Self-Regulating Platforms and Antitrust Justice

Elettra Bietti*

Until recently, we lived in an era dominated by the ideal of the self-regulating platform market. The hope was that digital platforms such as Amazon Marketplace, Google Search, and Twitter could remain autonomous, inherently efficient, and self-governing spaces of exchange immune from political whims and the corrupt laws of states. By envisioning markets as separate from politics and digital platforms as divorced from political life, dominant schools of antitrust law have long justified distributive asymmetries and concentrations of commercial power. Today, it is difficult to deny that digital platforms are more than just efficient spaces for commercial exchange. Indeed, platforms are also political actors that engage in lobbying, gatekeepers that curate platform infrastructures as loci of engagement, and social environments that tangibly affect people's lives.

Taking stock of the law's blind spots, this Essay argues that digital platforms' contested status represents an opportunity to bridge the imaginary market–politics divide in antitrust law and beyond. Platforms powerfully reveal that market processes are also political processes. They highlight that antitrust law must bring commercial life into alignment with societal needs. This Essay looks at the specific ways in which antitrust law has interacted with digital platforms, shaping and interpreting these spaces as "self-regulating" marketplaces. It shows that the facial neutrality of Chicago School antitrust's emphasis on total welfare maximization and efficiency has actively contributed to the erosion of social and collective values in these spaces. Embedding the values of equality and reciprocity in the structure of digital markets and reimagining platform environments as more openly political is not only possible but urgent in the context of the increasing privatization of digital life.

---

* Postdoctoral Fellow at NYU Law School and Cornell Tech. Doctorate from Harvard Law School. Affiliated to Yale Law School's Information Society Project, Harvard University's Berkman Klein Center for Internet and Society, and Harvard University's Weatherhead Center for International Affairs. I thank Yochai Benkler, Brian Berkey, Friso Bostoen, Richard Fallon, Michal Gal, Urs Gasser, James Grimmelmann, Nikolas Guggenberger, Amy Kapczynski, John Newman, Taylor Owen, Lucas Stanczyk, Thomas Streinz, Heidi Tworek, and Rory Van Loo for valuable input on this piece or on antecedent drafts. I also thank the *Texas Law Review* editors for their excellent work. This piece would not have been possible absent discussions at Yale Law School's Conference on Big Tech and Antitrust, the Amsterdam Conference on Competition Law and Inequality, and an EU workshop on Economic Analysis of Law and Political Economy in 2021.

Introduction

What is a market? Karl Polanyi described contemporary market societies as centered around a specific market form: the self-regulating market, a locus of exchange governed by price equilibrium.[1] As such, markets have been imagined throughout modern history as autonomous spheres of life whose internal justifying logic is separable from politics and the laws of the state.[2] Yet markets are created by law. And market societies' laws and institutions tend to preserve the autonomy of self-regulating price mechanisms from exogenous concerns through the operation of various material and social mechanisms, albeit frequently at a cost for humans and

1. *See* KARL POLANYI, THE GREAT TRANSFORMATION 71 (Beacon Press 2nd ed. 2001) ("A market economy is an economic system controlled, regulated, and directed by market prices; order in the production and distribution of goods is entrusted to this self-regulating mechanism.").

2. *See, e.g.*, POLANYI, *supra* note 1, at 71, 74, 79 (defining market societies as ones where markets are governed by a logic that is considered separate from social and political concerns yet that eats into social and political life); *see also* FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 11–12, 222 (reprt. 1978) (1960) (arguing that the optimal way to govern a society and markets is to let them be guided by individual preferences and not by the partial knowledge of governments).

the natural world.[3] More concretely, market societies operate according to a fictitious division of labor between the private sphere of markets, where the law's role is to facilitate the expression and effects of individual choices, and the public sphere of politics, where the law's role is to ensure representation and democratic governance.[4]

The tendency to artificially separate self-regulating markets from politics, encasing individual choices and market-derived advantages so as to shield them from democratic rule, is characteristic of most market societies.[5] It is also characteristic of the internet and cyberspace, understood to be independent and self-governing, based on private technological affordances and community-based governance.[6] Digital platforms such as Facebook, Google, and Amazon are new market forms in the information economy.[7] They are ambiguously referred to as highly efficient commercial spaces while at the same time being seen as sovereigns, governors, and constitutive spaces.[8]

---

3. *See, e.g.*, Rob Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, *in* THE ROAD FROM MONT PÈLERIN 139, 143, 154–55 (Philip Mirowski & Dieter Plehwe eds., 2015) (discussing the instrumental role of F. Hayek in the construction of the Chicago School in the United States and outlining the ideological contours of neoliberalism in the United States).

4. *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1788–91, 1814, 1831 (2020) (analyzing how the pervasive view of law that separates markets from claims of justice implicates democracy and other social concerns); Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 477 (1988) ("A major goal of the legal realists was to undermine laissez-faire ideology by attacking the idea of a self-regulating market system based on free contract, which operated largely outside state influence and control.").

5. *See generally* Britton-Purdy et al., *supra* note 4 (discussing the market–politics divide and its legal entrenchment in the United States).

6. *See* John Perry Barlow, *A Declaration of Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), https://www.eff.org/cyberspace-independence [https://perma.cc/QKK6-BCVA] (arguing that the internet ought to be a space immune from government interferences); *see also* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378 (1996) ("Many of the jurisdictional and substantive quandaries raised by border-crossing electronic communications could be resolved by one simple principle: conceiving of Cyberspace as a distinct 'place' for purposes of legal analysis by recognizing a legally significant border between Cyberspace and the 'real world.'").

7. I adopt the definition of "platforms" proposed by Julie Cohen. Julie E. Cohen, *Tailoring Election Regulation: The Platform Is the Frame*, 4 GEO. L. TECH. REV. 641, 656 (2020) (defining an information platform as an "intermediary that uses data-driven, algorithmic methods and standardized, modular interconnection protocols to facilitate digitally networked interactions and transactions among its users").

8. For more on platforms as efficient marketplaces, see generally Clifford Maxwell & Scott Duke Kominers, *What Makes an Online Marketplace Disruptive?*, HARV. BUS. REV. (May 24, 2021), https://hbr.org/2021/05/what-makes-an-online-marketplace-disruptive [https://perma.cc/9KJZ-NX8C], and VILI LEHDONVIRTA, CLOUD EMPIRES: HOW DIGITAL PLATFORMS ARE OVERTAKING THE STATE AND HOW WE CAN REGAIN CONTROL (2022). On platforms as governors or sovereigns, see Kate Klonick, *The New Governors: The People, Rules, and Processes Governing*

Indeed, platforms are both political and economic actors. As political actors, platform gatekeepers lobby governments, fund political campaigns, and support research centers and academic conferences.[9] They maintain, curate, and govern platform infrastructures as political and cultural spaces for participation, deliberation, and learning, akin to public squares, agoras, and libraries.[10] As savvy commercial actors, they have built successful economic empires through structurally opaque, monopolistic, and predatory behavior.[11] These companies assert their control over infrastructure to reach audiences and distribute content, goods, or services at arguably unprecedented levels of scale and speed.[12] They create, collect, and store more real-time information about more persons and businesses than was possible under preexisting material conditions.[13] Despite their hybrid status, the dominant belief has long been that platforms, like many business activities, should be kept at a distance from politics and shielded from regulation.[14]

Online Speech, 131 HARV. L. REV. 1598, 1603 (2018), and David Pozen, *Authoritarian Constitutionalism in Facebookland*, KNIGHT FIRST AMEND. INST. AT COLUM. UNIV. (Oct. 30, 2018), https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland [https://perma.cc/3CUD-7P9J].

9. *See, e.g.*, Emily Birnbaum, *Facebook Staff Complained for Years about Their Lobbyists' Power*, POLITICO (Oct. 25, 2021), https://www.politico.com/news/2021/10/25/facebook-fatal-flaw-technologists-lobbyists-516927 [https://perma.cc/TL7C-A7C7] (describing the scope of Facebook, Twitter, and Google's lobbying arms).

10. *See* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1224–25 (2021) (Thomas, J., concurring) (discussing Twitter as a "public forum"); *see also* Franklin Foer, *The Death of the Public Square*, THE ATLANTIC (July 6, 2018), https://www.theatlantic.com/ideas/archive/2018/07/the-death-of-the-public-square/564506/ [https://perma.cc/3VKF-RRDW] (discussing the "pernicious" relationship of old public squares in relation to their integration with new platform technology).

11. *See* Sara Morrison, *How Much Longer Can Google Own the Internet?*, VOX (May 20, 2022), https://www.vox.com/recode/23132580/google-antitrust-search-android-mobile-ads [https://perma.cc/LT8N-9EEF] (discussing Google's ubiquity and power and stating that "[Google] has become so deeply ingrained in everything we do online that it's difficult to imagine how the internet would function without it. But that power may have been obtained and maintained unfairly, in ways that have hurt competitors and consumers").

12. *See, e.g.*, Sebastian Herrera, *Amazon Builds Out Network to Speed Delivery, Handle Holiday Crunch*, WALL ST. J. (Nov. 29, 2021), https://www.wsj.com/articles/amazon-builds-out-network-to-speed-delivery-handle-holiday-crunch-11638181801 [https://perma.cc/W758-R9HD] (describing Amazon's "unprecedented" speed and scope of delivery services).

13. *See, e.g.*, Dylan Curran, *Are You Ready? Here Is All the Data Facebook and Google Have on You*, THE GUARDIAN (Mar. 30, 2018), https://www.theguardian.com/commentisfree/2018/mar/28/all-the-data-facebook-google-has-on-you-privacy [https://perma.cc/QPS2-KSXX] (showing the breadth of personal knowledge platforms have on each of us).

14. Section 230, which protects platforms from liability for most user-generated content, is an example of how platforms have been statutorily protected from content-based liability and regulation. *See, e.g.*, JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2–3 (2019) (outlining the policy and practice of Section 230). Section 230 is an example of the deference Washington has shown toward platforms.

This Essay argues that platforms are not autonomous sovereigns or self-regulating marketplaces. Rather, platforms are actively constructed political spaces, shaped by politics and state law, that can alter societies in dangerous ways. Their positive impact and harmful effects flow beyond the imagined idea of the self-regulating market. If anything, viewing platforms as autonomous spaces causes harm and inequality. Self-regulating price mechanisms and private self-governance are inadequate ways of governing these spaces. In an increasingly digitalized society, platforms must be regulated in ways that connect markets to politics, and commercial to social needs. Against the backdrop of the increasing privatization of digital life, platforms must themselves become representative spaces and loci of democratic self-rule.[15]

The notion that platforms are political might seem obvious. Yet American law makes governing these organizations as political and democratic spaces very difficult.[16] This paradox applies beyond technology platforms and throughout the American economy. Law, including antitrust law, treats the economic freedom and discretion of private conglomerates of economic power in markets (and politics) as supreme.[17] The needs that persons derive from markets as citizens, consumers, and workers are instead construed as marginal considerations at best.[18]

---

15. This argument becomes particularly salient in a context where the role of the state continues to shrink, giving way to privatized hospitals, prisons, digital classrooms, and walled gardens all safely structured around the profit-maximizing logics of a handful of market actors. *See generally* CHIARA CORDELLI, THE PRIVATIZED STATE (2020) (arguing that privatization shrinks the space for democratic participation and representative institutions and can therefore have authoritarian implications).

16. *See supra* note 14; *see also* Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1463, 1465–66, 1479 (2020) (critiquing arguments on the lawlessness of surveillance capitalism and showing that law plays a role in shaping digital environments prone to surveillance).

17. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 365 (2010) (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and stating therefore that there is no basis for government to limit corporate independent expenditures).

18. For literature on the separation between antitrust's focus on consumer welfare, efficiency, and social concerns, see Herbert J. Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust*, U. PA. L.: LEGAL SCHOLARSHIP REPOSITORY, 6 (Dec. 29, 2013), http://scholarship.law.upenn.edu/faculty_scholarship/1868 [https://perma.cc/8KVG-TPQX]; Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551, 624 (2012); and Ioannis Lianos, *Some Reflections on the Question of the Goals of EU Competition Law* 3 (Ctr. for Law, Econ., & Soc'y, Working Paper 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875 [https://perma.cc/66H3-HEK2]. For more on the recent integration of social concerns into antitrust, see Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 YALE L.J. 175, 178–79 (2021) [hereinafter Paul, *Moral Economy Foundations*]; Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378, 381 (2020) [hereinafter Paul, *Antitrust as Allocator*]; and Stephen Macedo, *Introduction* to ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) vii–viii (Stephen Macedo ed., 2017). *See generally* WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE

Not all hope is lost, however. The United States is entering an antimonopoly "spring":[19] trust-busting leaders have been appointed to positions of power,[20] antitrust lawsuits have emerged against big tech companies,[21] and competition law reforms have been proposed in Congress.[22]

AMERICAN LABOR MOVEMENT (1991) (tracing the history of the American labor movement); JOSEPH FISHKIN & WILLIAM E. FORBATH, THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY (2022) (promoting a progressive interpretation of the United States Constitution that integrates the commercial and political spheres).

19. Maurice E. Stucke, *Antitrust Spring*, INST. FOR NEW ECON. THINKING (Dec. 18, 2020), https://www.ineteconomics.org/perspectives/blog/antitrust-spring [https://perma.cc/NEH3-2X2V] (arguing that a "new anti-monopoly movement [is] taking hold across the globe" in reaction to a long antitrust "winter" of under-enforcement); *see* SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE COMM. ON THE JUDICIARY OF THE H.R., 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 1–2 (Comm. Print 2022), https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf [https://perma.cc/2JA4-2E9R] [hereinafter SUBCOMMITTEE ON ANTITRUST, 117TH CONG.] (summarizing findings of investigation into the potential antitrust concerns of digital markets and big tech).

20. Examples include Tim Wu and Lina Khan. For details on their appointments, see Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html [https://perma.cc/5FEW-4342], and *Lina M. Khan Sworn in as Chair of the FTC*, FED. TRADE COMM'N (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc [https://perma.cc/LS9E-82VT].

21. *See, e.g.*, Complaint at 5–6, New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 1:20-cv-03589-JEB) (alleging that Facebook violated antitrust laws); Complaint at 1, FTC v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (No. 1:20-cv-03590-CRC) (petitioning for relief against Facebook to "undo and prevent its anticompetitive conduct and unfair methods of competition"); Complaint at 5, Colorado v. Google LLC, No. 1:20-cv-03715-APM (D.D.C. filed Dec. 17, 2020) (alleging that Google violated antitrust law); Complaint at 1, Texas v. Google LLC, 2021 WL 2043184 (E.D. Tex. 2021) (No. 4:20-CV-957-SDJ) (alleging that Google violated antitrust and deceptive trade practices laws); Complaint at 7–8, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR) (alleging that Apple engaged in unlawful anticompetitive conduct); Complaint at 1, District of Columbia v. Amazon.com, Inc., No. 2021 CA 001775 B (D.C. Super. Ct. 2021) (alleging that Amazon violated antitrust law); Rebecca Klar, *Amazon Hit with Antitrust Lawsuit Alleging E-book Price Fixing*, THE HILL (Jan. 14, 2021), https://thehill.com/policy/technology/534364-amazon-hit-with-class-action-lawsuit-alleging-e-book-price-fixing [https://perma.cc/R92B-6LK9] (reporting that a complaint was filed against Amazon for alleged anticompetitive agreements). For a more general look at the new swathe of antitrust cases in recent years, see Rachel Kraus, *A Running List of American Antitrust Lawsuits Against Google and Facebook*, MASHABLE (Dec. 17, 2020), https://mashable.com/article/antitrust-lawsuits-facebook-google/ [https://perma.cc/3U3W-YMMW].

22. *See, e.g.*, Chris M. Rodrigo, *Klobuchar to Introduce Omnibus Antitrust Bill*, THE HILL (Feb. 4, 2021), https://thehill.com/policy/technology/537279-klobuchar-to-intro-omnibus-antitrust-bill [https://perma.cc/AL39-3G6D] (discussing a bill intended to strengthen competition laws and revamp antitrust enforcement); Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021) (exemplifying Congressional reform in antitrust regulation and enforcement); ACCESS Act of 2021, H.R. 3849, 117th Congress (2021) (promoting competition, lowering entry barriers, and reducing costs for consumers and business switching from one platform to another); Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021)

In Europe, a fresh structural approach to digital markets has been introduced through the Digital Services and Digital Markets Acts, which would combine traditional antitrust rules with new *ex ante* investigatory and remedial powers in tech markets.[23] An important question is whether this wave of change is in *continuity* with the perception of platforms and digital markets as self-regulating spaces, or if recent efforts represent a new turn and the *beginning* of a welcome period of renewal. Answering this question requires considering the notion of distributive justice in all its facets and asking what the values of justice and equality might demand in this new era of market regulation.

This Essay proceeds as follows. In Part I, it introduces the current approach to digital platform markets: autonomous, efficient exchanges that are separable from political concerns and require minimal regulatory intervention. Part I shows that this view is particularly pervasive in antitrust law because of a scholarly and judicial insistence on viewing the competitiveness of digital marketplaces through the modes of price equilibrium, efficiencies, and consumer welfare. Part II discusses normative and distributive justice considerations in the context of digital platform markets—how they surface in current antitrust law and how they ought to be reoriented. It argues that separating efficiency and justice and relying on redistributive principles is insufficient. Instead, the next era of antitrust jurisprudence demands a historical, methodological, and philosophical renewal. This renewal requires an emphasis on cooperation, reciprocity, and collective empowerment in antitrust and in digital market regulation more broadly.

(promoting "competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful"); Ending Platform Monopolies Act, H.R. 3825, 117th Cong. (2021) (eliminating conflicts of interest arising from dominant online platforms' concurrent ownership of online platforms and other businesses); Press Release, Mark R. Warner, Senator, Lawmakers Reintroduce Bipartisan Legislation to Encourage Competition in Social Media (May 25, 2022), https://www.warner.senate.gov/public/index.cfm/2022/5/lawmakers-reintroduce-bipartisan-legislation-to-encourage-competition-in-social-media [https://perma.cc/KE39-5FWY] ("reintroducing the . . . *[]ACCESS[] Act*, [encouraging] market-based competition to dominant social media platforms by requiring the largest companies to make user data portable – and their services interoperable – with other platforms, and to allow users to designate a trusted third-party service to manage their privacy and account settings . . . ."); *see generally* AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE (2021) (listing action items for Congress to improve antitrust laws and deter anticompetitive behavior).

23. *Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC*, at 69, COM (2020) 825 final (Dec. 15, 2020), https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN [https://perma.cc/G59N-NJYL]; *Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)*, at 3–4, COM (2020) 842 final (Dec. 15, 2020), https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf [https://perma.cc/29X8-GR88].

I. Digital Platforms as Self-Regulating Marketplaces: Efficiency and Welfare

To build the case for platforms' political and not purely economic status, this Part argues that digital platforms such as Facebook, Google, and Amazon can be viewed simultaneously as monopolies and as market makers. Their dual nature raises important new conundrums that can begin to be resolved by thinking of these private actors as architects of public and politically salient infrastructures. The argument is that the apparent intractability of these problems is due to an approach to digital markets which neglects these entities' social role.

A. Digital Platforms as Monopolies and Market Makers

1. Platforms as Monopolies.—Companies such as Facebook, Google, and Amazon are hegemonic players in their respective fields of operation, displaying great size, power, and reach. For instance, in 2019, Google's total revenue was as high as Hungary's GDP.[24] More than a fourth of the people alive in 2020 were active daily users of at least one of Facebook's family of social platforms.[25] In 2021, Amazon carried out fifty to seventy percent of U.S. online marketplace sales and had approximately 2.6 billion visits per month.[26] As noted by the U.S. House Judiciary Committee in its Antitrust Report in October 2020:

> Over the past decade, the digital economy has become highly concentrated and prone to monopolization. . . . Amazon, Apple, Facebook, and Google [ ]have captured control over key channels of distribution and have come to function as gatekeepers. Just a decade

24. *Compare GDP Indicator*, WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?end=2019&start=2018&year_high_desc=true [https://perma.cc/9S3R-JR8A], *with Google Revenue*, ZIPPIA, https://www.zippia.com/google-careers-24972/revenue/ [https://perma.cc/2NEN-NU4A] (showing Google's revenue in 2019 was very similar to Hungary's GDP that year).

25. *See* UNITED STATES SECURITIES AND EXCHANGE COMMISSION, FORM 10-Q: FACEBOOK, INC. 29 (2020), https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=14302237 [https://perma.cc/37VP-92EU].

26. *See* First Amended Complaint at 7, District of Columbia v. Amazon.com, Inc., No. 2021 CA 001775 B (D.C. Super. Ct. filed May 25, 2021) (describing Amazon's conduct and status as the dominant U.S. online marketplace). According to Statista, Amazon's share of e-commerce sales in the United States was 56.7%, while their next largest competitor Walmart had a 6.2% market share. *See* Daniela Coppa, *Amazon and Walmart Share of E-commerce Sales in the United States from 2018 to 2021*, STATISTA (Apr. 12, 2022), https://www.statista.com/statistics/1296802/amazon-and-walmart-share-of-online-sales-united-states/ [https://perma.cc/XSX3-HHTL]. Also, according to Statista, Amazon.com had 2.449 million monthly visits as of June 2021. *Leading E-commerce Websites in the United States as of June 2021, Based on Number of Monthly Visits (in Millions)*, STATISTA (July 26, 2022), https://www.statista.com/statistics/271450/monthly-unique-visitors-to-us-retail-websites/ [https://perma.cc/M3F3-Y8TR].

> into the future, 30 percent of the world's gross economic output may lie with these firms, and just a handful of others.[27]

These digital hegemons dominate their respective domains of activity. For instance, the German antitrust regulator, the Bundeskartellamt, among other authorities, has found Facebook to be the central player in the market for social networking services.[28] Google's dominance in the markets for general search, search advertising, and online advertising intermediation was also confirmed in several EU cases since the *Google/DoubleClick* merger investigation.[29] Google is dominant in a number of other market segments including an 80% market share in navigation-mapping services in the United States.[30] Not to be outdone, Amazon has "significant and durable market power in the U.S. online retail market" with an approximate share of 50% of online retail sales.[31] In addition, "[s]ixty-six percent of consumers start their search for new products on Amazon, and a staggering 74% go directly to Amazon when they are ready to buy a specific product."[32]

These companies' de facto dominance or ability to exercise market power is often greater than courts and regulators tend to state. Indeed, many findings of dominance or durable monopoly tend to rely on contestable definitions of market power and supply and demand substitutability in digital

---

27. SUBCOMMITTEE ON ANTITRUST, 117TH CONG., *supra* note 19, at 5–6.

28. *See Press Release: Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources*, BUNDESKARTELLAMT (Feb. 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html [https://perma.cc/SUL9-ZPPU] (stating Facebook had a dominant social media market share in Germany); *see also* SUBCOMMITTEE ON ANTITRUST, 117TH CONG., *supra* note 19, at 7 (stating Facebook has "monopoly power in the market for social networking"); *see also* COMPETITION & MARKETS AUTHORITY, COMPLETED ACQUISITION BY FACEBOOK, INC. (NOW META PLATFORMS, INC.) OF GIPHY, INC.: FINAL REPORT 4 (Nov. 30, 2021), https://assets.publishing.service.gov.uk/media/61a64a618fa8f5037d67b7b5/Facebook__Meta__GIPHY_-_Final_Report_1221_.pdf [https://perma.cc/78BB-W3KJ] (stating Facebook was the largest social media provider in the UK).

29. *See* Commission Decision of 27 June 2017, 2018 O.J. (C 9) 7 (stating Google had a dominant market position in general search in the EU); *see also* Commission Decision of 20 Mar. 2019, 2020 O.J. (C 369) 6–7 (stating Google had a dominant market position in online search advertising); *see also* Commission Decision of 11 Mar. 2008, 2008 O.J. (C 184) 9–10 (stating Google was a market leader in the search ad space); *see also* FED. TRADE COMM'N, NO. 071-0170, STATEMENT OF FEDERAL TRADE COMMISSION CONCERNING GOOGLE/DOUBLECLICK 3 (2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf [https://perma.cc/P4XQ-A7PF] (stating Google was a dominant provider of sponsored search advertising in the US).

30. SUBCOMMITTEE ON ANTITRUST, 117TH CONG., *supra* note 19, at 193, 195–96.

31. *Id.* at 9.

32. Complaint at 6, District of Columbia v. Amazon.com, Inc., No. 2021 CA 001775 B (D.C. Super. Ct. filed May 25, 2021), https://oag.dc.gov/sites/default/files/2021-05/Amazon-Complaint-.pdf [https://perma.cc/7JGK-48ZC].

markets.[33] They frequently include traditional business models within the definition of relevant markets and thus define tech companies' market shares narrowly; they presume efficient digital markets where competition is one-click away, and they often fail to account for data or other intangibles as part of an analysis of nonprice metrics.[34]

While many routine market definition methods are helpful to the analysis of analog markets, they provide weak guidance in digital environments where price differentials are often less determinative than a diagnosis of access, infrastructure, and network power.[35] The markets that Google, Facebook, and Amazon operate on are not just monopolistic in the sense that other competitors that could compete on them fail to do so. They are also monopolistic by default—consciously constructed and maintained by the goodwill and infrastructural capabilities of platform gatekeepers. As a result, competing in the digital economy increasingly means creating alternative marketplaces, not competing in the same market as other platforms.[36]

2. Platforms as Market Makers.—Platforms are not just monopolies; they are markets and they *make* markets. Platforms "replace (and rematerialize)" markets.[37] They are market makers before they become

33. Under the Sherman Act, market definition consists of identifying the products or services that substantially compete with, or are substitutable to, the products or services at issue in the relevant geographic area. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2285 (2018). To define the product market, courts rely on customers' potential to switch to a substitute product in reaction to a small price differential (technically a small but significant nontransitory price increase). Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962) (showing the Supreme Court defines a product market traditionally by cross-elasticity of demand between a product and alternative substitutes); U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 6 (1997) (stating the agencies' delineation of a product market is based on the effect a small but significant price increase would have on demand).

34. *See generally* Reuben Binns & Elettra Bietti, *Dissolving Privacy One Merger at a Time: Competition, Data and Third Party Tracking*, 36 COMPUT. L. & SEC. REV. 1, 28 (2020) (explaining competition authorities have, until recently, failed to incorporate the importance of data and privacy into their analyses).

35. *See* John M. Newman, *Antitrust in Attention Markets: Definition, Power, Harm* 28, 30 (Univ. of Mia. Legal Stud., Research Paper No. 3745839, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3745839 [https://perma.cc/9J4C-XMXL] (explaining that different metrics for measuring market power are needed in attention economies). For more on the notion of power in networks, see generally Manuel Castells, *A Network Theory of Power*, 5 INT'L J. COMMC'N 773 (2011).

36. This argument has been made by entrepreneurs themselves. *See* PETER THIEL, ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE (2014) (writing as an entrepreneur to argue that succeeding in the economy of the future requires moving away from competition as traditionally understood).

37. JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 42 (2019).

market actors. Platforms could even been seen as "gamemakers,"[38] for they control the digital game: they design and manipulate preferences, dictate the terms of competition for the market actors that operate within their ecosystems, and arguably exploit users.[39] Before they become anyone's competitors, these entities intermediate and infrastructurally enable access and repeated transactions between diversified groups of customers and users.[40]

An illustrative example is the way in which digital platforms have shifted contemporary patterns of consumption from the purchase of physical ownership to the purchase of access rights and subscription-based goods and services.[41] This pattern is widespread. Airbnb intermediates between homeowners and temporary travelers, reimagining hospitality. Netflix and YouTube offer video-on-demand services, replacing VCRs, DVDs, and the traditional content production and distribution industries. Amazon and eBay have arguably reinvented retail consumption, and Facebook and Twitter have substantially changed social interaction and public discourse.[42] Together, these platforms have transformed owned goods or social experiences into consumerist lifestyles accessible at any point in time from anywhere. These businesses do not merely compete with supermarkets, hotels, and other analog services. They have changed many of these markets, producing passive and ubiquitous forms of digital consumerism and capitalism on steroids.

Relevant to this analysis are two connected aspects of platform business models: their multisided nature and network effects. Markets tend to be considered multisided if three conditions are present.[43] First, there must be

38. MAURICE E. STUCKE & ARIEL EZRACHI, COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS 192 (2020).

39. *Id.* at 195.

40. *See id.* at 209–10 (explaining how "gamemakers" profit from their roles as intermediaries between advertisement publishers and users).

41. *See* Shelly Kreiczer-Levy, *Share, Own, Access*, 36 YALE L. & POL'Y REV. 155, 156–57 (2017) (arguing that digital platforms pioneered new forms of access and sharing that are transforming the idea of property).

42. *See* Jeff Himmelman, *EBay's Strategy for Taking On Amazon*, N.Y. TIMES MAG. (Dec. 19, 2013), https://www.nytimes.com/2013/12/22/magazine/ebays-strategy-for-taking-on-amazon.html [https://perma.cc/Y2RB-4C2M] (explaining how major online retailers, namely Amazon and eBay, have changed consumer expectations of the retail experience); Geoffrey A. Fowler & Chris Alcantara, *Gatekeepers: These Tech Firms Control What's Allowed Online*, WASH. POST (Mar. 24, 2021), https://www.washingtonpost.com/technology/2021/03/24/online-moderation-tech-stack/ [https://perma.cc/GM8M-K9JR] (discussing how Facebook and Twitter moderate the content users share online, which importantly influences public discourse).

43. *See generally* David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REGUL. 325, 331–32 (2003) (explaining the three necessary conditions of a multisided platform business). Note, however, that the distinction between single-sided and multisided markets is contested and blurred. *See* Michael Katz & Jonathan Sallet, *Multisided*

two or more distinct groups of customers. These can be distinct because they possess different features (for example, men and women), or they can be distinct because they take advantage of different platform functionalities (user-generated content production versus consumption).[44] Second, coordinating and connecting these groups of customers must be costly.[45] Third, an intermediary platform must be able to internalize some of these costs.[46]

Amazon, for example, does not just intermediate the sale of books but makes it much cheaper for buyers of books to find booksellers and for sellers to find buyers. As such, it is a multisided platform. This also means that books sold through Amazon are less expensive to buy and sell than they would be otherwise. Conventional marketplaces like shopping malls, credit cards, the stock exchange, newspapers, the farmer's market, and the auction house are also multisided markets. Some of these business models have been difficult for antitrust law to reckon with, because they defy the propensity to define violations on the basis of anticompetitive price increases or low outputs.[47]

Network effects are a closely related concept. They are the positive effect that an additional user of a good or service has on the value of that product for others.[48] When a network effect is present, the value of a product or service increases according to the number of actors using it. Network effects can be *direct* and apply among members of a customer group (e.g., the more friends one has on Facebook, the more other friends are likely to join). They can also be *indirect* and apply among members of different

---

Platforms and Antitrust Enforcement, 127 YALE L.J. 2142, 2148 (2018) ("The lack of consensus regarding the definition of a platform is important, because some commentators emphasize the distinction between single-sided businesses and multisided platforms and suggest that antitrust enforcement reflect this distinction. Yet, it is much harder to distinguish single-sided business from multisided ones than one might initially suspect . . . ."); Benjamin E. Hermalin & Michael L. Katz, *What's So Special About Two-Sided Markets?*, *in* TOWARD A JUST SOCIETY: JOSEPH STIGLITZ AND TWENTY-FIRST CENTURY ECONOMICS 111, 111 (Martin Guzman ed., 2018) ("An unusual feature of two-sided markets is that there is no consensus regarding what they are. There have been many attempts to offer precise definitions of two-sided markets, but none is fully accepted.").

44. Evans, *supra* note 43, at 331–32.

45. *Id.* at 332.

46. *Id.*

47. *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 721, 756, 803 (2017) (analyzing how Amazon engages in predatory pricing yet has avoided antitrust scrutiny due in part to U.S. antitrust law's lenient attitude toward predatory pricing). *See also* Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS'N 990, 990–92 (2003) (describing how multisided platforms "differ from the textbook treatment of multiproduct oligopoly or monopoly").

48. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 13 (1999) (explaining that a product exhibits network effects when "the value of a product to one user depends on how many other users there are," such that "consumers benefit from using a popular format or system").

customer groups (e.g., the more videos are posted on YouTube, the more viewers YouTube is likely to attract).

Relying on these concepts, economists and policymakers have attempted to theorize platform markets, generalizing their inherent tendencies to be at once monopolistic and fractal.[49] But taking a one-size-fits-all approach to these concepts has produced more heat than light.[50] One important hurdle in the interpretation of concepts such as multisided markets and network effects has been the incompatibility of two perspectives on platforms' functions and nature. On the one hand, neoliberal paradigms emphasize the centrality of price equilibrium and consumer welfare maximization in self-regulating digital marketplaces, portraying platforms as efficient actors in a competitive, frictionless economy governed by lowering prices.[51] On the other hand, platforms have a market-making public and infrastructural function that cannot be ignored as they increase in size and importance. The prevalence, until very recently, of perspectives that emphasize digital markets' informational efficiencies, such as neoclassical economic thinking in U.S. antitrust law, has had the distinctive effect of obscuring the social dimensions of digital markets, naturalizing the purported separability between markets and politics.

---

49. *See, e.g.*, Evans, *supra* note 43, at 331 (discussing how theory and empirics shed light on idiosyncrasies of multisided platform markets and how these insights can guide analysis of competitive practices); *see* Katz & Sallet, *supra* note 43, at 2145 (explaining that a multiple-markets approach to defining multisided platforms accounts for the different markets on each side of the platforms); *see also* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 976–77 (2019) (arguing that platforms control marketplaces in potentially abusive ways); *see generally* David S. Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151 (2007) (discussing how nearly all aspects of two-sided platforms affect antitrust analysis as a matter of theory); Lapo Filistrucchi, Damien Geradin, Eric van Damme & Pauline Affeldt, *Market Definition in Two-Sided Markets: Theory and Practice*, 10 J. COMPETITION L. & ECON. 293 (2014) (asserting that the failure to incorporate the theory of two-sided markets results in the failure to recognize key differences between non-transaction and two-sided transaction markets, among other things); Rochet & Tirole, *supra* note 47 (noting that two-sided markets differ from oligopolies and monopolies, giving rise to complementarities without the corresponding externalities being internalized by end users); John B. Kirkwood, *Antitrust and Two-Sided Platforms: The Failure of* American Express, 41 CARDOZO L. REV. 1805 (2020) (analyzing how the *American Express* Supreme Court decision has made it increasingly difficult for two-sided platforms to stifle competition, and was thus deeply flawed).

50. *See* Thomas B. Nachbar, *Platform Effects*, 62 JURIMETRICS 1, 18, 20 (2021) (arguing that the *American Express* case and commentary on the case failed to acknowledge platform effects); *see also* Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 ANTITRUST BULL. 130, 131–32 (2022) (discussing failed attempts at defining markets and monopoly power in digital antitrust cases and proposing alternative methodologies).

51. At least until recently. *See, e.g.*, Rory Van Loo, Inflation, Market Failures, and Algorithms 34–49 (Sept. 27, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4226318 [https://perma.cc/6XYZ-H3SL] (discussing remedial approaches to inflation).

B. U.S. Antitrust and Platform Regulation

As said, digital platforms such as Google or Amazon are monopolists and at the same time market makers and gatekeepers. Their existence as both challenges preexisting antitrust law paradigms.[52] In the United States, the Chicago School understanding of antitrust law, which focuses on consumer welfare[53] and measures anti-competitive behavior by reference to price increases and output restrictions, dominates.[54] However, the Chicago School has coexisted with other approaches too. One other approach is the Harvard School of antitrust approach, which contributed to the demise of predatory pricing as an antitrust offense and is generally well represented in the U.S. courts.[55] These approaches tend to mischaracterize digital monopoly harms. Platform gatekeepers' business models are frequently based on free services, predatory pricing, and excesses of output, all features that dominant antitrust doctrines are not equipped to capture.[56] Moreover, courts have often deferred important decisions to paid economists and consultants,[57] furthering the

52. *See, e.g.*, Khan, *supra* note 47, at 979–82 (discussing the challenges in regulating platforms and applying proper remedies).

53. Broadly, consumer welfare in antitrust is taken to mean the maximization of productive and allocative efficiencies. Thus, antitrust is seen as a branch of law that intervenes in markets to make them more productive and allocatively efficient, and produce the most beneficial output at the lowest possible cost.

54. *See* Herbert Hovenkamp, *On the Meaning of Antitrust's Consumer Welfare Principle*, CONCURRENTIALISTE (Jan. 17, 2020), https://leconcurrentialiste.com/herbert-hovenkamp-meaning-consumer-welfare/?mc_cid=05eddf4e53&mc_eid=34790440cd [https://perma.cc/KCJ6-5PAD] (arguing that maximizing consumer welfare does not mean minimizing prices but rather maximizing outputs). *See generally* John M. Newman, *The Output-Welfare Fallacy: A Modern Antitrust Paradox*, 107 IOWA L. REV. 563 (2022) (arguing that Chicago School antitrust's true focus was on output restrictions and not on price increases).

55. *See* William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U. CHI. L. REV. 459, 464–66 (2020) (arguing for a recalibration of the respective roles of the Chicago and Harvard Schools of Economics in shaping antitrust enforcement in the 1970s and 1980s). Note that Stephen Breyer, former Supreme Court Justice and student of these scholars, also contributed to the influence of Harvard School principles in U.S. law. *See generally* Stephen Breyer, *In Memoriam: Philip E. Areeda*, 109 HARV. L. REV. 889 (1996) (expressing his gratitude to Philip E. Areeda for his career at Harvard).

56. *See* Khan, *supra* note 47, at 756 (describing the inadequate treatment of Amazon's monopoly position under current antitrust law); Timothy J. Trujillo, *Predatory Pricing Standards Under Recent Supreme Court Decisions and Their Failure to Recognize Strategic Behavior as a Barrier to Entry*, 19 J. CORP. L. 809, 825 (1994) (stating that the Court's recoupment analysis in the *Matsushita*, *Cargill*, and *Brooke* cases "refers to recoupment only in the market in which the predation actually occurs. Thus, the Court's analyses and test . . . ignore . . . that successful predation could occur because the dominant firm can spread its gains from predation over several markets").

57. *See generally* Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011) (examining the reliance of judges on economic consultants in antitrust litigation).

perception of platforms as efficient self-regulating spaces governed by an economic logic divorced from politics.[58]

1. Antitrust Enforcement from the 1890s to 2020s.—American antitrust law has progressive roots that date back to the 1890s, when antitrust emerged as an apparatus for tackling abuses of market power and anticompetitive commercial conduct, particularly in the railway and electricity industries.[59] The Sherman Act came into force in 1890, and the Supreme Court first declared a merger unlawful in 1904.[60] Strong regulatory enforcement began at the turn of the century and arguably lasted until the 1980s. During this period, regulators were not always proactive. There were phases where they favored big business interests.[61] Still, strong remedies were imposed throughout the period in merger cases and beyond.[62] In the 1911 landmark case of *Standard Oil Co. of New Jersey v. United States*,[63] the Supreme Court ordered the oil monopoly's breakup into thirty-four segments.[64] In 1982, the AT&T monopoly was similarly broken up into the baby bells.[65] Throughout antitrust's history, enforcement was both rigorous and effective.

58. *See* Elliott Ash, Daniel L. Chen & Suresh Naidu, *Ideas Have Consequences: The Impact of Law and Economics on American Justice* (Nat'l Bureau of Econ. Rsch, Working Paper 29788, 2022), http://www.nber.org/papers/w29788 [https://perma.cc/MZ9A-82NM] (describing seminars that indoctrinate judges into law and economics thinking and their effects); *see also* David Dayen, *Corporate-Funded Judicial Boot Camp Made Sitting Federal Judges More Conservative*, THE INTERCEPT (Oct. 23, 2018), https://theintercept.com/2018/10/23/federal-judiciary-henry-manne-law-economics/ [https://perma.cc/HJ27-4JFT] (discussing paper by Elliott Ash et al., above).

59. *See generally* William J. Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 BUS. HIST. REV. 665 (2019) (describing Progressive Era efforts to regulate the American economy in the late-nineteenth and early-twentieth centuries).

60. N. Sec. Co. v. United States, 193 U.S. 197, 360 (1904).

61. For a nuanced history that questions the neo-Brandesian account of antitrust's history, see Brian Cheffins, *History and Turning the Antitrust Page*, 95 BUS. HIST. REV. 805, 807 (2021). *See also* Brian Cheffins, *Why the Mid-20th Century Was Not the Golden Age of Antitrust*, PROMARKET (Dec. 12, 2021), https://www.promarket.org/2021/12/12/antitrust-midcentury-golden-era-new-brandeis-reform/ [https://perma.cc/M4E9-MABJ] (identifying, for instance, "a reluctance on the part of the Kennedy and Johnson Administrations to antagonize big business seen as playing a role").

62. For examples of aggressive antitrust enforcement in merger cases, see generally, Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (breaking up Brown Shoe Co. into two units with strong structural remedies). The trend continued throughout the 1960s. *See generally* United States v. Phila. Nat'l Bank, 374 U.S. 321, 364–68, 371–72 (1963) (detailing the proposal to consolidate banks under § 7 of the Clayton Act, which was denied because it would substantially decrease competition in the surrounding area); United States v. Von's Grocery Co., 384 U.S. 270, 277–79 (1966) (discussing how the merger of two of the most successful retail grocery stores in a particular area, among other things, violated § 7 of the Clayton Act); United States v. Pabst Brewing Co., 384 U.S. 546, 551–53 (1966) (holding that the merger of Pabst Brewing Company and Blatz Brewing Company was a violation of § 7 of the Clayton Act).

63. 221 U.S. 1 (1911).

64. *See id.* at 81–82 (affirming decree breaking up Standard Oil).

65. United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 226–27 (D.D.C. 1982).

However, by the time it was Microsoft's turn in the 1990s, enforcement had slowed down.[66] Microsoft is an outlier in those years but also confirms an overall deregulatory stance in digital markets. Though the district court in the case against Microsoft ordered a structural breakup of the company,[67] the court of appeals vacated the breakup,[68] giving way to a settlement.[69] *United States v. Microsoft Corp.*[70] epitomized a new, ambiguous approach to antitrust enforcement in digital markets—whereby regulators were explicitly reluctant to interfere with the purported dynamism and natural competitiveness of digital markets.[71]

Between 1890 and the 1970s, antitrust law was consistently viewed as an institutional apparatus meant to serve a state presence in economic affairs.[72] Whether or not it was widely believed that markets were political and gave rise to distributive effects,[73] it was no doubt understood that political institutions ought to have the power to act in the public interest to address unacceptable concentrations of economic power.

---

66. *See generally* TIMOTHY WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018) (describing the slowdown in antitrust enforcement during and after the Reagan Administration).

67. United States v. Microsoft Corp., 97 F. Supp. 2d 59, 64 (D.D.C. 2000) (issuing an order requiring Microsoft to submit a proposed plan of divestiture, with the company to be split into an "Operating Systems Business" and an "Applications Business").

68. United States v. Microsoft Corp., 253 F.3d 34, 103 (D.C. Cir. 2001) ("Quite apart from its procedural difficulties, we vacate the District Court's final judgment in its entirety for the additional, independent reason that we have modified the underlying bases of liability.").

69. *See* Press Release, Dep't of Just., Department of Justice and Microsoft Corporation Reach Effective Settlement on Antitrust Lawsuit (Nov. 2, 2021), https://www.justice.gov/archive/atr/public/press_releases/2001/9463.htm [https://perma.cc/USL6-YHP9] (highlighting details of the settlement); *U.S. v. Microsoft Corporation Information on the Settlement*, DEP'T OF JUST., www.justice.gov/atr/usdoj-antitrust-division-us-v-microsoft-corporation-information-settlement [https://perma.cc/5RSA-VTUB] (providing resources and documents related to the settlement).

70. 253 F.3d 34 (D.C. Cir. 2001).

71. Note, however, that there had been reluctance to impose structural remedies in previous cases. *See, e.g.*, United States v. Aluminum Co. of Am., 91 F. Supp. 333, 417–19 (1950) (ruling against divestiture due to the market entry of two competitors in the aluminum industry: Reynolds and Kaiser).

72. *See generally* Paul, *Moral Economy Foundations*, *supra* note 18 (detailing how antitrust law in the nineteenth century was connected to the role of the state in railroads and markets); *see also* AMY KLOBUCHAR, ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE 137 (2021) (discussing the evolution of antitrust enforcement before and after the Reagan administration).

73. For an early critical perspective on market regulation, see generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). *See also* ROBERT L. HALE, FREEDOM THROUGH LAW: PUBLIC CONTROL OF PRIVATE GOVERNING POWER 19–24 (1952) (arguing that markets are structured by the private law of contract and property, which themselves have distributive effects).

The 1970s and 1980s saw a change of course with the shift toward Chicago and Harvard School of Economics approaches to antitrust analysis.[74] These influences, particularly the Chicago School approach, consciously supported the abandonment of egalitarian and populist goals in favor of an approach aimed explicitly at immunizing markets from politics, promoting self-regulating markets, and enhancing efficiency and consumer welfare.[75] This ideology quickly began to dominate and deter state intervention in markets.[76]

Judge Robert Bork contributed to popularizing and transposing the Chicago School approach into antitrust policy in his classic review of the goals of antitrust law published in 1978.[77] Bork effectively revised the history of antitrust law, arguing that it needed to be understood as a branch of law concerned with the promotion of consumer welfare above all else.[78] This approach became consciously tolerant of monopolies, favoring large (and purportedly efficient) conglomerates of economic power, including digital

74. This approach was illustrated in a variety of cases at the time. *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 56, 58–59 (1977) (citing Robert Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II]*, 75 YALE L.J. 373, 403 (1966)) (supporting overruling *United States v. Arnold, Schwinn & Co.*, 388 U. S. 365, and abandoning the per se rule against vertical nonprice restraints).

75. *See* Kovacic, *supra* note 55 (arguing that academia has had an "obsession" with the Chicago School, that there is a need to recalibrate the Chicago School and Harvard School's respective influence); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925 (1979) (concluding that given the synergies between Chicago School and other schools of antitrust, "it is no longer worth talking about different schools of academic antitrust analysis").

76. Posner, *supra* note 75, at 948 n.67; *see generally* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30326, 2022), https://www.nber.org/system/files/working_papers/w30326/w30326.pdf [https://perma.cc/V7XT-AUWN] (examining the decline in antitrust enforcement since the 1960s and the reasons for such decline).

77. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

78. *Id.* at 9; Lianos, *supra* note 18, at 2. *See also* Alan J. Meese, *Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act: How Harvard Brought Us a Total Welfare Standard and Why We Should Keep It*, 85 N.Y.U. L. REV. 659, 690 (2010) (noting that the Supreme Court has found that the Sherman Act "pursues 'consumer welfare' to the exclusion of other values"); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (holding that antitrust should pursue the consumer welfare standard and that consumers could sue price fixers directly for an overcharge). For a normative discussion of the place of efficiency in the consumer-welfare driven understanding of market regulation, see generally Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV, 487 (1980), and Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979). For progressive accounts of this history, see generally Paul, *Moral Economy Foundations*, *supra* note 18, and Novak, *supra* note 59. *See generally* WU, *supra* note 66, at 86–92 (explaining Bork's ascendance in the Chicago School and criticizing his views); Khan, *supra* note 47 (critiquing the rise of the Chicago School and its impact on the rise of predatory pricing and vertical integration).

power, over the fairness of markets and the well-being of consumers, workers, and other actors.[79]

Bork's legacy has profoundly shaped contemporary U.S. antitrust law and digital markets to this day,[80] arguably contributing to the growth of digital monopolies.[81] It has contributed to establishing a vision of digital platforms as perfectly efficient, self-regulating spaces that do not require political, legal, or regulatory intervention.[82] One salient symptom of this has been the *laissez-faire* approach to mergers in the digital sector. One illustrative example could be the closing of the Google/DoubleClick merger investigation in 2007.[83] In that case, the Federal Trade Commission (FTC) found no risks of anticompetitive harm despite the creation of a large adtech conglomerate that would dominate advertising markets for the long-term future.[84] Another salient characteristic of Chicago's influence on tech markets is the difficulty claimants face in pleading anticompetitive conduct due to procedural obstacles built over time by the courts in cases such as

79. It should be noticed that these tendencies to favor big business were the result of a joint influence of various schools of thought and not the sole product of Chicago School ideology. On this point, see generally Kovacic, *supra* note 55. On the effect of legal and economic ideology on court decisions, see Ash et al., *supra* note 58. *See also* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 73 (2005) (discussing how neoliberalism became part of a conscious pro-big-business political agenda in the United States during the Reagan Era). *But see* Kovacic, *supra* note 55, at 484 (cautioning that it would be a "serious error to attribute the [antitrust] developments of the past forty years solely or chiefly to the Chicago School").

80. *See* Posner, *supra* note 75, at 925–26, 933–34 (identifying Bork among those instrumental in setting out the foundations of the Chicago School and concluding that its basic tenet "has triumphed . . . [and] is beginning to be reflected in the application of economics to antitrust law"); For critical perspectives, see generally Khan, *supra* note 47; Paul, *Moral Economy Foundations*, *supra* note 18; and WU, *supra* note 66, at 86–92.

81. *See* Khan, *supra* note 47, at 720–22 (linking Bork's emphasis on consumer welfare to the growth of predatory pricing and Amazon's path to dominance).

82. This vision can be found in the commentary on the FTC's decision not to pursue an antitrust case against Google in January 2013. *See* Craig Timberg, *Federal Trade Commission to End Antitrust Investigation of Google*, WASH. POST (Jan. 2, 2013), https://www.washingtonpost.com/business/technology/federal-trade-commission-to-end-antitrust-investigation-of-google/2013/01/02/3bb4b128-550c-11e2-bf3e-76c0a789346f_story.html?tid=a_inl_manual [https://perma.cc/DR36-K6XQ] (reporting on the end of the FTC's antitrust investigation of Google). *See also* Craig Timberg, *FTC: Google Did Not Break Antitrust Law with Search Practices*, WASH. POST (Jan. 3, 2013), https://www.washingtonpost.com/business/technology/ftc-to-announce-google-settlement-today/2013/01/03/ecb599f0-55c6-11e2-bf3e-76c0a789346f_story.html [https://perma.cc/9G3B-2AWN] (explaining that the FTC was unpersuaded by arguments against Google's practices because antitrust laws "protect competition, not competitors").

83. FED. TRADE COMM'N, FTC FILE NO. 071-0170, STATEMENT OF THE FEDERAL TRADE COMMISSION CONCERNING GOOGLE/DOUBLECLICK 2, 8 (Dec. 20, 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf [https://perma.cc/4854-NWMT].

84. *Id.*

Trinko.[85] In *Trinko*, the Supreme Court found that because the Telecommunications Act of 1996 applied to the antitrust-relevant conduct in question, pleading an antitrust violation required pleading conduct that did not already fall under the Act.[86] This practically limited the application of antitrust law in regulated industries.[87]

A third characteristic is a very loose approach to market definition and a narrow conception of market power and of its exercise in tech markets.[88] This is what arguably led to the closure of the search self-preferencing case against Google in 2010.[89] The FTC originally alleged that "Google unfairly preferences its own content on the Google search results page and selectively demotes its competitors' content from those results."[90] But to meet the pleading standard, the FTC needed to show an intent to acquire or maintain monopoly power through exclusionary conduct, a high bar in an industry where search rankings are mediated by opaque algorithms.[91]

2. Antitrust in Tech Markets: Ohio v. American Express *and Beyond.—*

The recent Supreme Court judgment in *Ohio v. American Express Co.* (*AmEx*)[92] demonstrates the influence of neoclassical economic thinking in channeling confusions among judges on the nature of digital power.[93] This approach makes recent antitrust litigation against big tech platforms less

85. Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004) (holding that a complaint alleging the breach of a statutory duty did not state a claim under § 2 of the Sherman Act).

86. *See id.* at 407 (holding that since the 1996 Act "does not create new claims that go beyond existing antitrust standards," plaintiffs were required to allege conduct that violated § 2 of the Sherman Act).

87. *See generally* Howard Shelanski, *The Case for Rebalancing Antitrust and Regulation*, 109 MICH. L. REV. 683 (2011) (arguing that *Trinko* was wrongly decided insofar as it precluded the ordinary operation of antitrust law in regulated sectors of the economy).

88. For a better way to define markets, see Daniel P. O'Brien & Abraham L. Wickelgren, *A Critical Analysis of Critical Loss Analysis*, 71 ANTITRUST L.J. 161, 162–63 (2003).

89. On the not-pursued Google antitrust case, see *supra* note 82.

90. FED. TRADE COMM'N, FTC FILE NO. 111-0163, STATEMENT OF THE FEDERAL TRADE COMMISSION REGARDING GOOGLE'S SEARCH PRACTICES *IN THE MATTER OF GOOGLE INC.* 1 (2013), https://www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf [https://perma.cc/2WNT-XTN2].

91. This follows the standard rules of a § 2 claim. To state a monopolization claim under § 2 of the Sherman Act, a plaintiff must allege that (1) the defendant possessed monopoly power in the relevant market, (2) the defendant willfully acquired or maintained that power through exclusionary conduct, and (3) the defendant thereby caused antitrust injury. MetroNet Servs. Corp. v. Qwest Corp., 383 F.3d 1124, 1130 (9th Cir. 2004).

92. 138. S. Ct 2274 (2018).

93. *See generally id.* (calculating the net effect of antisteering clauses on what the Court identified as a two-sided credit card market).

likely to succeed even where such litigation largely represents the interests of consumers and workers in concentrated digital environments.[94]

In *AmEx*, the Supreme Court considered anticompetitive behavior in two-sided credit card markets.[95] The market in question was two-sided: it included AmEx cardholders on one side, who benefited from AmEx deals, and merchants on the other, who paid fees to AmEx.[96] The question before the Supreme Court was whether the fact that American Express imposed antisteering provisions in their agreements with merchants (prohibiting merchants from steering consumers away from AmEx cards) constituted a violation of competition rules.[97] It found it did not.[98]

Justice Thomas, speaking for the majority, found there to be no violation of the Sherman Act.[99] He defined the relevant market as comprising both of AmEx's customer groups: the merchant side, which was charged for card transactions, and the customer side, which primarily got AmEx rewards.[100] If one added up the effects of the antisteering provisions on each customer group, their zero-sum effect was to incentivize more transactions, leading to an overall increase in consumer welfare (outputs).[101] Even if merchants were effectively charged more by AmEx, the overall result was to promote the volume of transactions and was therefore not unreasonably restrictive of competition.[102]

Justice Stephen Breyer, speaking for the minority, proposed a different way of analyzing the market: instead of summing up the effects of the antisteering clauses on each complementary customer group, Breyer proposed that the Court should focus on the merchant side only and should ask whether antisteering unduly restricted merchant-facing competition between credit cards.[103] The minority suggested that AmEx was able to

94. *See, e.g.*, Complaint at 1, Texas v. Google LLC, 2021 WL 2043184 (E.D. Tex. filed Dec. 6, 2020) (No. 4:20-cv-00957) (alleging that Google violated antitrust law in advertising markets).

95. *See AmEx*, 138 S. Ct. at 2280–81 (observing characteristics of credit card market).

96. *Id.* at 2282.

97. *Id.* at 2280, 2283.

98. *Id.* at 2279.

99. *See id.* at 2280 ("In this case, we must decide whether Amex's antisteering provisions violate federal antitrust law. We conclude they do not.").

100. *Id.* at 2282, 2287.

101. *See id.* at 2282 ("In sum, Amex's business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.").

102. *See id.* at 2290 (identifying the congruity between Amex's business model and the goals of antitrust law). *See also* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59–60 (1911) (outlining the Court's "undue restraint" standard); Newman, *supra* note 54, at 609 (discussing *AmEx* and the question of output restrictions).

103. *See AmEx*, 138 S. Ct. at 2295 (Breyer, J., dissenting) ("[T]he District Court was correct in considering . . . simply whether the agreement had diminished competition in merchant-related services.").

increase its transaction fees and lower merchants' margins anticompetitively.[104] AmEx cards were very unprofitable for merchants who might have opted out of most transactions but for the antisteering clauses which locked them in.[105]

AmEx illustrates some confusions concerning the basic pillars of antitrust analysis in platform two-sided markets.[106] First, the Court's analysis leaves the law unclear on what a relevant market can be in such a situation. Are two-sided marketplaces themselves the relevant markets, or should each side be considered a separate market with separate effects, and does it matter? It is unclear whether the multisidedness of a market is relevant to market definition for the purpose of antitrust analysis.[107] Second, neither the majority nor the minority clearly addressed the question of market power. *Where* and *what* is market power, let alone power, in these markets? Is power the ability to limit merchants' economic opportunities and reduce total welfare? Or is it instead an ability to shape infrastructural constraints and market possibilities more broadly?[108] Third, what is the role of price and output differentials in the analysis of platform markets? Do prices, outputs, and margins play the same role in these markets as they do in brick-and-mortar industries?

The majority's view, that market power amounts to the power to raise prices if this also leads to output restrictions, is paradigmatic of a neoclassical approach.[109] Yet this view of market power as the ability to raise prices above competition or restrict outputs below competition does not make good sense

104. *See id.* at 2294 ("[T]he District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. . . . That conclusion makes sense[.]") (citing United States v. Am. Express Co., 88 F. Supp. 3d 143, 209 (E.D.N.Y. 2015), *aff'd sub nom.* Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018)).

105. *See id.* at 2292 (discussing merchant incentives).

106. *AmEx* is not the only confused decision on two-sided markets. *See, e.g.*, United States v. Sabre Corp., 452 F. Supp. 3d 97, 136 (D. Del. 2020) (following *AmEx* and making a categorical distinction between one-sided and two-sided markets).

107. *See* Caio Mario da Silva Pereira Neto & Filippo Lancieri, *Revisiting Ohio vs. American Express: It's Time for a More Nuanced Approach to Market Definition*, PROMARKET (Mar. 31, 2021), https://promarket.org/2021/03/31/ohio-vs-american-express-market-definition-antitrust/ [https://perma.cc/HL3A-FD37] (arguing that multisidedness is not a dispositive factor in antitrust analysis); *see also* SUBCOMMITTEE ON ANTITRUST, 117TH CONG., *supra* note 19, at 337 (suggesting that Congress take action to clarify the role of market definition in antitrust enforcement in response to *AmEx* and *Sabre Corp.*); Nachbar, *supra* note 50, at 5 (arguing that multisidedness is not determinative in antitrust analysis).

108. Perhaps it is the ability to infrastructurally control distributed transactions.

109. *See AmEx*, 138 S. Ct. at 2288 (majority opinion) ("Market power is the ability to raise price profitably *by restricting output*.") (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 5.01 (4th ed. 2022)); *see also* Newman, *supra* note 54, at 580–81 (discussing the relationship between output restrictions and Chicago School thinking).

of platforms' actual power in this context.[110] This is because a platform's higher or lower prices are hardly satisfactory proxies for a platforms' ability to control its users' and customers' behavior and choices on the internet.[111]

In response to some of these questions, John Newman has argued that focusing on two-sided or multisided markets obscures the fact that many platform markets are best described as traditional distribution chains where natural persons are suppliers of attention or data, platforms and intermediaries are distributors, and advertisers or merchants are consumers of attention, data, and more.[112] This analysis is helpful but does not tell us what, if anything, is specific about digital markets.[113]

Thomas Nachbar has argued that anticompetitive effects in platform markets require a contextual analysis of what he called "platform effects," defined as the ability of platforms to cross-subsidize between customer groups.[114] In his view, courts "should be careful about generalizing from the existence of a two-sided market to specific consequences for antitrust."[115] For Nachbar, platforms do not simply charge fixed prices to each customer group, but also price discriminate and personalize pricing to different customers and subgroups based on algorithmic and infrastructural control. Certainly, leveraging infrastructural capability maximizes platform revenues and ensures that customers on various sides of the platform do not switch to other competitors.

Price discrimination, personalization, and cross-subsidization of pricing to different customers and subgroups is a clear characteristic of market power (or infrastructural political power) in digital platform markets.[116] In this vein, Marshall Steinbaum has cogently argued that:

---

110. The D.C. Circuit's decision in the *Microsoft* monopolization case was that "a firm is a monopolist if it can profitably raise prices substantially above the competitive level." United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001); *see also* United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956) (defining "monopoly power" as "the power to control prices or exclude competition").

111. *See* Robert H. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. PITT. L. REV. 503, 511 (2001) (explaining that factors other than price may require looking at choice, not consumer welfare, as the dominant criterion for deciding antitrust cases); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 175 (2007) (arguing that choice is a much better proxy of harm caused by market power than price in media and communication industries).

112. *See* Newman, *supra* note 35, at 17–18.

113. Da Silva and Lancieri have argued that the analysis should remain case-by-case and start with a holistic consideration of platform structure and competitive constraints in digital settings. *See* Da Silva & Lancieri, *supra* note 107.

114. Nachbar, *supra* note 50, at 12.

115. *Id.* at 28.

116. These clear characteristics of digital platform markets were not identified in *AmEx* and cannot be derived by Chicago School orthodoxy.

> [I]n either the two-sided or multi-sided context, the platform profit is earned as a take rate on transactions between the parties. Platform competition minimizes that take rate by having platforms compete for the attention and loyalty of counterparties on each side by offering low prices, honest service, and value to all counterparties. High take rates signify the absence of platform competition[] because counterparties do not need to be rewarded by the platform for their loyalty. Instead, that loyalty is obtained through the exercise of power, including by weaponizing the loyalty of one set of subsidized counterparties to extract bargaining surplus from the other.[117]

This characteristic of market power is quite clearly represented in recent antitrust complaints against Google and Facebook. In a recent antitrust complaint against Google, a senior Google employee is illustratively quoted as saying that "[b]y charging non-transparently on both sides, we give ourselves some flexibility to react and counteract market changes. If we face tons of pricing pressure on the buy-side, we can fall back on the sell-side, and vice versa."[118]

The statement is relied on in the complaint as evidence of alleged anticompetitive conduct on Google's part.[119] The statement underlines that what matters in a (digital) platform context is not just price or the volume of transactions, as the neoclassical thinking would have courts believe. What is critical to modern digital platform antitrust analysis is how platforms structure (and make) their marketplaces. This includes the terms they impose on different categories of merchants, customers, workers, and users; the opacities that allow platforms to nudge customers towards certain prices and outputs, avoiding switching and maintaining dominance; and the precision with which they can steer and redesign markets in their own interests. For example, on Amazon, sellers are invited to use the platform through promises of growth and expansion[120] and are then charged a range of fees for different modalities of access.[121] Amazon offers different merchant classes with

117. Marshall Steinbaum, *Establishing Market and Monopoly Power in Tech Platform Antitrust Cases*, 67 ANTITRUST BULL. 130, 137 (2022).

118. Second Amended Complaint at 93–94, *In re* Google Digit. Advert. Antitrust Litig., No. 1:21-md-03010-PKC (S.D.N.Y filed Oct. 22, 2021) (internal quotation marks omitted).

119. *Id.*; *see also* Steinbaum, *supra* note 50, at 131 (arguing that the FTC amended complaint against Facebook and the Epic/Apple case reflect such an analysis of market power in platform contexts).

120. *See The Beginner's Guide to Selling on Amazon*, AMAZON, https://sell.amazon.com/beginners-guide.html?ref_=sdus_soa_tbg_fnav [https://perma.cc/J7BQ-RWHA] (providing an overview of Amazon's sellers program).

121. *See FBA: Let Amazon Pick, Pack, and Ship Your Orders*, AMAZON, https://sell.amazon.com/fulfillment-by-amazon?ref_=sdus_soa_bg_fba [https://perma.cc/6LHW-K4FV] (explaining the "Fulfillment by Amazon" program); Jillian Hufford, *Are Fulfillment by Amazon's (FBA) Fees Worth the Cost?*, NCHANNEL (Nov. 12, 2020), https://www.nchannel.com/blog/is-

varying price structures, product visibility options, and classes of products:[122] product-specific fees, referral fees, selling fees, high-volume license fees, closing fees, and per-item fees.[123] These fee structures are not always fair and are heavily contested.[124] Their alignment with competition rules is doubtful or at least begs to be scrutinized by regulators.[125] A tunnel vision on price and welfare elides vital social and political considerations that pertain to the effects of platforms on categories of workers and persons.

Platforms are not only marketplaces and monopolists; they are market makers of an entirely novel kind. They actively construct, manage, and transform the markets they control within the bounds created by neoliberal law, attracting profits for themselves and their shareholders and, until recently, they have avoided antitrust scrutiny. They are political and economic actors whose power must be addressed through the imposition of democratically determined constraints. As this Part discussed, dominant approaches to antitrust are poorly equipped to address harm in platform markets. A radically different approach is needed that allows policy makers, courts, and scholars to redraw the lines between efficiency and justice, and across markets, politics, and law.

II. Distributive Justice

Like other schools of antitrust thinking, Chicago School antitrust is premised on the idea that autonomous efficient markets guided by consumer welfare, understood as "total" welfare maximization rationales and immune

---

fulfillment-by-amazon-fba-worth-the-cost/ [https://perma.cc/A3UE-8QVS] (explaining the costs associated with using the program).

122. *See, e.g.*, Micah McDunnigan, *What Is an Amazon Platinum Merchant?*, BIZFLUENT (Sept. 26, 2017), https://bizfluent.com/info-12197761-amazon-platinum-merchant.html [https://perma.cc/2K3Y-WZ6P] (explaining Amazon's Platinum status).

123. *See generally Let's Talk Numbers*, AMAZON, https://sell.amazon.com/pricing#referral-fees [https://perma.cc/Z7CK-SJK6] (explaining pricing for selling on Amazon).

124. *See* Annie Palmer & Jordan Novet, *Amazon Bullies Partners and Vendors, Says Antitrust Subcommittee*, CNBC (Oct. 6, 2020), https://www.cnbc.com/2020/10/06/amazon-bullies-partners-and-vendors-says-antitrust-subcommittee.html [https://perma.cc/6RDA-KDLA] (reporting on findings about Amazon's treatment of its sellers).

125. Another example is how platforms can nudge customers to their own products through lock-in and network effects, and to what their clients pay for in advertisements and for data. *See* Nicholas Confessore, *Cambridge Analytica and Facebook: The Scandal and the Fallout So Far*, N.Y TIMES (Apr. 4, 2018), https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html [https://perma.cc/F6R4-AJAN] (discussing how Facebook sold and misused customer data for the political benefit of the Trump campaign); Roberta Fusaro & Julia Sperling-Magro, *Much Anew About 'Nudging'*, MCKINSEY & CO. (Aug. 6, 2021), https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/much-anew-about-nudging [https://perma.cc/4ZEB-LPLQ] (discussing the variety of institutions, including social media, and their use of nudging and behavioral expertise); Feng Zhu & Marco Iansiti, *Why Some Platforms Thrive and Others Don't*, HARV. BUS. REV. (Jan.–Feb. 2019), https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont [https://perma.cc/5JJY-6WSC] (discussing the effect and impact of network effects which lock in customers).

from distributive considerations, promote the public interest.[126] This belief in the necessity of separating political-justice distribution and efficiency-welfare maximization is both a symptom and part of a more general belief that markets should follow logics that are distinct and separable from politics and egalitarian goals, a belief that is not specific to antitrust in digital markets but is characteristic of U.S. law more broadly.[127] Harvard School antitrust provides support for a similar political agenda under the guise of procedural fairness and legal certainty. As noted by William Kovacic, Harvard School scholars "provided vital support to the view that courts and enforcement agencies should reject a broadly egalitarian view of the proper aims of antitrust policy."[128]

This Part focuses on Chicago School antitrust to highlight the need to incorporate egalitarian and distributive goals within antitrust law. Belief in the separation of efficiency rationales from questions of justice has led to a "division of labor" between legal branches and to a redistributive approach to justice that has contributed to several blind spots. This Part argues that shifting towards a joint political and economic focus, centered around structural and infrastructural concerns, can shed light on the limits of current approaches to digital markets and can help us move beyond. In doing so, this Part does not imply that the Chicago School influence is the sole reason for antitrust law's current detachment from political and egalitarian concerns. It simply addresses the Chicago position to argue that it is imperative to move away from views of markets and politics as separate and move closer to a Neo-Polanyian position, i.e., one that embeds values of political justice and equality into the legal shaping of digital marketplaces.

A. Efficiency and Redistribution

A particularly illustrative way in which Chicago School antitrust justifies a self-regulatory understanding of markets is the emphasis it places on consumer welfare and efficiency as the primary goals of antitrust. The key idea is that antitrust law's primary function is to minimize state interferences in markets and maximize total welfare (i.e., Kaldor–Hicks allocative efficiency).[129] This assumes that other branches of the law, including taxation, can perform a redistributive function: compensating consumers and ensuring a fair reallocation of the resulting economic surplus.[130]

126. On the notion of "total welfare," see generally discussions *supra* subpart I(B).

127. *See* Britton-Purdy et al., *supra* note 4, at 1789–91 (discussing the prevailing disconnect between political and economic legal discourse).

128. Kovacic, *supra* note 55, at 465.

129. *See* Kovacic, *supra* note 55, at 460 n.3.

130. *See* Lianos, *supra* note 18, at 8 ("The implicit assumption is that the tax system is a more efficient way of engaging in redistribution than the regulatory system.").

1. The "Separability Thesis."—The move to elevate efficiency and total wealth maximization to the status of a normative value[131] and to isolate these considerations from justice and distribution[132] is a recognized feature of broader strands of law and economic thinking as discussed by Jedediah Purdy and others in their *Law and Political Economy Manifesto*.[133] There exists a tendency to isolate and elevate efficiency across a range of legal areas, including antitrust: "[e]fficiency itself is typically defined—in practice if not always in theory—as a kind of 'wealth maximization' that works to structurally prioritize the interests of those with more resources. This methodological approach offers no framework for thinking systematically about the interrelationships between political and economic power."[134]

This tendency indeed isolates economic and efficiency considerations from distributive, social, and structural considerations. It shields what happens in markets from democratic and political decision-making and leads to a view of justice that favors *ex post* redistribution (increase the size of the pie first) rather than structural predistribution (ensure the shares of the pie are proportionate first).[135] "Elevating efficiency as a value . . . marginalize[s] questions of distribution, so that the law of economic exchange [is] itself 'encased,' protected from distributive or other political demands beyond the demand for efficiency itself."[136]

In antitrust law, the so-called "separability thesis" posits that all distributive and social justice considerations fall outside the remit of antitrust law and must be handled outside competitive markets by other branches of law (such as public law or tax law).[137] The thesis posits that consumers benefit from an increase in the size of the pie even if that size increase is not immediately beneficial to them in the form of a bigger share. That is because, in theory, when a transaction or market decision maximizes total welfare (the size of the pie), it makes transfers of wealth from those with larger shares to those with smaller shares of the pie *possible*. But this theory is flawed in

131. Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 502–06 (1980) (arguing that efficiency is a key value that ought to be pursued by the common law); LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 5 (2002); Richard A. Posner, *Law and Economics Is Moral*, 24 VAL. U. L. REV. 163, 166 (1990) [hereinafter Posner, *Law and Economics Is Moral*].

132. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 3 (2004) (excluding distributive concerns from the analysis of most branches of commercial law except taxation); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994).

133. Britton-Purdy et al., *supra* note 4, at 1789–90.

134. *Id.* at 1790; *see also* Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649, 1650–51 (2018) (showing that efficiency goals have distributive effects).

135. Britton-Purdy, *supra* note 4, at 1797 n.44, 1821.

136. *Id.* at 1797. For a connected use of the term "encasing," see QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 5–7, 13 (2018).

137. Lianos, *supra* note 18, at 6–8.

practice, for welfare-maximizing decisions in antitrust are not usually followed by actual redistribution through taxation or by actual improvements in the well-being of consumers. These decisions often result in long-term inequalities that favor some people, such as shareholders or CEOs, and disfavor others, such as certain classes of consumers who are more marginalized and more heavily surveilled.[138]

2. The Limits of Separating Distribution and Efficiency.—Not interfering in the business affairs of efficient digital monopolies such as Amazon or Google can be justified based on the belief that these monopolies, if left to operate autonomously, contribute to creating wealth—wealth that can be allegedly redistributed to the least well-off through more jobs or well-designed taxation.[139] The function of antitrust and economic law, according to this view, must be to increase the size of the economic pie, not to ensure that everyone gets a fair share of it: an unevenly divided but big pie makes everyone better off than a small, evenly divided one.[140] The imperative is to

138. *See generally* KHIARA M. BRIDGES, THE POVERTY OF PRIVACY RIGHTS (2017) (discussing differing levels of privacy protection depending on social class); Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO STATE L.J. 1103 (2020) (describing the disparate effects of surveillance on racial minorities); TAMARA K. NOPPER, DATA FOR PROGRESS, ALTERNATIVE DATA AND THE FUTURE OF CREDIT SCORING (2020), https://www.filesforprogress.org/pdfs/alternative-data-future-credit-scoring.pdf [https://perma.cc/59BA-RF8D] (describing the disparate effects of existing credit scoring systems on disadvantaged groups); Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race, Equity, and Online Data-Protection Reform*, 131 YALE L.J.F. 907 (2022) (discussing U.S. privacy law's disparate impacts on Black people).

139. *See* Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1195–96 (1977) (finding antitrust enforcement is poorly equipped to effect redistribution, protect small businesses, or promote neutral treatment of minorities); *see generally* Posner, *Law and Economics Is Moral*, *supra* note 131 (analyzing the implications of wealth maximization in several scenarios, including a monopoly); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) (arguing that redistribution through the income tax system is preferable to redistribution through legal rules); Peter Theil, *Competition Is for Losers*, WALL ST. J. (Sept. 12, 2014), https://www.wsj.com/articles/peter-thiel-competition-is-for-losers-1410535536 [https://perma.cc/28A5-BMJZ] (comparing market outcomes when there is perfect competition and when there is a monopoly); Louis Kaplow, *On the Choice of Welfare Standards in Competition Law* 19 (John M. Olin Ctr. for L., Econ., & Bus., Discussion Paper No. 693, 2011), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Kaplow_693.pdf [https://perma.cc/FT3D-EAMK] ("[I]t is more efficient to confine competition law to the maximization of total welfare and achieve redistribution solely through the tax and transfer system. The same redistribution can be achieved at less cost, or more redistribution at the same cost; [generally,] all income groups can be made better off.").

140. An alternative view is Ronald Dworkin's critique of theories that assume the increase or maximization of wealth in society to be valuable per se. *See generally* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980) (responding to economic analysis of law arguments made by Posner); LAWRENCE E. MITCHELL, *Is Wealth a Value?*, *in* CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 84, 84–90 (2001) (summarizing and agreeing with Dworkin's argument that increasing overall wealth does not necessarily make society better off).

avoid a system where antitrust regulators cause less wealth creation by prohibiting efficient monopolies.[141]

Applied to digital markets, the separability thesis roughly implies that it is legitimate for tech monopolies to keep accumulating monopolistic profits by exploiting the dependencies of users or customers on their platform without raising their employees' wages or sharing profits with customers or users—as long as some branch of the law other than antitrust or private law is capable of taxing the company and its excessively wealthy (former) CEO, thereby forcing a redistribution of monopolistic profits. This view goes hand-in-hand with approaches that seek to enable greater redistributive justice in digital environments without directly interfering with or restructuring productive processes themselves. Proposals to treat data as labor exchangeable on an auction, to create data dividends, or to consider data as owned property and a tradeable commodity might be seen to align with this view, depending on how one interprets them.[142] These approaches all assume that redistribution, for example through taxation, is sufficient to ensure justice, and that a division of tasks amongst legal branches is acceptable and fair.

A better view is that healthy and just digital political economies require the consideration of efficiency, justice, equality, and other political considerations jointly as part of a unified methodology.

The separation of efficiency from justice is questionable for empirical and normative reasons. Empirically, scholars have demonstrated a causal

---

141. This approach has been implemented in recent antitrust jurisprudence, such as the dilution of the per se standard for retail price maintenance. *See, e.g.*, Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 881–82 (2007) (overruling application of per se illegality standard for vertical price restraints between a manufacturer and its distributors).

142. *See* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 247–49 (2018) (arguing for a new paradigm whereby users are paid by platforms for their data); Imanol Arrieta-Ibarra, Leonard Goff, Diego Jiménez-Hernández, Jaron Lanier & E. Glen Weyl, *Should We Treat Data as Labor? Moving beyond "Free,"* 108 AM. ECON. ASS'N 38, 41–42 (2018) (same); will.i.am, *We Need to Own Our Data as a Human Right—and Be Compensated for It*, THE ECONOMIST (Jan. 1 2019), https://www.economist.com/open-future/2019/01/21/we-need-to-own-our-data-as-a-human-right-and-be-compensated-for-it [https://perma.cc/KG2U-E855] (arguing for data "ownership" rights); *Data as a Property Right*, YANG2020, https://2020.yang2020.com/policies/data-property-right/ [https://perma.cc/MC83-T24S] (suggesting that data should be owned and that one should at least receive a portion of the earnings generated on the basis of one's data); David Floyd, *Blockchain Could Make You—Not Equifax—the Owner of Your Data*, INVESTOPEDIA (June 25, 2019), https://www.investopedia.com/news/blockchain-could-make-you-owner-data-privacy-selling-purchase-history/ [https://perma.cc/P4YG-ZAUB] (arguing that blockchain could advance a vision of property rights over data); Laura Hautala, *California Wants Silicon Valley to Pay You a Data Dividend*, CNET (Feb. 25, 2019), https://www.cnet.com/news/california-wants-silicon-valley-to-pay-you-a-data-dividend/ [https://perma.cc/95JV-MTLU] (describing how California seeks to enact a new policy to pay a portion of revenue generated by tech companies based on personal data). For more information on dividends, also see *Ensuring the Tech Economy Benefits All of Its Stakeholders*, THE DATA DIVIDENDS INITIATIVE, https://www.datadividends.org/ [https://perma.cc/KKH9-VDXH].

connection between the consumer welfare approach in antitrust, the separation of wealth maximization from distribution, and income inequality.[143] Antitrust enforcement as it exists in the United States today does not have progressive effects on income or the position of the poorest in society.[144] Current economic arrangements and market power may also have regressive effects on the population: legitimizing transfers of wealth from ordinary Americans to affluent executives and shareholders.[145] These executives are indeed all in the top one to ten percent of the population and, in 2012, concentrated about seventy percent of the nation's wealth.[146] Further, current paradigms of consumer and antitrust law have regressive effects: there are wealth transfers of more than a trillion dollars every year from consumers to wealthy corporations, executives, and shareholders.[147] Moreover, the dominant and deregulatory approach to merger enforcement

143. *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235, 238 (2017) ("[M]arket power is likely to have regressive income and wealth effects[.]"); Sean Ennis, Pedro Gonzaga & Chris Pike, OECD, *Inequality: A Hidden Cost of Market Power* 7–8, 21 (2017) (draft discussion paper), https://www.oecd.org/daf/competition/Inequality-hidden-cost-market-power-2017.pdf [https://perma.cc/9LKP-HUHR] (discussing the impact of competition on inequality by developing a model to illustrate how higher profits from market power, and associated higher prices, could influence the distribution of wealth and income); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267, 1272 (2016) (discussing the growth of horizontal shareholdings in recent decades, which helps explain why income inequality has also risen in those recent decades). *But see* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171, 1177–78, 1228 (2016) (arguing that whether antitrust enforcement has progressive or regressive wealth distribution effects is context dependent and that there is not invariably a connection between a consumer welfare approach and income inequality).

144. *See* Khan & Vaheesan, *supra* note 143 ("Under current economic arrangements, market power, in general, can be expected to transfer wealth from ordinary Americans to affluent executives and shareholders. In other words, market power is likely to have regressive income and wealth effects."). There are other concerns as well of course—including polarization, poverty, and destabilization. *See generally* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2012) (highlighting the socioeconomic and political impacts of current income inequality).

145. *See generally* Jon D. Wisman & James F. Smith, *Legitimating Inequality: Fooling Most of the People All of the Time*, 70 AM. J. ECON. & SOCIO. 974 (2011) (explaining how populations internalize and thus contribute to legitimating unequal economic structures).

146. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* app. tbl.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 20625, 2014). *See also* Thomas Piketty, Emmanuel Saez & Gabriel Zucman, *Distributional National Accounts: Methods and Estimates for the United States* 40 tbl.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22945, 2016), http://www.nber.org/system/files/working_papers/w22945/w22945.pdf [https://perma.cc/TYU3-FZDF] (providing wealth inequality quantification for the United States).

147. Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 214–17, 260 (2019) (arguing that consumer law has distributive impacts that need to be more consciously baked into law).

has not contributed to lower prices and instead has led to price increases for consumers in some sectors.[148]

As illustrated, the primacy of efficiency under Chicago School thinking and its separation from justice considerations has caused and continues to cause a spectrum of harms to persons. It legitimizes unchecked levels of surveillance, allowing opaque data practices to be governed by "notice and choice" or "I agree to these terms" frameworks that allegedly should contribute to high levels of growth and innovation yet deny users actual self-determination in digital spaces.[149] It creates an information ecosystem that promotes scale, acontextual communication, and attention hoarding.[150] It also promotes polarizing, manipulative, and harmful speech, even though such speech perniciously distorts democratic participation and opinion formation, because this is the content that benefits shareholders the most.[151] The separation of welfare maximization from justice considerations also creates incentives to personalize, price discriminate, or differentiate access—all

148. *See* John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on US Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L.J. 619, 631–32 (2013) (reporting postmerger price increases ranging from 0.06% to 9.40% in most cases); JOHN E. KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 155 (2015) ("Of all mergers that resulted in price increases, the agencies acted in only 38 percent of cases, suggesting substantial under-enforcement. Incorrectly cleared mergers on average resulted in price increases in excess of 10 percent."). For further evidence of price increases and wealth transfers to the detriment of consumers in the United States in the last decade or more see THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS 122–23 (2019) (describing how prices have increased faster than wages in the United States).

149. Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQUIRIES L. 1, 6 (2019); Elettra Bietti, *Consent as a Free Pass: Platform Power and the Limits of the Informational Turn*, 40 PACE L. REV., no. 1, 2020, at 310, 336–37, 365, 387–88; Elettra Bietti, *The Discourse of Control and Consent Over Data in EU Data Protection Law and Beyond* 1–3 (Hoover Inst. Working Grp. on Nat'l Sec., Tech. & L., Aegis Series Paper No. 2001, 2020), http://www.hoover.org/sites/default/files/research/docs/bietti_aegis-nstl_webreadypdf.pdf [https://perma.cc/NW2K-K2DF] (arguing that notice and consent regimes in the United States and European Union are ineffective and morally wrong in digital platform settings).

150. For a detailed description of this phenomenon vis-à-vis social media's impact on attention, see generally DOMINIC PETTMAN, INFINITE DISTRACTION: PAYING ATTENTION TO SOCIAL MEDIA (2015), and JOHANN HARI, STOLEN FOCUS: WHY YOU CAN'T PAY ATTENTION—AND HOW TO THINK DEEPLY AGAIN (2022).

151. *See generally* COHEN, *supra* note 37 (observing that information platforms are held unaccountable for amplifying collective unreason); SOCIAL MEDIA AND DEMOCRACY: THE STATE OF THE FIELD AND PROSPECTS FOR REFORM (Nathaniel Persily & Joshua A. Tucker eds., 2020) (describing the impact of platform ecosystems on public discourse and political participation); LAURA BATES, MEN WHO HATE WOMEN: THE EXTREMISM NOBODY IS TALKING ABOUT (2021) (documenting the rise in violent misogynist online groups on platforms). *But see* YOCHAI BENKLER, ROBERT FARIS & HAL ROBERTS, NETWORK PROPAGANDA: MANIPULATION, DISINFORMATION, AND RADICALIZATION IN AMERICAN POLITICS 8, 19–21, 30 (2018) (arguing that digital platforms are not the sole cause of polarization but rather intersect with a country's institutions, media ecosystems, and political culture to create "information disorder" and a divisive political environment).

unfair market practices that have differential impacts on vulnerable populations.[152]

These empirical and normative findings suggest that a moral approach to antitrust requires moving beyond a division of labor between private and public law, efficiency and redistribution, or markets and politics. They point to the need for a different approach to how economic institutions allocate fundamental protections, wealth, and social advantages. They reveal that neither taxation nor traditional frameworks for redistributing corporate profits can adequately embed considerations of justice and equality into markets. Favoring a total welfare approach (maximizing the overall volume of production, consumption, and transactions) does not in fact improve the well-being of consumers. Rather, it favors the interests of investors and business owners to the detriment of values of privacy, equality, and environmental justice; the interests of persons and workers; and the opportunities of small units of production.[153]

B. (Infra)Structural Justice in Digital Markets

A methodological shift is needed for antitrust in digital markets. By separating questions of justice from questions of efficiency and total welfare maximization, the Chicago School and other dominant antitrust ideologies have made it harder to question the structure of existing marketplaces, their guiding logic, and their negative effects on society. The digital infrastructures and gatekeepers that exist are the result of contingent political, legal, and regulatory choices that are traceable to a long neoliberal tradition. Alternative infrastructures managed through very different procedures, corporate structures, and incentives are possible. Beginning to imagine these possibilities requires moving beyond current assumptions on the separability

152. *See generally* Ramsi A. Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 HASTINGS L.J. 1371 (2017) (arguing for price regulation in response to price discrimination risks); Maurice E. Stucke & Ariel Ezrachi, *Online Platforms and the EU Digital Single Market*: *Submission to the U.K. House of Lords, Internal Market Sub-Committee* (U. Tenn. Coll. L. Legal Stud. Rsch. Papers Series, Rsch. Paper No. 283, 2015) (explaining price discrimination to lawmakers); Akiva Miller, *What Do We Worry About When We Worry About Price Discrimination? The Law and Ethics of Using Personal Information for Pricing*, 19 J. TECH. L. & POL'Y 41 (2014) (engaging in normative line-drawing around price discrimination in digital markets).

153. *See supra* note 18 and accompanying text; *see generally* Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERKELEY BUS. L.J. 39 (2019) (describing Facebook's possible liability under antitrust law); ARIEL EZRACHI & MAURICE STUCKE, VIRTUAL COMPETITION, THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY (2016) (describing how anticompetitive practices—like collusion, monopoly, and price discrimination—develop in digital settings despite online platforms' alluring promises of increased efficiency, competition, and prosperity); Stucke, *supra* note 18, at 612 (explaining that historically in antitrust law, sustainability, fairness, and profitability were seen as conflicting interests, and arguing for a reconsideration of antitrust's goals to achieve a form of capitalism imbued with a social purpose); Binns & Bietti, *supra* note 34 (discussing how competition authorities gloss over data and privacy concerns and pointing out the difficulty of applying mainstream antitrust analysis to cases involving data and privacy issues).

of markets from politics, and of justice from efficiency, instead viewing digital markets as political spaces. Such an approach prompts a vision for embedding (infra)structural justice in digital markets. At its inception, this requires starting from three pillars: a historical revival of the progressive antimonopoly tradition, a methodological shift, and a philosophical renewal.

1. Historical Revival.—Historically, the consumer or total welfare focus in antitrust law is relatively recent.[154] Early progressive antitrust focused to a much greater extent on justice and the close ties between market regulation, democracy, and distributive justice.[155] In Justice Brandeis's words, democracy requires "[n]ot merely political and religious liberty, but industrial liberty also."[156] Indeed, early antitrust law enforcement was concerned with the diffusion and predistribution of private power in the economy. A particular focus was on the need to ensure political equality and prevent concentrations of power, as captured by Justice William Douglas in his 1948 dissent in the case of *Columbia Steel Co.*:[157]

> [A]ll power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. . . . That is the philosophy and the command of the Sherman Act.[158]

Drawing from the lessons of early Progressivism in antimonopoly is a key starting point.[159] This is indeed what "Neo-Brandeisian" scholars and

154. *See* Paul, *Moral Economy Foundations*, *supra* note 18, at 204 ("Interpretations of the Sherman Act's legislative history in recent decades have often revolved around . . . 'consumer welfare'" rather than the "economic vision of the antimonopoly movement" that motivated legislators to pass the Act).

155. *See, e.g.*, Louis B. Schwartz, *"Justice" and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1076, 1078 (1979) (highlighting the noneconomic relevance of antitrust decision-making). See generally early accounts such as John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191 (2008). For a more recent account, see generally Paul, *Moral Economy Foundations*, *supra* note 18.

156. Louis Brandeis, Address to the Economic Club of New York: The Regulation of Competition Versus the Regulation of Monopoly 6 (Nov. 1, 1912) (transcript available in the Louis D. Brandeis School of Law Library).

157. United States v. Colum. Steel Co., 334 U.S. 495 (1948).

158. *Id.* at 536.

159. Novak, *supra* note 59 at 667, 695–96.

policy makers are currently doing.[160] United around a legal and political agenda that seeks to revive the antimonopoly roots of the past, these scholars and activists have a negative agenda, pushing back against Chicago School antitrust and the "consumer welfare" standard, and a positive agenda, promoting decentralization, distributive justice, equality, self-determination, and democracy through antimonopoly law. Reform proposals include strong presumptions against the lawfulness of certain mergers and acquisitions, an offense of abuse of dominance, stronger remedies against digital monopolies, greater powers to the FTC, and an emphasis on interoperability and data portability in digital markets.[161] Many of these proposals are beginning to see the light of day, but the future of antitrust is not a solipsistic Neo-Brandeisian project. It requires a joint effort to learn from the past and to build a different future for law in markets.

2. Methodology and Policy Shift.—The historical revival this Part describes must thus go hand-in-hand with a shift in the methodologies adopted by regulators. A number of lawsuits have been initiated against big tech companies, alleging anticompetitive conduct. In December 2020, two complaints were filed against Facebook, one by more than forty states[162] and one by the FTC,[163] and two other lawsuits were filed against Google.[164] Some of these lawsuits have been dropped or pleaded anew while new lawsuits have been introduced against Amazon and Apple.[165] One characteristic of these complaints is an attempt to shift regulatory priorities while continuing to follow dominant methodologies and heuristics (e.g., methodological individualism and the pursuit of allocative efficiency). In the first FTC

160. *See, e.g.*, Khan, *supra* note 47, at 717–19, 737 (tracing a history of progressive antitrust to assist in policy decisions today); Novak, *supra* note 59, at 666 (tracing a history of progressive antitrust); William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 139 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (same). *But see* Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531, 532–33, 536–38 (2019) (critically examining the Neo-Brandeisians' alignment with Brandeis).

161. SUBCOMMITTEE ON ANTITRUST, 117TH CONG., *supra* note 19, at 4–14.

162. Complaint, New York v. Facebook, Inc., 549 F. Supp. 3d 6 (D.D.C. 2021) (No. 1:20-cv-03589-JEB).

163. Complaint for Injunctive and Other Equitable Relief, FTC v. Facebook, Inc., 2022 WL 103308 (D.D.C. 2022) (No. 1:20-cv-03590-CRC).

164. Two filings were made against Google in December 2020: Complaint, Colorado v. Google LLC, No. 1:2020cv03715-APM (D.D.C. filed Dec. 17, 2020); Complaint, Texas v. Google LLC, 2021 WL 2043184 (E.D. Tex. 2021) (No. 4:20-cv-00957). *See generally* Rachel Kraus, *A Running List of American Antitrust Lawsuits Against Google and Facebook*, MASHABLE (Dec. 17, 2020), https://mashable.com/article/antitrust-lawsuits-facebook-google/ [https://perma.cc/TG3W-EJDZ] (listing the U.S. antitrust lawsuits against Google and Facebook).

165. Complaint, Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898 (N.D. Cal. 2021) (No. 4:20-cv-05640-YGR); Complaint, District of Columbia v. Amazon.com, Inc., No. 2021 CA 001775-B (D.C. Super. Ct. 2021).

complaint against Facebook, for example, harms to users were described in terms of lack of choice, i.e., the inability to walk away or make choices regarding:

> personal social networking provider[s] that more closely suit[] their preferences, including, but not limited to, preferences regarding the amount and nature of advertising, and the availability, quality, and variety of data protection privacy options for users, including, but not limited to, options regarding data gathering and data usage practice[].[166]

This seems an innovation. Yet, it emphasizes individual autonomy and choice within preexisting markets, instead of suggesting the need to rethink the structure of these markets to make them less asymmetric and more representative by removing them from the operation of self-regulating markets and decommodifying aspects of them. It is important to start viewing harm more capaciously. For example, instead of focusing on a relatively empty concept of choice, authorities could focus on the objectively beneficial public functions that given digital markets are meant to serve, and the essential social needs they address.

By framing harm against that public interest benchmark and including a decommodification lens as part of their objectives, regulators could transform the problem from one of enabling private actors to provide more *options* for consumers or customers to choose from, to one of ensuring reasonable *access* to essential social networking functionality free from opacities and undue forms of manipulative interference, addiction, discrimination, or extractive profit-maximizing practices. While these lawsuits are symptomatic of an important change in U.S. antitrust, public purposes and values such as equality, privacy, or justice continue to have no methodological salience in antitrust discourse. Efficiency and welfare maximization concerns always take priority, obscuring the complexities of and the myriad of ways in which power manifests online. This in turn undermines distributive justice, equality, and reciprocity in markets. The relatively vacuous notion of "bigness" acts as a poorly theorized placeholder which cannot replace the real task at hand: revisiting and practically reorienting the roots of antitrust and regulatory thinking in this context. Some new methodological thinking, in both legal and economic scholarship, is already underway.[167]

---

166. Complaint at *48, FTC v. Facebook, Inc., 2022 WL 103308 (D.D.C. 2022) (No. 1:20-cv-03590-CRC).

167. *See generally* Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. CHI. L. REV. 357 (2020) (making a case for the FTC's rulemaking authority); Paul, *Antitrust as Allocator*, *supra* note 18 (arguing that coordination rights ought to be understood as a public resource, allocated and regulated in pursuit of the public's interest and

3. Philosophical Renewal.—Finally, from a normative and philosophical standpoint, the imperative is to move beyond formalist and utilitarian visions that focus on uniform and acontextual goals such as efficiency or total welfare maximization. A new approach must foreground social and political values, justice, and contextuality in antimonopoly regulation.[168] Neo-Brandeisian reform tends to align with republican ideals of economic and political equality: a wide dispersion of ownership, monopoly breakups, structural separation remedies, and democratic equality. Regardless of the exact tradition to which one attributes new antitrust developments, a philosophical renewal is needed, one that is bold and imaginative and that bridges beyond simplistic ideas of "bigness." Renewal must start from an infrastructure-based approach to justice and distribution, which connects political and economic concerns. An infrastructural conception of justice captures three core moves that aim to embed principles of political and relational equality in markets: cooperation, reciprocity, and collective empowerment.

The first move is to extend the grammar of cooperation to contemporary (digital) markets. Economist Elinor Ostrom has famously theorized the value of cooperation and collective management of collectively owned resources.[169] Yochai Benkler and others have extended these ideas to digital markets, demonstrating that digital networked economies could sustain themselves effectively on the basis of cooperation and altruism—Wikipedia and Linux are very salient examples in this context.[170] In the antitrust context, Maurice Stucke and Ariel Ezrachi have overlapped with these ideas, suggesting that the platonic ideal of noble competition should be an ideal of cooperation between competitors: to "help[] your rivals reach their full

delineating policy choices that stem from that recognition); Nathan Tankus & Luke Herrine, *Competition Law as Collective Bargaining Law*, *in* THE CAMBRIDGE HANDBOOK OF LABOR IN COMPETITION LAW 72, 72–95 (Sanjukta Paul, Shae McCrystal & Ewan McGaughey eds., 2022) (arguing that collective bargaining laws shape competitive market processes as much as antitrust law does); Steinbaum, *supra* note 50 (redefining the way courts should measure market power in light of platform multisidedness); Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 600, 617 (2019) (introducing the effective competition standard and suggesting tangible remedies to the various infirmities of the consumer welfare standard).

168. *See, e.g.*, Stucke, *supra* note 18, at 590, 612 (discussing the limits of consumer welfare as a goal of antitrust law); Steinbaum & Stucke, *supra* note 167, at 600, 617 (proposing an alternative to the consumer welfare standard).

169. *See generally* ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990) (discussing methods for governing resources in common).

170. YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 70, 72, 104–05 (2006); YOCHAI BENKLER, THE PENGUIN AND THE LEVIATHAN 1–2 (2011) (discussing the virtues of peer-to-peer and commons-based cooperative frameworks for organizing productive systems).

potential."[171] Large tech platforms such as Amazon should, under this view, be incentivized to help small competitors like eBay or local bookstores flourish. Non-profits and for-profits should be able to coexist, and the bigger players should enable the smaller ones to sustain themselves, contributing to the maintenance of a balanced ecosystem of fair competition. From a pragmatic policy standpoint, this could entail making it so expensive for giants to pursue monopoly gains that competitive cooperation, interoperability, and market diversity would pay off.

The second move goes further. It grounds the (digital) political economy not only in principles of cooperation but also in the ideal of social and economic reciprocity between citizens, a principle of relational equality that pertains to the way different persons stand in relation to each other as equals. In his late work *Justice as Fairness: A Restatement*, John Rawls offered some suggestions on how to envision such an economy.[172] He recognized that welfare-state capitalism is unjust in that it allows "very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands."[173] Instead, in his view, two noncapitalist forms of economic governance could ensure a broader structural and durable distribution of control over productive resources compatible with his ideal of justice, which includes guaranteeing equal liberty and reciprocity.[174] He named these two visions *property-owning democracy* and *liberal democratic socialism*.[175]

Both Rawlsian models favor bottom-up economic democracy and are based on the idea that the coexistence of smaller units of production is superior to *dirigiste* state ownership of the means of production.[176] As part of his vision, these small units can be owned by the state, but some are collectively owned and others are owned by private entities who are not allowed to accumulate advantages that would undermine overall reciprocity between citizens.[177]

The third move, beyond cooperation and reciprocity, is to enhance social and collective empowerment in (digital) productive processes. Here the imperative is collective self-determination in markets, not only in the form of renewed patterns of empowered consumption but also in the form of a stronger ability to restructure and reorient productive and labor processes

171. STUCKE & EZRACHI, *supra* note 38, at 256 (emphasis omitted).

172. *See generally* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT (Erin Kelly ed., 2001) (clarifying previous writings on justice).

173. *Id.* at 138. *See also* WILLIAM A. EDMUNDSON, JOHN RAWLS: RETICENT SOCIALIST 5 (2017) (arguing that Rawls was in fact a socialist).

174. RAWLS, *supra* note 172, at 136–38.

175. *Id.* at 136, 138.

176. *Id.* at 138–39.

177. *Id.*

in the public interest. In the current digital economy, decisions on what products are produced, how much and what labor is employed, how much data is collected, and how much attention can be extracted tend to depend on the private whims of entrepreneurs or the atomistic choices of individualized consumers in decentralized marketplaces. Instead, collective empowerment in markets should allow these decisions to become matters for collective or public decision-making, thus more closely aligned with the public interest. A starting point is to start framing market regulatory decisions not as questions about efficiency and self-regulating marketplaces, but as questions about what a market ought to afford society, and how society can benefit from competitive and functioning marketplaces.

These three moves crystallize the beginnings of a possible conception of infrastructural justice in markets: a vision of markets understood as political and social constructions that are not self-legitimating and are meant to serve society. Digital markets are salient laboratories and terrains of contestation of enormous political and economic stakes. They make visible urgent questions on the legitimacy of contemporary market societies and institutions. They represent a starting point for overcoming existing assumptions about the separability of distributive from efficiency considerations, and of economic rationales from politics. A new approach in antitrust will be vital to upgrading and renewing common conceptions of markets, and to facing the new challenges digital markets are posing and will continue to pose in future decades.

Conclusion

In digital markets, like in much of the economy, regulation is pervaded by Chicago School and other poorly justice-oriented roots. Digital platform markets are emblematic of a view of self-regulating markets as efficient and autonomous processes that regulators must try not to interfere with. These dominant visions of law and regulation tend to shield digital markets from democratic self-rule and from collective decision-making, often through claims about the priority of concerns about efficiency and welfare maximization. In doing so, these approaches to regulation neglect concerns about privacy, dignity, equality, and collective self-determination in digital spaces.

In the last few years, new winds have started blowing in antimonopoly and platform regulation circles, which have begun to frame political and economic processes as interdependent forces. In the United States, lawsuits and reforms clearly aimed at curbing big tech power suggest an appetite for a radically different vision of regulation and justice in the political economy. In Europe, reform includes the Digital Services and Digital Markets Acts, which shift regulatory priorities from *ex post* to *ex ante* and more "structural" regulation. It remains to be seen what these efforts will lead to in practice.

The result is likely to be a mixed one since departing from traditional governance in digital markets will be as difficult to accomplish in practice as it is to imagine in theory. Regardless of short-term results, it is of the utmost urgency to rebuild the historical, philosophical, and methodological pillars on which more just and equal digital markets can be sustained.