether or not monopolistic activity was both reasonable and merely ancillary to the main purpose of a lawful and legitimate contract. This method of analyzing antitrust cases was further broadened in Board of Trade of City of Chicago v. United States, where the Supreme Court reviewed the nature, scope, and effect of the monopolistic activity and if that activity promoted or restrained...
competition. The rule of reason theory also supports the economic principle that if there is an injustice in the market, the market will correct itself without the interference of the courts or the government. Since the Sherman Act enactment, courts have used both the per se illegality method and the Chicago School’s rule of reasoning approach to evaluate antitrust matters, however, the rule of reason has been the prevailing method for the courts recently, leaving the per se illegality method for the history books. The trend of giving preference to the rule of reason may be a prevailing reason why vertical mergers have been difficult to regulate in recent years.

FACTS

Vertical Mergers and The Clayton Act

Historically, courts have been more relaxed in regulating vertical mergers in comparison to other anti-trust violations. One unique instance where the Supreme Court has addressed an issue of vertical mergers was in 1962 with Brown Shoe Co. v. United States. The Court explained that to find a vertical merger antitrust violation, the companies need to be within the

51 See Bd. of Trade of City of Chi. v. United States, 246 U.S. 231, 239-40 (1918) (showing Supreme Court’s favored use of rule of reason over per se approach). The Court did not find a violation because the Board of Trade’s use of monopolistic activity was reasonable in order to promote fair competition and trade. Id. at 240-45.

52 See Piraino, supra note 48, at 350 (discussing court’s limited involvement under competitive theory). The Chicago School of Thought believed that courts should only “intervene in the competitive process when it was clear, after thorough study, that anticompetitive conduct was threatening consumer welfare.” Id.

53 See Piraino, supra note 48, at 354 (explaining increased use of rule of reason opposed to per se). “The most dramatic retreat from per se analysis occurred in 1977 when, in Continental T.V., Inc. v. GTE Sylvania Inc., the Supreme Court reversed its decision in Schwinn and decided that nonprice vertical restrictions should be judged by the rule of reason.” Id.


55 See Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: A Post-Chicago Approach, 63 ANTITRUST L.J. 513, 515 (1995) (explaining how vertical mergers have historically been seen as neutral and in favor of competition). The Chicago School of Thinking’s view on vertical mergers has been that mergers generally help competition and are better for consumer product and choice. Id. at 513-14.

56 See Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (discussing competition in vertical mergers). In Brown Shoe, the Court explained that vertical mergers deny competitors the opportunity to compete but further explains how the Clayton Act does not necessarily render vertical mergers entirely unlawful. Id. “[D]etermination of the relevant market is a necessary predicate to a finding of a violation of the Clayton Act because the threatened monopoly must be one which will substantially lessen competition ‘within the area of effective competition.’ Substantiality can be determined only in terms of the market affected.” Id. at 324.
same product market. Another early prominent case in determining the scope and limits to vertical mergers was *Ford Motor Co. v. United States*. In *Ford*, the government brought suit against Ford Motor Company for purchasing $28 million worth of the Electric Automobile Company. When the case was heard in the United States District Court of Michigan, the lower court discussed the importance of analyzing the product markets of each entity that intended to merge to determine if it would create unfair competition to the market. The government argued that the Clayton Act had been violated because the merger would combine wide-reaching pre-existing distribution networks. The Supreme Court agreed with the government and held that Ford's acquisition constituted a violation of the Clayton Act because the acquisition substantially lessened competition in automotive batteries and spark plug markets across the country. In addition, the Court reasoned that the phrase "in any line of commerce" under the Clayton Act is all encompassing, and if "the forbidden effect or tendency is produced in one out of all the various lines of commerce" then a violation of the Clayton Act will be present.

Since *Brown* and *Ford*, there have been minimal influential cases involving violation of the Clayton Act through vertical mergers because of

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57 See id. at 325 (describing scope of Clayton Act).

Clayton Act prohibits any merger which may substantially lessen competition 'in any line of commerce', it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed.

Id. at 325.

58 See Ford Motor Co. v. United States, 405 U.S. 562, 564 (1972) (discussing important early case in vertical merger history). This case was brought in violation of Celler-Kefauver Anti-Merger Act. Id.


60 See id. at 411 (stressing importance of analyzing product markets for fairness in market competition). The government's argument against this acquisition predicted a high likelihood of "probable substantial lessening of competition in four lines of commerce." Id. These four lines of commerce were automobiles, automotive batteries, spark plugs, and ignition parts. Id. Ford did not dispute that automobiles, automotive batteries, and spark plugs had their own commercial chains, but disputed that ignition plugs have a market of their own. Id.

61 See id. at 418 (citing governments argument for Clayton Act violation in *Ford*).

62 See id. at 441 (finding Clayton and Celler-Kefauver Act violation). The Court assumed that the merger would not create a monopoly in automobiles or industries for automobile parts, but still concluded that this type of merger was a per se violation of the Sherman Act. Id. The Court determined that the agreement would have a "pervasive impact on the replacement market for spark plugs" and be a barrier to entry for others, resulting in a violation of the Celler-Kefauver Anti-Merger Act. Id. at 429.

63 See id. at 445 (explaining reasoning behind *Ford*).
the "apparent lack of competitive concern" that a Clayton Act violation expresses.\textsuperscript{64} In 1997, the Supreme Court heard \textit{Continental Television v. GTE Sylvania}, a case involving an agreement between a manufacturer and a seller of television sets.\textsuperscript{65} In \textit{Sylvania}, the Court determined that while the \textit{per se} illegality reasoning used in previous antitrust cases is still a valid method of analysis, the Court may also need to look at other factors such as market share and scope.\textsuperscript{66}

In 1977, the DOJ failed to halt a vertical merger with a potential violation of Section 7 of the Clayton act in \textit{United States v. Hammermill Paper Co.}\textsuperscript{67} In \textit{Hammermill}, the U.S. District Court for the Western District of Pennsylvania took the rule of reason approach by looking at the line of commerce, market shares, and the distribution process to determine that there was not a legitimate threat on consumers resulting from the merger.\textsuperscript{68}

Another significant decision is from the Second Circuit in \textit{Fruehauf Corp. v.}


\textsuperscript{65} See Cont'l Television v. GTE Sylvania, 433 U.S. 37, 54-55 (1977) (finding per se method not applicable when determining antitrust violation). The Court found the rule of reason approach was warranted instead of the per se method that had been used in previous vertical merger cases. \textit{Id.}

\textsuperscript{66} See \textit{id.} (differentiating rule of reason and per se illegal approaches).

\textsuperscript{67} See United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1293 (W.D. Pa. 1977) (holding DOJ's position). The DOJ attempted to block two paper wholesalers from purchasing a paper manufacturer. \textit{Id.} The DOJ failed to convince the court that the purchase was unreasonable. \textit{Id.} The court rejected the government's reasoning based on the history between the companies, the insufficient evidence of limiting either field from competition and that foreclosure would be profitable for the market structure. \textit{Id.}

3. The following is the line of commerce within the meaning of Section 7 of the Clayton Act:

\begin{itemize}
\item The manufacture and sale of printing and fine paper;
\item As to this line of commerce the United States as a whole is the appropriate section of the country within the meaning of Section 7 of the Clayton Act;
\item The effect of the acquisition by Hammermill Paper Company of the assets of Western Newspaper Union and the capital stock of Carter Rice Storrs and Bement, Inc. will not be substantially to lessen competition in the lines of manufacture and sale of printing and fine paper;
\item The acquisitions of the stock of Carter Rice Storrs and Bement, Inc. and the assets of Western Newspaper Union by Hammermill Paper Company are not violations of Section 7 of the Clayton Act.
\end{itemize}

\textit{Id.} at 1294.

\textsuperscript{68} See \textit{id.} at 1274 (finding no violation of Clayton Act because of industry standard and size of controlled market).
F.T.C. in 1979.69 The *Fruehauf* court, cited to *Brown* in its reasoning, and denied the F.T.C.’s ordering of a divestiture, claiming that for a Section 7 liability under the Clayton Act, the F.T.C. must show “a probably anticompetitive impact”, which was not present in the set of facts.70 *Fruehauf* is one of the first examples of the permissive acceptance of vertical mergers that became commonplace in the modern judicial system.71

In 1990, courts again sanctioned a merger, this time in the D.C. Circuit with *United States v. Baker Hughes Inc.*72 In *Baker*, the court looked at the totality of the circumstances instead of the government’s argument pertaining to the direct violation of law.73 *Baker* highlighted that to violate Section 7 of the Clayton Act, the government is required to show that the merger will lead to an undue concentration in the market for a “particular product in a demographic area.”74

In 1984, the DOJ released updated Vertical Merger Guidelines that echoed the thoughts of many, who found that vertical mergers did not stifle competitive business but were actually a procompetitive action.75 With the relaxed guidelines, the DOJ stressed against the potential harm of repressing prospective entrants to the market through vertical mergers.76 The updated guidelines addressed two other possible problems that could lead to violations of the Clayton Act: (1) “vertical mergers could create competitively objectionable barriers to entry” and (2) vertical integration

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69 See Fruehauf Corp. v. F.T.C., 603 F.2d 345, 361 (2d Cir. 1979) (holding that merging of two companies would not have negative effect on markets). The government failed to supply evidence that the merger of the two companies would have a negative effect on customers. Id. In contrast, the court thought that it would only provide a greater efficiency in both markets. Id.

70 See id. at 360 (finding no presence of anticompetitive impact). “It is true that some market foreclosure may ensue from the merger, but not one that deprives rivals from major channels of distribution, much less one that excludes them from the market altogether.” Id.


73 See id. at 983 (finding no violation). After looking at all the statistics provided, the court ruled that the government “did not produce any additional evidence showing a probability of substantially lessened competition, and thus failed to carry its ultimate burden of persuasion.” Id.

74 See id. (explaining reasoning of court).


76 See id.; see also Merger Guidelines, U.S. DEP’T OF JUSTICE (1968), https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf (providing merger guidelines). In order to bring a suit accusing a merger of eliminating possible entrants it must prove: “(1) the relevant market (whether upstream or downstream) must be highly concentrated, (2) there must be high entry barriers, (3) the acquiring firm must have some sort of “entry advantage” and (4) the acquired firm must have at least a 5 percent market share.” *Ford Motor Co.*, 286 F. Supp. at 411.
“may facilitate collusion in the upstream market by making it easier to monitor price” both of these thresholds are difficult to satisfy.\textsuperscript{77} The interpretation of these statutes have been vastly different, especially with the application of the Chicago School of thought.\textsuperscript{78}

**Vertical Mergers Today**

The current structure of America’s largest corporations has seen an evolution of vertical merging unlike anything the drafters of the Clayton Act could have anticipated.\textsuperscript{79} In the last decade, multimedia giants, pharmaceutical heavyweights, and cable company behemoths have emerged as the byproduct of large companies merging vertically with companies outside of their direct competition to gain advantages in multiple industries.\textsuperscript{80} Although the DOJ has not ruled on many vertical merger cases in the past few decades, they have put a stop to some prominent potential acquisitions that would have had a widespread impact on the landscape of modern consumerism, including deals between GE and Avio; Pepsi and PBG; and Coca-Cola and CCE.\textsuperscript{81} Alternatively, when Amazon acquired Whole Foods, the deal went through without any of the backlash from the FTC or DOJ which was anticipated from many prominent antitrust scholars.\textsuperscript{82}

The paramount case controlling the media today is the $85.4 billion merger between AT&T and Time Warner.\textsuperscript{83} AT&T and Time Warner are

\textsuperscript{77} See Keyte, supra note 64, at 12 (addressing qualifications needed to bring successful vertical merger violation).

\textsuperscript{78} See sources cited, supra notes 45, 46 (discussing approaches to antitrust regulations); see also Robert H. Lande, Proving The Obvious: The Antitrust Laws Were Passed To Protect Consumers (Not Just To Increase Efficiency), 50 HASTINGS L.J. 959, 964 (1999) (explaining statutory interpretations). The Chicago School of Thought structured their view of antitrust law around the goal of efficiency. Id. at 960. The School coined the “strict constructionist” view as opposed to the “populist” view which thinks the laws “were passed to further a variety of social and political goals, such as combating the political power of big business . . . .” Id.


\textsuperscript{80} See id. (stating entertainment and telecom industries have led vertical mergers).

\textsuperscript{81} See id. (noting rarity of FTC finding vertical merger violations).

\textsuperscript{82} See Bryce Covert, The Real Price of Those Cheaper Avocados, SLATE, http://www.slate.com/articles/business/moneybox/2017/08/we_need_a_better_antitrust_standard_to_deal_with_mergers_like_whole_foods.html (last visited Feb. 25, 2018) (describing Amazon’s business methods). With Amazon’s trend of disturbing every market it enters, there will be little surprise that entering into the grocery market would prove any different. Id. One reason why Amazon has been able to avoid antitrust scrutiny is their ability to undercut prices rather than driving them up for profit, which would be a benefit for consumers. Id.

\textsuperscript{83} See James B. Stewart, Battle Lines Form For Epic Antitrust Case Over AT&T-Time Warner Merger, SEATTLE TIMES, (Nov. 16, 2017, 8:09 PM) https://www.seattletimes.com/business/battle-
not direct competitors, triggering the Clayton Act and a vertical merger analysis. This merger had the attention of the DOJ and even before filing a complaint, the Justice Department’s Antitrust division recommended to Time Warner to sell its DirectTV unit in order to gain permission for the deal to go through. On November 20, 2017, the DOJ announced its intent to sue AT&T for its bid to make a telecommunications empire. The arguments were heard before Judge Richard J. Leon of the U.S. District Court for the District of Columbia. On June 12, 2018, Judge Leon issued his decision, ruling in favor of AT&T and denied the DOJ’s enjoinder of the merger. In his 172-page opinion, Judge Leon stated, “[i]f there ever were an antitrust case where the parties had a dramatically different assessment of the current state of the relevant market and a fundamentally different vision of its future development, this is the one.” The government argued that if the merger was allowed, Time Warner and AT&T would have an increased bargaining power in its ability to upcharge for its media content that is provided to consumers. This argument was unsuccessful as the government failed to prove that the merger would substantially lessen

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84 See 15 U.S.C §§ 12-27 (1914) (discussing guidelines of Clayton Act of 1914); see also James B. Stewart, With AT&T and Time Warner, Battle Lines Form for an Epic Antitrust Case, N.Y. TIMES (Nov. 16, 2017), https://www.nytimes.com/2017/11/16/business/att-time-warner.html?ref=collection%2Ftimestopic%2FAntitrust%20Laws%20and%20Competition%20Issues&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=1&pgtype=collection (explaining vertical mergers). A vertical merger is defined as two companies who are not already in direct competition. Id. If the two companies were to merge, a competitor would not be eliminated from the market, there would be the same number of competitors as before. Id.

85 See Stewart, supra note 83 (explaining merger would create “telecom-media goliath” having power to directly affect competitors and consumer prices). If Time Warner divested the DirectTV, the DOJ would have been less concerned about the merger with AT&T. Id. Time Warner did not take this suggestion. Id.


88 See id. at 164 (looking at Judge Leon’s reasoning for denying stay).

89 See id. at 163-64 (explaining why court found no violation). Judge Leon reasoned that the two companies were so different that the merger would have little effect on each perspective markets. Id.

competition. The court came to this decision by engaging in a comprehensive inquiry into the future competitive conditions in the market by looking to the past decisions of Hughes and Brown Shoe. To win, the government needed to prove that the "proposed merge . . . at this time and in the remarkably dynamic industry [was] likely to substantially lessen competition in the manner it predicts," which it failed to do. The Appeals Court granted the DOJ’s motion for an expedited appeal on July 19, 2018. Oral arguments were held on December 6, 2018, where the panel casted doubt on the strength of the government’s argument and seemingly leaned towards agreeing with Judge Leon’s original decision. In February 2019, the government lost its second challenge in front of a three-judge panel of the United States Court of Appeals for the District of Columbia, and stated that it did not intend to take the argument any further. The AT&T decision gave a green light to many other companies in negotiating for similar deals; and shortly after the AT&T decision landed, the DOJ had no reaction to a $71.3 billion dollar merger deal between Disney and 21st Century Fox.

Mergers like AT&T and Time Warner, Disney and Fox, Google’s acquisition of Motorola, Amazon’s acquisition of Whole Foods and Kindle Fire, or Microsoft’s long-standing hardware production agreements with Xbox, are changing the landscape of the consumer marketplace. The only method for the government to bring claims against vertical mergers is with the Clayton Act, but even that has not proved strong enough in recent decades. Is it time for Congress to once again visit the subject of vertical

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91 See AT&T, 310 F. Supp. 3d at 192 (stating defendant did not create violation).
92 See id. at 189 (explaining rule of reason approach). The court focused on the language “may be substantially to lessen competition” in Section 7 of the Clayton Act, and that a “mere” possibility of harm would be enough to find a violation. Id.
93 See id. at 194 (reasoning behind government’s failure to meet its burden).
95 See Lent, supra note 89 (discussing oral agreements for AT&T appeal).
99 See sources cited, supra note 32 and accompanying text (discussing Clayton Act).
mergers and enact stronger enforcements current with the industries trends of today?\textsuperscript{100}

ANALYSIS

The Sherman Act of 1890 was written to enhance competition and protect consumers across all industries.\textsuperscript{101} At the time, the Sherman Act went against the laissez faire foundation of how the framers saw the American market.\textsuperscript{102} It was not until the abuse of the railroad and pipeline industries which brought cases like \textit{Standard Oil} that Congress felt it was imperative to implement regulations to maintain fair competition in the interests of consumers.\textsuperscript{103} The implementation of the Sherman Act was followed by further regulation to strengthen what it originally put in place.\textsuperscript{104} Notably, the Clayton Act in 1914 furthered congressional guidelines on vertical mergers to accommodate the growing demand to regulate conglomerate business entities taking over market control.\textsuperscript{105} Regulations like the Clayton Act are the only instruments the FTC and DOJ have to combat monopolization, oligopoly, and singular market control; the question is, should Congress revisit the outdated regulations to include a more strict view

\textsuperscript{100} See sources cited, supra notes 12 and 15 and accompanying text (showing growth of vertical merger regulation).

\textsuperscript{101} See sources cited, supra notes 20-23 and accompanying text (outlining free competition debate in America pertaining to free competition and freedom of contract); see also 15 U.S.C. §§ 1-7 (2004) (citing authority of Sherman Act).

\textsuperscript{102} See Nicola Giocoli, \textit{Classical competition and freedom of contract in American laissez faire constitutionalism}, INST. FOR NEW ECON. THINKING, 2-3 (June 10, 2014) https://www.ineteconomics.org/uploads/papers/ClassicalCompetitionandFreedomofContract.pdf (explaining contract history in America). The government originally thought that the markets should be free from external forces. \textit{Id.} This became increasingly difficult when trusts were controlling much of the wealth in America. \textit{Id.} at 3. Unfortunately, with the free market without interference, Congress found that companies such as Standard Oil were becoming so powerful that they could not only buy or put their competitors out of business, but they could regulate the product price and the quality of the products sold in the entire industry. \textit{Id.} at 1.

\textsuperscript{103} See Standard Oil Co. v. United States, 221 U.S. 1, 1 (1911) (noting first judicial restriction on competition in American market). \textit{Standard Oil} was the first case in American history using the Sherman Act to regulate a market. \textit{Id.} The Court held that Standard Oil had indeed exceeded their market control and caused barriers of entry to competitors, had the intent to exclude others from trade, and controlled the commodity across the market. \textit{Id.} at 56-57.

\textsuperscript{104} See sources cited supra notes 2 and 10 and accompanying text (discussing evolution of Antitrust law and regulation).

on the type of vertical mergers that have become so enticing to corporate companies?\textsuperscript{106}

Perfect competition is defined as having multiple buyers and sellers so that not one single action should have a noticeable impact.\textsuperscript{107} In the theory of perfect competition, consumers have the opportunity to conform to their preferences over multiple available products, prices are known to producer’s, producing capabilities are maximized by the input-output decisions to maximize profits, and finally, every producer has equal access to the market.\textsuperscript{108} The theory of perfect competition is threatened when monopolistic actions enter the market place.\textsuperscript{109} The problem of monopolization is still evident in today’s market, with the growing popularity in vertical merging creating cross industry monopolies.\textsuperscript{110} Vertical mergers are considered problematic to the welfare of the consumers because they tend to “[lead to] monopolistic domination of the market by a single corporation.”\textsuperscript{111} These fears mirror the government’s argument in the recent case of AT&T because if these companies are allowed to merge, they will have bargaining power across markets, which would allow companies to hike up prices with no other notable competition across not just one, but multiple markets.\textsuperscript{112}

Of course, not everyone believes that vertical mergers impact the market in a negative way.\textsuperscript{113} Some believe that vertical mergers, instead of

\textsuperscript{106} See sources cited supra notes 12 and 15 and accompanying text (growth of vertical merger regulation).


\textsuperscript{108} See id. (discussing elements of “perfect competition theory”). The theory of perfect competition is important because it provides an equilibrium in the market and it motivates producers to create the best product for the lowest price to gain consumer attention. \textit{Id}. Without competition in the market, producers will have the power to make the products they wish for the prices they want, without interference from outside competitors. \textit{Id}. at 7. In this scenario, consumers are bound to lose out in a market with limited choice stemming from a single or just handful of producers. \textit{Id}.

\textsuperscript{109} See Posner, supra note 48 and accompanying text (discussing effect of monopolies on economic markets).


\textsuperscript{112} See Drew, supra note 96 and accompanying text (outlining bargaining power agreement).

hurting the economy and market competition, help the economy grow and give more options to consumers.\textsuperscript{114} There have arguably been many mergers that have benefited consumers, but when these mergers begin to limit consumer choice and create barriers to entry for small businesses, government regulation is necessary to keep some semblance of a fair and competitive market.\textsuperscript{115} As discussed earlier, antitrust regulation was needed to protect the consumers and producers from the effects of unequal competition.\textsuperscript{116} Looking at Walmart, on the surface it may seem like its low prices are a benefit to consumers, but in reality, it also has a negative effect on producers and this negative effect can reach the consumers without the average shopper even realizing.\textsuperscript{117} This leaves very little room for the producers underneath to negotiate or be competitive in the market.\textsuperscript{118}

With the recent allowance of mergers like AT&T and Time Warner, Disney and Fox, Whole Foods with Amazon, Comcast with NBC Universal, and Ticket Master with Live Nation, it is hard to determine if the same outcome would have occurred if \textit{United States v. Ford Motor Co.} had happened today.\textsuperscript{119} The DOJ was successful in their attempt to halt Ford in

\begin{footnotesize}
\textsuperscript{114} See id. (merging companies can help lower prices and give consumers cheaper products).

\textsuperscript{115} See sources cited, \textit{supra} notes 10 and 15 and accompanying text (discussing vertical mergers); \textit{see also} Phillip Areeda, Louis Kaplow, and Aaron Edlin, \textit{Antitrust Analysis: Problems, Text, and Cases}, 5 (Aspen Casebook 7th ed., 2013) (discussing barriers to entry is obstructing new businesses from establishing presence in market).


\textsuperscript{117} See Barry C. Lynn, \textit{Breaking the chain: The antitrust case against Wal-Mart}, \textit{HARPER’S} MAG., 31 (July 24, 2006), https://harpers.org/archive/2006/07/breaking-the-chain/ (discussing Walmart’s business model). Walmart’s business strategy is to undercut manufacturers to sell the products at the lowest price. \textit{Id.} Walmart will even create their own products to compete if the manufacturers do not agree on a price low enough for Walmart’s standards. \textit{Id.} This creates an impossible position for manufacturers and provides a less appealing product made in a lesser quality for customers. \textit{Id.}

\textsuperscript{118} See id. (discussing effect of monopolies on producers).

\textsuperscript{119} See Ford Motor Co. v. United States, 405 U.S. 562, 564 (1972) (discussing Ford merger); see also DOJ: Vertical Merger Precedent, AT&T, https://about.att.com/content/dam/sitesdocs/AT\%26T_TimeWarner/FINAL\%20DOJ\%20Merger\%20Precedent%20One%20Pager%2011.19\%203pmET.PDF (last visited Feb. 25, 2018) (discussing commonality of vertical mergers). Recently, the trend has been to grant vertical mergers. \textit{See United States v. Ford Motor Co.}, 286 F.Supp. 405, 409 (E.D. Mich. 1968). With the unlikelihood of denial, companies are granted access to conspire and to control their supply chain, which is what \textit{Ford} was denied of in 1972. \textit{Id.} Ford was denied because if granted the control over the supply chain, it would have had too much market power. \textit{Id.} This same logic could be said for
acquiring a supply chain used in their cars, however, only a few years later in *Hammermill*, the U.S. District Court for the Western District of Pennsylvania determined that the merger was beneficial for the paper market.\(^{120}\) The trend of *Hammermill, Hughes*, and more recently *AT&T*, seems to suggest that courts do not see a danger in allowing these companies to control multiple markets.\(^{121}\) If the government wishes to bring future cases, it will need to provide evidence that these kinds of mergers are not beneficial for the markets, even if analyzed under the rule of reason approach.\(^{122}\) Perhaps if courts fail in regulating vertical mergers with the current statutes under the Clayton Act, the government will take action and pass further legislation to allow the DOJ to effectively stop mergers when they see a threat to the markets.

In the coming years, there will be a lot to look forward to when it comes to antitrust regulation.\(^{123}\) Despite the United States Court of Appeals, District of Columbia Circuit decision, the DOJ’s attempt to halt AT&T and Time Warner shows an aggressive stance in favor of strong antitrust regulation contrary to the DOJ’s stance in previous decades.\(^{124}\) Next in the pipeline is the expected FTC report following the agency’s Hearings on Competition and Consumer Protection in the 21\(^{st}\) Century, which will add some guidance on the present climate of vertical mergers.\(^{125}\) If courts are

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\(^{120}\) See Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962); *Ford Motor Co.*, 405 U.S. at 411 (stressing importance of analyzing product markets for fairness in market competition); see also United States v. Hammermill Paper Co., 429 F. Supp. 1271, 1293 (W.D. Pa. 1977) (involving *Ford* and *Hammermill* merging supply chains with producers, *Ford* was denied and *Hammermill* granted).

\(^{121}\) See *Hammermill Paper Co.*, 429 F. Supp. at 1293 (discussing shift from per se to rule of reason resulting shift for vertical merger decisions).


\(^{123}\) See id. (allowance of AT&T merger steps towards growing trend of vertical mergers).


Vertical restraints (including mergers) frequently yield procompetitive benefits and only on rare occasion result in any anticompetitive harms. Indeed, the DOJ’s chief economist, Luke Froeb, has explained that “there is a paucity of support for the proposition that vertical restraints and vertical integration are likely to harm consumers.” This statement is supported by a tremendous empirical literature, which recognizes that exceptions exist but also demonstrates that these exceptions are few and far between.

\(^{125}\) See Jacqueline Grise et al., *Antitrust Trends In 2019: Enforcement Watch List For The Year To Come*, MONDAQ (Jan. 10, 2019), available at
holding that there are mainly procompetitive effects of vertical mergers, perhaps the DOJ will also take that stance and lobby for more restrictive legislative action from Congress.\textsuperscript{126}

\section*{CONCLUSION}

The Sherman Act along with the Clayton Act were passed to protect the consumers and emerging businesses in the United States. What started out as a way to combat the amassing of wealth of the American elite, has turned into a regulatory force that has allowed Congress and the courts to rule on what can and cannot be tolerated in American businesses. Congress and the courts have a robust history of ruling that standard monopoly practices are harmful, but provide limited direction when determining the harm of a vertical merger. Courts and Congress need to solidify their stance on the effects and allowance of these mergers, and to what extent non-competing companies can merge.

Generally, vertical mergers do not have the same anti-competitive effect on the economy and consumers as horizontal mergers, and in turn, vertical merger regulations should be more relaxed. Many believe that vertical mergers help foster creativity and integrate efficiencies between purchaser and seller instead of negatively affecting them. America was built upon the theory of capitalism and the freedom of business, so to some, antitrust regulation goes against everything for which this country was formed. Although on the surface allowing these mergers seems pro-business, these deals are primarily taking place between the elite of the elite and are limiting the small businessperson chances of breaking into the market. Companies like Amazon and Walmart are regulating the products we buy and the prices we buy them for. It is not a stretch to think that this practice can have a series of negative impacts on the quality or the quantity of the products we purchase over time. Combating price fixing and regulating quality of products were the original principles behind the Sherman and Clayton Act in the twentieth century. Without regulation, companies would be able to control the landscape of American consumerism without the input of the consumer and will bar new entry for young enterprises.

With the merge of AT&T with Time Warner, and Disney with 21st Century Fox, we will start to see what shape vertical mergers will take in

\textsuperscript{126} See Lee, supra note 96 (discussing allowance of AT&T and Time Warner merger).
American businesses and the economic landscape. The allowance of these mergers may prompt Congress to act and pass further legislation on the matter but considering the procompetitive benefits courts have already discussed when ruling on vertical merger cases, this is unlikely to happen in the current climate. One thing is clear, the controversy surrounding vertical mergers is not likely to go away any time soon.

Natalie Brough