

SELF-REGULATING PLATFORMS AND ANTITRUST JUSTICE

Abstract

As digital gatekeepers such as Google, Facebook, Amazon continue to grow, eroding equal fundamental rights to privacy and speech and fostering political and economic inequality and instability, antitrust policy increasingly seems the right tool for re-aligning the digital economy in a more healthy and inclusive direction. After a long phase of lethargy, the progressive roots of American antimonopoly law are being revived, giving rise to an antitrust Renaissance in digital markets. A pioneering Report by the House Judiciary Committee was quickly followed by five new lawsuits against Google and Facebook by the DOJ, FTC and by State AG, and proposed reform bills are already making their way into Congress. Meanwhile in Europe new legislative instruments are seeking to address digital power by expanding the regulatory toolbox towards ex ante enforcement and beyond traditional competition paradigms.

This Article applies Karl Polanyi's theoretical insights on the transformation of industrial societies in response to industrial capitalism, transposing them to the digital platforms and anti-monopoly context. Inspired by Julie Cohen's analysis of industrial and informational capitalism, the Article considers digital platforms such as Google, Facebook or Amazon as a new market form that is seen to operate quasi autonomously. It shows that platforms are artificial and contingent institutional constructions and argues that it is imperative to reintroduce anti-monopoly social controls into these (self-regulating) digital structures, most importantly egalitarian controls. It also asks whether Neo-Brandeisian reforms constitute an effective Polanyian regulatory counter-movement.

After articulating the specificities of digital platforms and their role and operation as new market forms, the Article scrutinizes antitrust law's normative underpinnings, the consumer welfare standard's anti-egalitarian effects and the potential for its reform. It shows that predominant consumer welfare approaches to US antitrust law, focused on productive efficiencies and maximizing total welfare, have contributed to a monopolized digital platform economy where fundamental rights and political equality are systematically eroded. It then considers how antitrust law and antimonopoly institutions are changing in response to Neo-Brandeisian impetus and asks whether current changes actually might promote greater equality, inclusivity and respect for fundamental rights in otherwise concentrated and unjust 'self-regulating' platform environments.

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INTRODUCTION

Large companies that operate on the Internet such as Facebook, Google/Alphabet or Amazon, are growing in political and economic importance yet remain relatively poorly understood new hybrids in today's political economy. Referring to them as sovereigns, governors, or constitutional spaces, as many scholars have done,¹ disguises an essential aspect of their operation: their primary commercial nature. More aptly, Julie Cohen considers digital platforms a *sui generis* market mechanism for the informational capitalist era. In her words, platforms are “information intermediar[ies] that use... data-driven, algorithmic methods and standardized, modular interconnection protocols to facilitate digitally networked interactions and transactions.”² They “replace (and rematerialize)” markets.³

Karl Polanyi defined the market as “a meeting place for the purpose of barter or buying and selling”.⁴ In the *Great Transformation*, he contrasted modern market mechanisms to more primitive economic systems based on principles of reciprocal exchange, centralized redistribution and household autarchy.⁵ He argued that Western societies during the second half of the eighteenth-century underwent social transformation, an economic shift from local hierarchical forms of production to market economies governed by self-regulating markets.⁶ In societies with market economies, economic and political spheres were artificially separated and political and social institutions became subordinated to economic rationales. The goals of law and political institutions in market societies adapted to preserve and facilitate the functioning of self-regulating price mechanisms, generally at a cost for natural persons or nature. These costs to society, caused by a society that serves markets rather than the other way around, demand, according to Polanyi, the introduction of social protections, what he calls the protective “countermovement”.⁷

¹ Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARVARD LAW REVIEW 598–670 (2018); David Pozen, *Authoritarian Constitutionalism in Facebookland*, KNIGHT FIRST AMENDMENT INSTITUTE ESSAY, October 18, 2018, <https://knightcolumbia.org/content/authoritarian-constitutionalism-facebookland>.

² Julie E. Cohen, *Tailoring Election Regulation: The Platform Is the Frame*, 4 GEO. L. TECH. REV. 641, 656 (2020).

³ JULIE E. COHEN, BETWEEN TRUTH AND POWER (OUP, 2019), at 42 (hereafter TRUTH AND POWER).

⁴ Karl Polanyi, *Great Transformation: The Political and Economic Origins of Our Time* (1944, Beacon Press, 2001), p. 59.

⁵ *Id. supra*, Chapter 4.

⁶ *Id. supra*, p. 74.

⁷ *Id. supra*, p. 136.

A similar logic of separation of politics from market transactions can be found in today's platform economy. Digital platforms are intermediaries that perform at least two simultaneous functions: they are at once multi-sided marketplaces, and are themselves actors that engage in competitive dynamics of "co-opetition", rivalry, affiliation and monopolization.⁸ Their fractal nature allows platform gatekeepers to deploy a variety of legal, economic and technical strategies to transform human lives and human attention into data and to commodify them for profit. Framing the story of the growth and success of digital platforms as that of a new market form's artificial emergence, as Julie Cohen does, sheds new light on the current moment of controversy and opportunity at the intersection of digital law and political economy.⁹ When framed as the advent of a new market form, the advent and consolidation of digital platform monopolies raises old questions about what markets are for and what role law can play in constructing and introducing protective frictions into these digital marketplaces.

At present, the United States is entering an antimonopoly "spring":¹⁰ following a thorough investigation and well-documented Report by the House Judiciary Committee,¹¹ five important lawsuits have been initiated against Google and Facebook,¹² other cases are being started or considered, and reform bills are beginning to emerge.¹³ In Europe, a fresh structural

⁸ ADAM M. BRANDENBURGER AND BARRY J. NALEBUFF, CO-OPETITION (1st ed. ed., 1996).

⁹ TRUTH AND POWER.

¹⁰ Maurice E. Stucke, *Antitrust Spring*, INSTITUTE FOR NEW ECONOMIC THINKING, December 18, 2020, <https://www.ineteconomics.org/perspectives/blog/antitrust-spring> (last visited Jan 13, 2021).

¹¹ House Committee on the Judiciary, *Investigation of Competition in the Digital Marketplace: Majority Staff Report and Recommendations*, October 6th, 2020, <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3429> (hereafter "House Report").

¹² State of New York et al. v. Facebook Inc., No. 1:2020cv03589 (U.S. District Court for the District of Columbia, filed December 9th, 2020); FTC v. Facebook Inc., No. 1:2020cv03590 (U.S. District Court for the District of Columbia, filed December 9th, 2020); United States of America v. Google LLC, No. DC/1:20-cv-03010 (US District Court for the District of Columbia, filed October 20, 2020); State of Colorado et al v. Google LLC, No. 1:2020cv03715 (US District Court for the District of Columbia, filed December 17, 2020); The State Of Texas, et al v. Google, LLC, No. 4:2020cv00957 (US District Court for the Eastern District of Texas, filed December 16, 2020). More generally see Rachel Kraus, *A running list of American antitrust lawsuits against Google and Facebook*, MASHABLE, December 17th, 2020, <https://mashable.com/article/antitrust-lawsuits-facebook-google/> (last visited Feb 4, 2021).

¹³ See, e.g., Rebecca Klar, *Amazon hit with antitrust lawsuit alleging e-book price fixing*, THEHILL, January 14th, 2021, <https://thehill.com/policy/technology/534364-amazon-hit-with-class-action-lawsuit-alleging-e-book-price-fixing>; Chris M. Rodrigo, *Klobuchar to introduce omnibus antitrust bill*, THEHILL, February 4th, 2021, <https://thehill.com/policy/technology/537279-klobuchar-to-intro-omnibus-antitrust-bill> (last

approach to digital markets has been introduced in the Digital Services and Markets Acts, which would combine traditional antitrust rules with new *ex ante* investigatory and remedial powers in tech markets.¹⁴

This Article focuses on one particular area of antimonopoly policy - antitrust law - and scrutinizes its normative underpinnings and potential for fostering political and social justice in digital environments, understood as the protection of equal basic rights for all persons and equal distribution of economic and social advantages and disadvantages. I first critique predominant approaches to US antitrust law, showing that their focus on promoting productive efficiencies and maximizing total welfare is inadequate and exacerbates inequity in platform environments, constructing platform marketplaces where fundamental rights and political equality are systematically eroded. I then consider how antitrust law and antimonopoly institutions are changing in response to a Neo-Brandeisian impetus and ask whether current changes actually promote equality and basic liberties in platform environments. The Article takes seriously the Polanyian insight that platforms are artificial and contingent institutional constructions and that it is imperative to reintroduce social controls into these (self-regulating) digital structures.

Part I begins by introducing complexities around seeing large tech platforms as monopolies or marketplaces, analyzing courts' misleading attempts to theorize platforms from an antitrust perspective. In Part II, I turn to the normative evolution of US antitrust law, the limits of the consumer welfare standard and its effects in digital platform markets. I show that the consumer welfare standard entrenches a separation between markets and politics, one which Karl Polanyi considers problematic. In Part III, I critique the idea that efficiency and distribution are separable and show that their separation eases monopolies in ways that entrench opaque power dynamics and erode fundamental freedoms such as privacy and free speech. In Part IV, I discuss the current antimonopoly movement's normative underpinnings, its promise and its potential limits.

visited Feb 4, 2021); American Economic Liberties Project, *The Courage to Learn: A Retrospective on Antitrust and Competition Policy During the Obama Administration and Framework for a New Structuralist Approach*, REPORT, January 12, 2021, <https://www.economicliberties.us/our-work/courage-to-learn/> (last visited Jan 13, 2021).

¹⁴ Commission Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) COM/2020/825 final, <https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN>; Commission Proposal for a Regulation on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final, https://ec.europa.eu/info/sites/info/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

I. DIGITAL PLATFORMS AS MONOPOLIES AND MARKETPLACES

Digital platforms such as Facebook, Google, Amazon or Apple are attracting public attention because they are powerful actors whose political, social and economic power is still misunderstood. In this section, I show that these actors can be viewed simultaneously as monopolies and as marketplaces, and that their dual nature raises important new conundrums that are yet to be resolved.

A. Digital Platforms as Monopolies

There is little doubt that companies such as Facebook, Google or Amazon are monopolies in their respective fields of operation. In 2019, Google's total revenues were as high as Hungary's GDP that same year, according to the World Bank indicator,¹⁵ and these revenues continue to grow in 2021. The Covid-19 pandemic made Amazon's founder and former CEO Jeff Bezos break a historical record of personal wealth.¹⁶ And more than a fourth of the people alive in 2020 are active daily users of at least one of Facebook's family of social platforms (Facebook, Instagram, WhatsApp or Messenger).¹⁷ As noted by the US 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. Several markets investigated by the Subcommittee—such as social networking, general online search, and online advertising—are dominated by just one or two firms. (...) Amazon, Apple, Facebook, and Google—have captured control over key channels of distribution and have come to function as gatekeepers. Just a decade into the future, 30% of the world's gross economic output may lie with these firms, and just a handful of others.¹⁸

Courts and regulators have found these companies to be dominant bottlenecks in a number of industries. The US House Committee and Germany's antitrust regulator have found Facebook dominant on the market for social networking services in their respective jurisdictions.¹⁹ Google's

¹⁵ See the World Bank Indicator here:

https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?year_high_desc=true.

¹⁶ Tom Maloney, *Jeff Bezos Is Stepping Back With Wealth Near All-Time High*, BLOOMBERG, February 2nd, 2021, <https://www.msn.com/en-us/money/companies/jeff-bezos-is-stepping-back-with-wealth-near-all-time-high/ar-BB1dkxdK>.

¹⁷ Facebook, Inc., Quarterly Report (Form 10-Q) 29 (July 31, 2020), <https://investor.fb.com/financials/sec-filings-details/default.aspx?FilingId=14302237>.

¹⁸ House Report at 11.

¹⁹ House Report, at 12; and *see* Press Release, 'Bundeskartellamt prohibits Facebook

dominance in the markets for general search, search advertising and online advertising intermediation was confirmed in several EU and US cases since the *Google/DoubleClick* merger investigations.²⁰ Google is dominant in a number of other market segments as well including an 80% market share in the market for navigation mapping services in the United States.²¹ Amazon has “significant and durable market power in the U.S. online retail market” with an approximate share of 50% of online retail sales.²²

These findings of dominance or durable monopoly tend to rely on functional definitions of supply and demand substitutability in digital markets, which cover communications, social networking, or search services that extend beyond those that these platforms have put in place. Functional definitions are helpful to capturing competitive constraints in analog markets, but they provide weak guidance in digital environments. One reason is that many of these functional definitions rely on notions of scarcity and substitutability of the analog world. Taking the example of Google’s presence on advertising and tracking markets, recent findings show that, as of 2020, Google’s data tracking capabilities covered approximately 70% of existing websites and almost 90% of mobile apps, with Facebook the second biggest third-party tracker covering approximately 40% of websites and of mobile apps respectively.²³ These percentages add up to more than 100% because websites and mobile apps can be tracked by an infinite number of third-party trackers. Even if Google’s dominance is undeniable in this space, defining the relevant market is by no means obvious: should the market be defined by reference to trackers’ revenues and turnover, or by reference to how much information they gather, or by reference to the number of people or sites they

from combining user data from different sources’, 7 February 2019, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

²⁰ See, e.g., Commission decision of 27 June 2017 in case 39740 *Google Search (Shopping)*, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740; Case AT. 40411 *Google Search (AdSense)*, European Commission Decision of March 30, 2019, https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_40411; European Commission decision of 11 March 2008 in Case COMP M.4731 – *Google / DoubleClick*, http://ec.europa.eu/competition/mergers/cases/decisions/m4731_20080311_20682_en.pdf; Statement of the Federal Trade Commission Concerning *Google/DoubleClick*, FTC File No. 071-0170 (December 20, 2007), https://www.ftc.gov/system/files/documents/public_statements/418081/071220googlede-commstmt.pdf.

²¹ House Report, at 15.

²² *Id. supra*.

²³ See Reuben Binns & Elettra Bietti, *Dissolving privacy, one merger at a time: Competition, data and third party tracking*, 36 *COMPUTER LAW & SECURITY REVIEW: THE INTERNATIONAL JOURNAL OF TECHNOLOGY LAW AND PRACTICE* (2020), Table 1 page 9.

track? There are challenges to measuring any of these dimensions.

Other important reasons why functional definitions of digital markets are misleading is that these companies own and control the digital infrastructural constraints within which markets can exist. These definitions assume that other providers services are ‘substitutable’ and that customers and suppliers have the ability to switch to functionally analogous services. Yet this is not the case. Alternatives in digital environments are not only frequently absent but when they exist switching is made exceptionally burdensome by lock-in, network effects and behavioral barriers inherent in these marketplaces. The result is multi-homing rather than switching. Yet multi-homing is difficult to account for in the calculation of market share and definition of markets.

Another way of putting it is that the markets that Google, Facebook or Amazon operate “on” are not markets that other competitors can “enter” into, but are rather, by definition, monopolistic markets constructed and maintained by the good will and profit motives of platform gatekeepers alone. Competition in the digital economy is about creating alternative marketplaces, not about competing on the same market.²⁴

B. Digital Platforms as Markets

In Julie Cohen’s words, digital platform gatekeepers “replace (and rematerialize)” markets.²⁵ They transform and rematerialize aspects of human life and analog transactions into digital commodities and new commercial relations. They are best described not as market actors, but as market *makers*. Maurice Stucke and Ariel Ezrachi indeed refer to them as “gamemakers”: before being anyone’s competitors, these are entities that intermediate and infrastructurally enable access and repeated transactions between diversified groups of customers and users.²⁶

An illustrative example is the way in which digital platforms have contributed to shifting contemporary patterns of consumption from the purchase of physical ownership to the purchase of access rights and subscription-based goods and services.²⁷ *By Rotation* and *My Wardrobe HQ*, for example, are online platforms that connect merchants and lenders of fashion items with customers.²⁸ They take care of aspects such as delivery

²⁴ On this, see, e.g., PETER THIEL, *ZERO TO ONE: NOTES ON STARTUPS, OR HOW TO BUILD THE FUTURE* (2014).

²⁵ TRUTH AND POWER, at 42.

²⁶ MAURICE E. STUCKE & ARIEL EZRACHI, *COMPETITION OVERDOSE: HOW FREE MARKET MYTHOLOGY TRANSFORMED US FROM CITIZEN KINGS TO MARKET SERVANTS* (First edition, ed. 2020), Chapter 8 “Gamemakers”.

²⁷ See Shelly Kreiczer-Levy, *Share, Own, Access*, 36 *YALE LAW & POLICY REVIEW* (2017).

²⁸ By Rotation: <https://www.byrotation.com/>; My Wardrobe HQ:

and dry cleaning, and take a percentage of the fashion rental cost. *The Fashion Pass* offers a similar service, but this time rental occurs through a monthly subscription, with a variety of items to choose from.²⁹ In a similar vein, *Airbnb* intermediates between home-owners and temporary travelers replacing hotels;³⁰ *Netflix* and *YouTube* offer video on-demand services,³¹ replacing VRs, DVDs and the traditional content production and distribution industries. Similarly, and increasingly successfully, Amazon is re-inventing retail and Facebook changed communication and social ties. Together, these platforms have transformed owned goods or social experiences into accessible consumerist lifestyles. They do not merely compete with car manufacturers, supermarkets, hotels and other analog services. They have instead contributed to making many of these services less relevant, reinventing consumerism and capitalism.

While economists have made significant breakthroughs in understanding these markets, lawyers and competition regulators still lag behind. The recent Supreme Court judgment in *Ohio v. American Express* illustrates common confusions with the understanding and analysis of platform markets.³²

1. Multi-Sided Markets and Network Effects

The economic literature focuses on two connected aspects of platform business models: their multi-sidedness and the network effects they give rise to.

According to David Evans, multi-sided market exists if three necessary conditions are present.³³ (a) There must be *two or more distinct groups of customers*. These can be distinct because they possess different features, e.g. men and women, companies and natural persons, or they can be distinct only for the purpose of using the platform in question. (b) *Coordinating and connecting these groups of customers is costly*; and (c) *an intermediary can internalize some of these costs*. Amazon, for example, makes it cheaper for buyers of books to find sellers of these books, and for sellers to find buyers. This means that books sold through Amazon are less expensive to buy and sell than they would be otherwise, and their price is therefore likely lower on Amazon than offline. Multi-sided markets are not necessarily limited to digital platforms. Shopping malls, credit cards, the stock exchange,

<https://www.mywardrobehq.com/>.

²⁹ The Fashion Pass: <https://thefashionpass.com/>.

³⁰ <https://www.airbnb.com/>.

³¹ www.netflix.com; www.youtube.com.

³² *Ohio v American Express*, 585 U.S. ____ (2018)

³³ See David Evans, *The antitrust economics of multi-sided platform markets*, 20 YALE JOURNAL ON REGULATION 325 (2003).

newspapers, the farmer's market, the auction house, can all be defined as multi-sided.

The notion of a multi-sided or platform market is closely linked to the notion of network effects. According to Carl Shapiro and Hal Varian, a network effect is the positive effect that an additional user of a good or service has on the value of that product to others.³⁴ When a network effect is present, the value of a product or service increases according to the number of others using it. Network effects can exist on multi-sided platforms among the same group of customers (*positive* network effects: the more friends I have on Facebook the more incentive I have to join Facebook); and among different customer groups (*negative* network effects: the more videos there are on YouTube, the more viewers will go on YouTube).

2. The Supreme Court's Decision in *Ohio v American Express*

The United States Supreme Court case of *Ohio v American Express* (hereafter "AmEx"), is illustrative of confusions on the nature of digital platform markets and on the role of competition law in regulating them.³⁵ The case examined the credit card market and the question before the court was whether AmEx' imposition of anti-steering provisions in their agreements with merchants, prohibiting them from steering consumers towards non-AmEx cards, was an anticompetitive practice under section 1 of the Sherman Act. Justice Thomas, speaking for the majority, found there to be no violation. He defined the relevant market as comprising both of AmEx' customer groups: the merchant side, which was being charged for card transactions, and the customer side that paid no fees and got AmEx rewards. If one added up the effects of the anti-steering provisions on each customer group, their zero-sum effect was to incentivize more transactions, leading to an overall surplus in consumer welfare. Under the rule of reason, even if merchants paid more transaction fees to AmEx, the overall result was not unreasonably restrictive of competition.³⁶

In his dissenting judgment, Justice Breyer, speaking for the minority, proposed a different way of analyzing the market: instead of summing up the effects of the anti-steering clauses on each complementary customer group, card holders and merchants, the court should have focused on the merchant side and whether the provisions were anti-competitive with respect to that market segment only. Focusing on that unit of analysis, the minority found that by imposing anti-steering provisions, AmEx was able to anticompetitively increase its transaction fees and unduly lower merchants'

³⁴ CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES (1999).

³⁵ *Ohio v American Express*, *supra* note 32.

³⁶ *See Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

margins, leading to a loss of profits for merchants. While AmEx cards were interchangeable for card customers, they were very unprofitable for merchants. Not allowing merchants to ask their customers to switch cards was thus anti-competitive.

3. Platform Markets

What is at stake in the *AmEx* case are two different understandings of platform markets and of the role of antitrust law. The majority sees merchants as free agents able to opt-out of AmEx' network, and therefore as free to accept or not accept AmEx' increasing transaction costs. The minority sees merchants as having less agency, as squeezed between costly credit card payment options and unable to choose which of these credit cards to accept as payment methods. In the digital platform context, one could similarly see online advertisers or Amazon sellers either as free agents able to switch between platforms, or as vulnerable agents whose profits are increasingly squeezed by a few dominant gatekeepers who operate opaquely and anti-competitively.

The disagreement between the majority and minority in this case is illustrative of confusions in the current understanding and court treatment of (digital) platform markets. First, it is unclear what the relevant market is: are multi-sided marketplaces themselves the relevant markets or should each side be considered a separate market with separate effects? Who are AmEx' competitors? Are Justice Thomas or Justice Breyer correct, or are they both incorrect in their definitions of the relevant market? Second, where is market power, let alone power, in these markets? Neither the majority nor the minority clearly tackled the question of market power, and how such power informs the question of anti-competitive effects. Third, what is the role of price differentials in the analysis of platform markets? How do prices, outputs and margins matter to the competition analysis in these markets?

In response to some of these questions, Thomas Nachbar has argued that anticompetitive effects in platform markets must not be generalized and require a case-by-case analysis.³⁷ In his view, the majority and minority were both "overly categorical in their treatment of the platform problem"³⁸ and "[t]he clearest lesson of American Express for an analysis of platforms is that courts should be careful about generalizing from the existence of a two-sided market to specific consequences for antitrust."³⁹ Nachbar argues that courts

³⁷ Thomas Nachbar, *Platform Effects*, Virginia Public Law and Legal Theory Research Paper No. 2021-10, Virginia Law and Economics Research Paper No. 2021-03 (2021), <https://ssrn.com/abstract=3775205>.

³⁸ *Id. supra*, at 38.

³⁹ *Id. supra*, at 41.

should focus more on “platform effects”, which he defines as the ability of platforms to cross-subsidize between two customer groups.⁴⁰ His definition is based on the work of Jean-Charles Rochet and Jean Tirole who understand platforms’ distinguishing feature as being their ability to cross-subsidize between two sides, one more elastic than the other, with their profit depending “not only on the total price charged to the parties to the transaction, but also on its decomposition.”⁴¹ One way to understand this is that platforms do not simply charge fixed prices to each customer group, but they can also price discriminate and personalize pricing to different customers and sub-groups based on algorithms and infrastructural access. This maximizes their revenues and ensures that customers or customer groups do not switch to competitors, albeit in ways that are not clearly visible to an external analyst.

What matters in a (digital) platform context is not just price, as per traditional competition analysis, but also how platforms structure their pricing across categories of merchants or customers, nudging them towards certain prices and outputs to avoid switching and to maintain dominance. Platform gatekeepers’ effort to maintain and increase network effects is one of their main concerns, though it is not always anti-competitive, and might or might not have a direct impact on prices or outputs. In this sense, platforms are not only markets; they are markets of an entirely novel kind. As discussed in what follows, these markets require a radically different approach to antitrust analysis, and they require a reconsideration of foundational notions such as market definition, market power and price.

II. ANTITRUST LAW AND THE PURPORTED AUTONOMY OF DIGITAL MARKETS

Digital platforms such as Google or Amazon are monopolists and at the same time marketplace gatekeepers. Their existence challenges predominant antitrust law paradigms. As was gleaned from the *AmEx* case, courts have improperly analyzed these markets, remaining attached to visions of antitrust harms that don’t match the reality of digital markets. In the United States, the predominant Chicago School understanding of antitrust law, which focuses on consumer welfare and measures anti-competitive behavior by reference to price raises or output restrictions, has failed to properly understand digital platform harms. Platform gatekeepers’ business models incentivize low or zero prices and excesses of output in ways that might be anti-competitive but that Chicago School antitrust is unequipped to theorize.⁴² Further, courts have

⁴⁰ *Id. supra*, at 14.

⁴¹ Jean-Charles Rochet & Jean Tirole, *Platform Competition in Two-Sided Markets*, 1 J. EUR. ECON. ASS’N 990, 1018 (2003).

⁴² On the inadequate treatment of Amazon’s monopoly position under current antitrust law, *see, e.g.*, Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L. J. 710 (2017)

often deferred important decisions to paid economists and consultants, a process that has skewed enforcement in favor of large corporate interests.⁴³

In this section, I present the current state of antitrust law and its effects on digital markets from a social and political justice perspective. I detail the evolution of United States antitrust law and show that the current approach construes markets, including digital platform markets, as self-regulating autonomous processes separate from politics and government regulation. Antitrust facially acts as a facilitator of self-regulating market processes, and contributes to entrenching platform environments where equal freedoms and equal distribution of socio-economic advantages are denied.

A. US Antitrust Law from Anti-Monopoly to Efficiency and Self-Regulation

1. Antitrust Law's Anti-Monopoly Roots

American antitrust law has progressive roots that date back to the 1890s, when it emerged as an apparatus for tackling abuses of market power and anticompetitive commercial conduct particularly in the railway and electricity industries.⁴⁴ Although the Sherman Act came into force in 1890, it is in 1904 that the Supreme Court for the first time declared the merger between three railway companies unlawful.⁴⁵ In spite of the de-regulatory judicial impulse during the Lochner Era,⁴⁶ Theodore Roosevelt and then Woodrow Wilson's Presidencies denoted an increasing role for government in markets, overseeing public corporations, regulating utilities and breaking-up so-called "trusts", as illustrated by the landmark case of *Standard Oil* in 1911,⁴⁷ where the Supreme Court ordered the oil monopoly's break-up into 34 segments.

Strong antitrust enforcement continued during Franklin D. Roosevelt's

(hereafter *Amazon's Paradox*); in particular her discussion of predatory pricing at 756.

⁴³ See Elliott Ash, Daniel L. Chen, and Suresh Naidu, *Ideas Have Consequences: The Effect of Law and Economics on American Justice* (June 26, 2017), <https://ssrn.com/abstract=2992782> (explaining the influence of the Manne Economics Institute for Federal Judges on federal judges' antitrust and other rulings, showing that after Manne trainings judges tended to issue more conservative judgments). Also see David Dayen, *Corporate-Funded Judicial Boot Camp Made Sitting Federal Judges More Conservative*, THE INTERCEPT (2018), <https://theintercept.com/2018/10/23/federal-judiciary-henry-manne-law-economics/>.

⁴⁴ William J. Novak, *Institutional Economics and the Progressive Movement for the Social Control of American Business*, 93 NEW PERSPECTIVES IN REGULATORY HISTORY 665 (2019).

⁴⁵ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

⁴⁶ Which began after the US Supreme Court case of *Lochner v. New York*, 198 U.S. 45 (1905).

⁴⁷ *Standard Oil*, *supra* note 36, 52-55.

New Deal Presidency in the 1930s and thereafter. In parallel to the introduction of numerous pieces of legislation including the Clayton Act, the FTC Act and the Hart-Scott-Rodino Act, antitrust law continued to be vigorously enforced in the United States until 1982, the date of AT&T's breakup.⁴⁸ Many years later, the next and last big antitrust case was the *Microsoft* case in the 1990s.⁴⁹ In that case, at first instance, the District Court ordered a break-up of Microsoft into two separate units.⁵⁰ On appeal, however, Microsoft was able to reverse course and to settle instead of being broken-up.⁵¹

During the long period between 1890 and the 1970s, antitrust law changed and significantly evolved in scope and importance, but it was consistently understood as an institutional apparatus available to branches of the democratically elected government to enact a political or normative agenda in economic affairs. In other words, throughout that period, it was understood that markets were political and required political legitimation and constraints. Through the intermediary function of the judiciary, antitrust authorities such as the DOJ and FTC could address unacceptable concentrations of political and economic power, rectify economic inequalities and constrain markets in the public interest.

2. Minimalist Antitrust

The philosophy underpinning antitrust law changed during the 1970s, undergoing an important normative shift from an anti-monopoly ethos to a Chicago School approach focused on removing markets from politics, and facilitating self-regulating markets autonomously guided by price, efficiency and consumer welfare maximization. Such ideology quickly began to cement doubts on the effectiveness of strong competition enforcement and to deter regulatory interference. Judge Robert Bork contributed to popularizing and transposing the Chicago School approach into antitrust law in his classic review of the goals of antitrust law published in 1978, *The Antitrust*

⁴⁸ 552 F. Supp. 131 (D. D.C. 1982).

⁴⁹ 253 F.3d 34 (D.C. Cir. 2001).

⁵⁰ *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64-65 (D.D.C. 2000) (the District Court or the District of Columbia issued 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).

⁵¹ *Microsoft*, *supra* note 49. Department of Justice, *Reach Effective Settlement on Antitrust Lawsuit*, PRESS RELEASE, November 2nd, 2001, https://www.justice.gov/archive/atr/public/press_releases/2001/9463.htm; U.S. v Microsoft Corporation Information on the Settlement, November 6th, 2001, <https://www.justice.gov/atr/usdoj-antitrust-division-us-v-microsoft-corporation-information-settlement>.

Paradox.⁵² In it, he effectively re-invented the history of antitrust law, arguing that it had to be understood as a history concerned with the promotion of consumer welfare,⁵³ the maximization of productive and allocative efficiencies, of total productive welfare.⁵⁴ In the long run, this approach has been consciously tolerant of and friendly to monopolies, favoring large (and purportedly efficient) conglomerates of economic power over the well-being of consumers or workers.⁵⁵

Bork's defense of the Chicago School approach in antitrust has deeply shaped contemporary US antitrust law from the Reagan Era to this day.⁵⁶ This was achieved by pairing the idea that antitrust is a judge-made common law doctrine⁵⁷ with a conservative agenda aimed at entrenching an anti-progressive law and economics methodology amongst US judges.⁵⁸

⁵² ROBERT BORK, *THE ANTITRUST PARADOX* (1978).

⁵³ For progressive accounts of this history see Sanjukta Paul, *Reconsidering Judicial Supremacy in Antitrust*, 131 *Yale L. J. forthcoming* (2021); Novak, *supra* note 44; TIMOTHY WU, *THE CURSE OF BIGNESS* (2018); Khan, *infra* note 59.

⁵⁴ See ROBERT BORK, *THE ANTITRUST PARADOX* (1978); Herbert J. Hovenkamp, *Distributive Justice and Consumer Welfare in Antitrust*, FACULTY SCHOLARSHIP AT PENN LAW 1868 (2013), http://scholarship.law.upenn.edu/faculty_scholarship/1868; 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, 690-698 (2010); and see *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (where the court found that antitrust should pursue the consumer welfare standard and that consumers could sue price fixers directly for an overcharge). Also see Ioannis Lianos, *Some Reflections on the Question of the Goals of EU Competition Law*, CLES Working Paper Series 3/2013, 4-13 (January 2013). For a normative discussion of the place of efficiency in the consumer welfare driven understanding of market regulation Posner, *Ethical and Political Basis of the Efficiency Norm*, *infra* note 72, (arguing that the common law is efficient and that this is normatively desirable); Richard A. Posner, *Utilitarianism, Economics, Legal Theory*, 8 *JOURNAL OF LEGAL STUDIES* 103 (1979).

⁵⁵ See David Harvey's overview of the way neoliberalism became part of the political agenda in the United States during the Reagan Era, and its ties to business interests, in DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 64 (OUP, 2005).

⁵⁶ Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 *UNIVERSITY OF PENNSYLVANIA L. REV.* 925 (1978).

⁵⁷ Early Sherman Act jurisprudence led to the formulation of a "rule of reason", according to which Section 1 of the Sherman Act had to be interpreted according to a "reasonableness" standard to be adjudicated by the courts, prohibiting only those agreements that constituted *unreasonable* restraints on trade. *Pipe and Steel Company v. United States*, 85 F. 271 (6th Cir. 1898); *Standard Oil*, *supra* note 36, at 52-55, *United States v. American Tobacco Co*, 221 U.S. 142 (1911); *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). For a critical analysis of the early jurisprudence and "rule of reason" principle see Rudolph J. Peritz, *A Counter-History of Antitrust Law*, 1990 *DUKE L. J.* 263 (1990). On the legislative history and historical context that made antitrust law a common law discipline see Paul, *supra* note 53.

⁵⁸ See note 43.

Throughout this period there was opposition to the consumer welfare approach from within antitrust law, for instance by scholars who emphasized the need to include some distributive concerns in antitrust, but such Post-Chicago opposition largely failed to address the most significant gaps in antitrust law.⁵⁹ Notably, Post-Chicago failed to address the fact that markets are not autonomous self-regulating forces but are instead, as Polanyi showed, conditioned by exogenous factors that include the way power emerges and manifests in the economy, and also inequality, liberty and markets' embeddedness in society. This is particularly salient when it comes to the current regulatory approach to digital platform markets.

B. The Separation of Digital Platform Markets and Politics

The Chicago School's influence has led to a toothless antitrust approach in digital markets. The focus on prices and short-term efficiencies has fed an already idealized view of digital marketplaces as loci of efficiency and competitiveness, with data and digital infrastructures fueling transactions at unprecedented levels of precision, personalization and scale.⁶⁰ Together, Chicago School antitrust and cyberutopian capitalism have obscured structural power dynamics in digital markets, the advance of widespread surveillance and the effects of concentration and low or zero prices on long-term competitiveness.⁶¹

As discussed in relation to the *AmEx* case, courts and regulators have made erroneous assumptions regarding market definition and market power in these environments. They have over-emphasized the importance of price levels and failed to comprehensively investigate platforms' infrastructural power, their ability to cross-subsidize monetary value between customer groups, their price and access discrimination strategies, their price structure and their strategies in relation to non-price goods and harms.⁶² They have also

⁵⁹ See Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655 (2020).

⁶⁰ On the view of digital markets as exceptionally competitive see, e.g., VIKTOR MAYER-SCHONBERGER & THOMAS RAMGE, *REINVENTING CAPITALISM IN THE AGE OF BIG DATA* (2018). Also see Hal R. Varian, *Computer Mediated Transactions*, AMERICAN ECONOMIC REVIEW: PAPERS & PROCEEDINGS 100 (May 2010); Hal R. Varian, *Beyond Big Data*, 49 BUSINESS ECONOMICS (2013); Hal R. Varian, *Intelligent Technology*, 53 FINANCE & DEVELOPMENT (September 2016).

⁶¹ See, e.g., Elettra Bietti, *Locked-In Data Production: User Dignity and Capture in the Platform Economy*, SSRN (October 14, 2019), <https://ssrn.com/abstract=3469819>.

⁶² *Amazon's Paradox* at 756. Khan argues that the narrow test developed in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp* 509 U.S. 209 (1993), which requires a

been too lenient towards conglomerate effects and mergers between vertically integrated businesses,⁶³ and have failed to recognize that data can contribute to a firm's market power.⁶⁴

The most successful antitrust strategies in digital markets have tended to focus on choice: how to ensure more choices for consumers and small businesses in platform mediated digital environments? A European illustration of this trend is the recent German Federal Cartel Office (Bundeskartellamt) decision against Facebook, currently before the Dusseldorf Higher Regional Court and subject to a preliminary reference before the CJEU.⁶⁵ In this case, the Bundeskartellamt decided that Facebook was abusing its dominance on the German social media market by imposing unfair terms to users in violation of data protection and competition law.

demonstration that the predatory price setter is capable of recouping its losses by sustaining supra-competitive prices, cannot be met by plaintiffs seeking to hold large digital monopolies accountable, in a context where these digital businesses are backed by venture capitalists and encouraged to provide services for free or below cost in long-term winner-take-all markets. Also see Nachbar, *supra* note 37; John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513 (2018); Friso Bostoen, *Online Platforms and Pricing: Adapting Abuse of Dominance Assessments to the Economic Reality of Free Products*, 35 COMP. L. & SEC. REV. 263 (2019).

⁶³ See, e.g., lax enforcement in the *Google/DoubleClick* case, *supra* note 20. Also see, e.g., Terrell McSweeney & Brian O'Dea, *Data, Innovation, and Potential Competition in Digital Markets—Looking Beyond Short-Term Price Effects in Merger Analysis*, CPI ANTITRUST CHRONICLE, February 2018; John Kwoka, *Reviving Merger Control: A Comprehensive Plan for Reforming Policy and Practice*, Antitrust Institute, October 9th, 2018, <https://www.antitrustinstitute.org/wp-content/uploads/2018/10/Kwoka-Reviving-Merger-Control-October-2018.pdf>; Scott C. Hemphill & Timothy Wu, *Nascent Competitors*, UNIV. OF PENN. L. REV. (forthcoming 2021); Tommaso M. Valletti and Hans Zenger, *Increasing Market Power and Merger Control*, 5 COMP. L. & POL'Y DEBATE 26 (2019).

⁶⁴ See *Google/DoubleClick*, *supra* note 20. Also see Maurice E. Stucke, *Should We Be Concerned About Data-polies?* 2 GEORG. L. & TECH. REV. 275 (2018); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009 (2013); Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, YALE L. J. F. 647 (2021); Viktoria Robertson, *Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data*, 57 COMM. MARK. L. REV., 161 (2020).

⁶⁵ Bundeskartellamt [Federal Cartel Office], Facebook Decision, 6th Decision Division B6-22/16, Dec. 22, 2015 (Ger.), https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5; Oberlandesgericht [OLG], Aug. 26, 2019, VI-Kart 1/19 (V), <https://perma.cc/QGR7-FR54>; Bundesgerichtshof [BGH] in der Kartellverwaltungssache KVR 69/19, 23 June 2020, Judgment, <https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=141547c9c31c91d6a7ccef2d748e85&nr=109506&pos=12&anz=26>; Oberlandesgericht, *Press Release*, 24 March 2021, https://www.olg-duesseldorf.nrw.de/behoerde/presse/Presse_aktuell/20210324_PM_Facebook2/index.php.

Facebook's terms were found unfair because they conditioned platform access to users accepting that Facebook would combine the data it collected about them across Facebook, Instagram, Whatsapp services and non-Facebook services. Instead, the German regulator stated that users should have a choice as to whether to allow the company to combine Facebook data with other data.

The decision is an example of innovative thinking in an evolving space. For the first time, a competition authority focused its analysis on the specific harms data produces, instead of trying to fit antitrust's conceptual round peg in the digital square hole. One limit of the Bundeskartellamt's approach, however, is that it remains grounded in a hands-off neoliberal approach to self-regulating platforms. What matters is giving consumers more choices, without changing the consumerist and privately owned infrastructures within which these choices are made. Re-distributing data access and control across these marketplaces can help, but it does not address the more important question: whether access to and power over digital marketplaces is sufficiently just, equal and distributed in the first place, not just whether it can give rise to *ex post* preference signaling. The decision in other words does not foreground the real problem of a structural lack of self-determination and democratic oversight in opaque platform environments. It does not address the fact that platforms like Facebook remain powerful, concentrated, and erode fundamental rights and equality.

Coupled with the early internet's cyberlibertarian ethos and wider neoliberal suspicion of government regulation,⁶⁶ US antitrust apathy and the insistence on applying old tools to new problems has meant that digital platform markets have grown exponentially at a distance from democratic constraints.⁶⁷ Their *sui generis* status, as spaces separate from politics, has

⁶⁶ Early Internet cyberlibertarian ideas are epitomized by John Perry Barlow, *A Declaration of Independence of Cyberspace*, EFF (1996), <https://www.eff.org/cyberspace-independence>; and David R. Johnson and David G. Post, *Law And Borders: The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367 (1996). The influence of Chicago School ideas on internet regulation theory is evident in Lawrence Lessig's early work: Lawrence Lessig, *The New Chicago School*, 27 J. OF LEG. STUD. 661 (1998) which perfectly mirrors the contemporaneous Lawrence Lessig, *The Laws of Cyberspace* (1998), https://cyber.harvard.edu/works/lessig/laws_cyberspace.pdf. Notable critics of these views include Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management"*, 97 MICH. L. REV. 462 (1998), and James Boyle, *Foucault in Cyberspace*, 66 UNIV. OF CINC. L. REV. 177 (1997).

⁶⁷ More generally on this point, see critiques of the growth of informational capitalist business models in TRUTH AND POWER; ZUBOFF, *infra* note 97; and a review that emphasizes the role of law in the growth of these models in Kapczynski, *infra* note 80.

led to – at times misleading - descriptions of them as quasi jurisdictions or sovereign constitutional spaces.⁶⁸ The opposite tendency has been to view them not as spaces separate from the power of the state, but rather to re-imagine them as utilities and common carriers subject to state regulation.⁶⁹ These metaphors denote profound disagreements and confusions on the nature of these new structures, actors and markets.

Most of these metaphors perpetuate an understanding of platforms as autonomous actors or spaces that exist in parallel to and are immune from democratic pressures and real-world politics. Viewing digital platforms as exceptionally competitive neoliberal marketplaces separate from politics obscures the inequalities that exist in digital environments and furthers a lack of protections against the commodification and instrumentalization of human life in digital environments. The erosion of justice inherent in existing antitrust enforcement in digital markets is what I discuss in the next section.

III. EFFICIENCY, MONOPOLY AND DISTRIBUTIVE JUSTICE

In this section I address a particular feature of American Chicago School antitrust, the consumer welfare standard, showing how the artificial and ideological separation it reinforces between efficiency and distribution contributes to inequality, monopoly power and losses of freedom in digital environments. It is imperative to move from views that separate efficiency and welfare maximization from distributive justice to views that embed justice and distributive concerns into the regulation of digital economies. This applies in antitrust law and to other areas of law that regulate digital marketplaces.

A. Antitrust, Efficiency and Distribution

A particularly illustrative way in which Chicago School antitrust justified

⁶⁸ See note 2.

⁶⁹ See *Biden v. Knight First Amendment Institute*, 593 U. S. ____ (2021), Thomas J, concurring. Also see K. Sabeel Rahman & Zephyr Teachout, *From Private Bads to Public Goods: Adapting Public Utility Regulation for Informational Infrastructure*, KNIGHT FIRST AMENDMENT INSTITUTE ESSAY, February 4, 2020, <https://knightcolumbia.org/content/from-private-bads-to-public-goods-adapting-public-utility-regulation-for-informational-infrastructure>; Sabeel K. Rahman, *Infrastructural Regulation and the New Utilities*, 35 YALE J. ON REG. 911 (2018); Josh Simons & Dipayan Ghosh, *Utilities for democracy: Why and how the algorithmic infrastructure of Facebook and Google must be regulated*, BROOKINGS INSTITUTION, August, 2020, <https://scholar.harvard.edu/dipayan/publications/utilities-democracy-why-and-how-algorithmic-infrastructure-facebook-and-google>.

an artificial understanding of markets as self-regulatory processes that must be kept immune from regulatory interferences, is the emphasis on consumer welfare and efficiency as a primary goal of antitrust. The 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).⁷⁰ It assumes that other branches of the law, including taxation, can perform a redistributive function, that of compensating consumers and ensuring a fair re-allocation of the resulting economic surplus.⁷¹

1. The “Separability Thesis”

The move to elevate efficiency and wealth maximization to the status of a normative value⁷² or to isolate efficiency considerations from justice and distribution⁷³ is discussed by Jedediah Purdy and others in their *Law and Political Economy Manifesto*.⁷⁴ They identify a tendency to isolate and elevate efficiency across a range of legal areas, including antitrust:

Efficiency 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.⁷⁵

⁷⁰ See note 54.

⁷¹ See the detailed discussion in Lianos, *supra* note 54, at 8 (“*The implicit assumption is that the tax system is a more efficient way of engaging in redistribution than the regulatory system*”).

⁷² Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 502–07 (1980) (arguing that the common law is efficient and that this is normatively desirable); 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) (“the minimum state defined by the economic analysis of market failure is the state that works best to achieve the common goals of most people in the world”).

⁷³ See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 2–3 (Belknap 2004) (focusing attention on efficiency and excluding distributive concerns); Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

⁷⁴ See Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 THE YALE LAW JOURNAL 1784, 1790 (2020).

⁷⁵ *Id. supra*. Also see Zachary Liscow, *Is Efficiency Biased?*, 85 U. CHI. L. REV. 1649 (2018), <https://chicagounbound.uchicago.edu/uclrev/vol85/iss7/4>.

Law and economics in other words isolates economic and efficiency considerations from distributive, social and structural considerations.⁷⁶ It makes distributive justice a question of *ex post* redistribution rather than structural predistribution. As they put it:

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.⁷⁷

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 ex-post and outside competitive markets by other branches of law (such as tax law).⁷⁸ The questionable trickle-down economic logic behind this thesis is that consumers benefit from an increase in total welfare even if that welfare is not immediately redistributed to them. That is because in theory when a transaction or market decision maximizes total welfare it makes compensation or redistribution *possible*. The problem is that in practice these welfare maximizing moves are not followed by actual redistribution. They simply lead to unequal transfers of wealth. Paradoxically, therefore, the “consumer welfare” standard subordinates equality, reciprocity and the well-being of “consumers” to the proper functioning of markets.

2. Healthy Competition is Inseparable from Distributive Justice

Those who think it best for antitrust regulators not to interfere in the business affairs of efficient digital monopolies such as Amazon or Google sustain that their position is morally justified because the consumer welfare standard contributes to increasing the overall economic wealth of a society and such wealth can then be redistributed to the least well-off through various exogenous mechanisms including progressive taxation. Some might also argue that unless antitrust pursues total welfare as its primary and sole goal, the overall pie of social and economic advantages would be smaller and society would be poorer and suffer as a result. In other words, the function of antitrust should be to increase the size of the pie, not to ensure that everyone

⁷⁶ *Id. supra*, at 1795.

⁷⁷ *Id. supra*, 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).

⁷⁸ Lianos, *supra* note 54, at 4-13. Posner, *Ethical and Political Basis of the Efficiency Norm*, *supra* note 72; Richard A. Posner, *Utilitarianism, Economics, Legal Theory*, 8 *JOURNAL OF LEGAL STUDIES* 103 (1979).

gets a fair share of it: a bigger pie even if unevenly divided makes people more happy than a smaller evenly divided one.⁷⁹ For these advocates of consumer welfare, it is important to avoid a system where antitrust regulators go after efficient monopolies leading to less wealth creation.

This view assumes that *ex post* redistribution through taxation is sufficient to ensuring justice, and that a division of tasks amongst legal branches is acceptable and fair. Instead, I argue that healthy and just digital political economies cannot be brought about through a division of labor between justice and efficiency. The separability of efficiency from justice is questionable for a number of moral and empirical reasons.

Applied to digital markets, the separability of efficiency and distribution roughly means that it is considered legitimate and just for tech monopolies such as Amazon, Facebook, Google or Apple to keep accumulating monopolistic profits without raising their employees' wages or sharing profits with users, as long as some branch of the law other than antitrust or private law taxes the company and its excessively wealthy (former) CEO forcing a redistribution of monopolistic profits. It reinforces the purported immunity of digital marketplaces from politics, causing a range of harms to persons and small businesses.⁸⁰

For example, this Manichean understanding of law and governance legitimates unchecked levels of surveillance, allowing opaque data practices to be governed by manipulative nudging and notice and consent on the ground that these practices contribute to high levels of growth and innovation.⁸¹ It creates an information ecosystem that promotes scale, de-contextualized communication, attention hoarding, polarizing, manipulative and harmful content, because this is the content that benefits shareholders the most, even when this perniciously affects democratic participation and opinion formation.⁸² The separation of welfare maximization from justice

⁷⁹ But see Ronald Dworkin's critique of theories that assume the increase or maximization of wealth in society to be valuable *per se* in Ronald M. Dworkin, *Is Wealth a Value?* 9 THE JOURNAL OF LEGAL STUDIES 191–226 (1980). Also see LAWRENCE E. MITCHELL, *Is Wealth a Value?* in CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT (2001).

⁸⁰ Amy Kapczynski, *The Law of Informational Capitalism, Review of Shoshana Zuboff, The Age of Surveillance Capitalism and Julie Cohen, Between Truth And Power, The Legal Constructions Of Informational Capitalism*, 129 Yale L. J. 1460, 1490 (2020)

⁸¹ Julie E. Cohen, *Turning Privacy Inside Out*, 20 THEORETICAL INQUIRIES IN L. (2019); Elettra Bietti, *Consent as a Free Pass: Platform Power and the Limits of the Informational Turn*, 40 Pace L. Rev. 307 (2020); Elettra Bietti, *The Discourse of Control and Consent Over Data in EU Data Protection Law and Beyond*, HOOVER INSTITUTION, AEGIS PAPER SERIES (2020).

⁸² TRUTH AND POWER, Chapter 3; W. LANCE BENNETT & STEVEN LIVINGSTON, THE

considerations also creates incentives to personalize, price discriminate or differentiate access schemes as well as to pursue unfair market practices that have differential impacts often to the disadvantage of vulnerable populations or groups on the ground that these are the most profitable ways of maximizing overall welfare.⁸³

As John Rawls and Ronald Dworkin among others have shown, justice is a primary virtue of institutions and the primary value that should guide political and collective decision-making, including the deliberation of courts and government officials.⁸⁴ In other words, antitrust law decision-making must be guided by justice as a primary value, and questions of efficiency and welfare maximization must, if anything, be subordinated to questions of justice and are relevant only to the extent it would be just to consider them relevant. From a moral standpoint, consumer welfare proponents violate the liberal ideal of justice when they take justice as one consideration among many instead of the primary value that institutions must pursue.

Empirically, scholars have demonstrated a clear causal connection between the consumer welfare approach in antitrust, the separation of wealth maximization from distribution, and income inequality.⁸⁵ Lina Khan and Sandeep Vaheesan have shown, for example, that antitrust enforcement as it exists in the United States today does not have progressive effects on income and on the position of the least well off in society.⁸⁶ They have shown that under current economic arrangements, market power has regressive effects on the population: it legitimates transfers of wealth from ordinary Americans to affluent executives and shareholders.⁸⁷ These executives are indeed all in the top 1-10% of the population and in 2014 concentrated about 70% of the

DISINFORMATION AGE POLITICS, TECHNOLOGY, AND DISRUPTIVE COMMUNICATION IN THE UNITED STATES (2020); Cohen, *infra* note 96.

⁸³ Ramsi Woodcock, *Big Data, Price Discrimination, and Antitrust*, 68 *Hastings L. J.* (2017); Ariel Ezrachi & Maurice E. Stucke, *Online Platforms and the EU Digital Single Market*, Submission to the U.K. House of Lords, Internal Market Sub-Committee (October 2015); 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. of TECH. L. & POL.* 41 (2014).

⁸⁴ JOHN RAWLS, *A THEORY OF JUSTICE* (1971); JOHN RAWLS, *POLITICAL LIBERALISM* (1995); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (2001) (hereafter *RESTATEMENT*); Ronald Dworkin, *Why Efficiency? – A Response to Professors Calabresi and Posner*, 8 *HOFSTRA L. REV.* 563 (1980); Dworkin, *supra* note 79.

⁸⁵ But see Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 *CORNELL L. REV.* 1171 (2016) (arguing that there is no connection between a consumer welfare approach and income inequality).

⁸⁶ Lina Khan and Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 *HARV. L. & POL. REV.* 235, 238 (2017).

⁸⁷ *Id. supra*.

nation's wealth.⁸⁸ Rory Van Loo has highlighted deep flaws in the conception that consumer and antitrust law do not have regressive effects: he pointed to empirical data indicating that failures to protect consumers through adequate consumer and antitrust regulation can lead to a wealth transfer from consumers to wealthy corporations, executives and shareholders of more than a trillion dollars every year.⁸⁹ John Kwoka has demonstrated that over 75% of merger transactions since the start of the century have led to price increases for consumers.⁹⁰

These empirical findings suggest that a moral approach to antitrust requires a consciously predistributive rather than a redistributive understanding of how economic institutions allocate fundamental protections, wealth and social advantages. What critiques of the separability of justice and efficiency reveal is that neither redistribution through taxation nor trickle-down economics can sufficiently incorporate considerations of justice and equality into market processes. As the rise of digital monopolies such as Amazon, Google and Facebook shows, consumer welfare approaches have tended to favor business decisions that maximize production, consumption and that favor the interests of business owners, often to the detriment of privacy, equality, environmental justice and the sustainability of small units of production.⁹¹

B. Monopoly, the Consolidation of Power and the Erosion of Freedom

A consumer welfare focused approach, i.e. an approach based on separating welfare maximization functions from distributive and justice functions, is tolerant towards efficient monopolies on the ground that monopolies can maximize allocative and productive efficiencies. The view

⁸⁸ See Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, NBER WORKING PAPER NO. 20625 (2014). Also see Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for The United States*, NAT'L BUREAU OF ECON. RESEARCH, WORKING PAPER NO. 22945 (2016).

⁸⁹ Rory Van Loo, *Broadening Consumer Law: Competition, Protection and Distribution*, 95 NOTRE DAME L. REV. 211, 214 (2019).

⁹⁰ See John E. Kwoka, *Does Merger Control Work? A Retrospective on US Enforcement Actions and Merger Outcomes*, 78 ANTITRUST L. J. 619, 631-32 (2013); JOHN E. KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2014). For further evidence of price increases and wealth transfers to the detriment of consumers in the US in the last decade or more see THOMAS PHILIPPON, *THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS* (2019).

⁹¹ *Amazon's Paradox*; Dina Srinivasan, *The Antitrust Case Against Facebook*, 16 BERK. BUS. L. J. 39 (2018); ARIEL EZRACHI AND MAURICE STUCKE, *VIRTUAL COMPETITION, THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY* (2016); Stucke, *supra* note 64; Binns & Bietti, *supra* note 23.

here is that Amazon has built a centralized platform for governing e-commerce transactions at scale, Google has built a centralized system that algorithmically ranks content at scale in response to search queries, and this is a good thing: these models optimize scale economies, minimize production and coordination costs, and ensure that the costs of collecting and storing data and of training and perfecting algorithmic targeting is internalized in ways that benefit Amazon, Google, producers and consumers alike.

There are at least three responses to this view: that it does not take seriously gatekeepers' power in platform mediated environments, that it erodes fundamental freedoms and the ability of humans to flourish in these privately controlled spaces, and that it fails to take seriously the way in which monopolies threaten the fundamental political equality of persons in a democracy. I examine the first two in this section, and the third in Part IV.

1. The Hierarchical Power of Digital Gatekeepers

As Katharina Pistor has noted, the defense of bigness in a digital context is often based on a Coasean justification that understands firms as means of internalizing and reducing transaction costs.⁹² Yet as she points out, “if Coase was right that firms are primarily a product of (or response to) transaction costs, we should be witnessing the disappearance of firms and the flattening out of markets” in datafied environments where the costs of information production and sharing are so low.⁹³ What has happened instead is that digital platform gatekeepers have monopolized control over data and content, offering differentiated access to them as a way of profiting from them at scale. This leads to the conclusion that digital gatekeepers do not merely internalize costs in efficient ways, they also re-create power asymmetries based on their ability to organize information asymmetrically in self-interested ways. As Pistor notes, “[t]he business of data is not about markets. It is about hierarchy.”⁹⁴

Julie Cohen makes a parallel observation about power in digital platform environments by analogizing information capitalism and the political economy of corporate surveillance to the emergence of industrial capitalism as described in Polanyi's *Great Transformation*.⁹⁵ In particular, she compares the production and hierarchical organization of data to the harvesting and

⁹² Katharina Pistor, *Rule By Data: The End Of Markets?* 83 LAW AND CONTEMPORARY PROBLEMS 101, 102 (2020). Also see Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) and Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

⁹³ Pistor, *supra*, at 102.

⁹⁴ *Id. supra*, at 104.

⁹⁵ See TRUTH AND POWER.

refining of raw materials in an industrial context. As she explains:

the processes of harvesting and culling “raw” consumer personal data resemble the harvesting of raw materials within an industrial system of agriculture. Just as agriculture on an industrial scale demands grain varieties suited to being grown and harvested industrially, so the collection of personal information on an industrial scale inevitably adopts an active, curatorial stance regarding the items to be gathered. Strains of information are selected and cultivated precisely for their durability and commercial value within a set of information processing operations. The data are both raw and cultivated, both real and highly artificial. The algorithmic processes that manipulate the data function as information-age refineries. In a process comparable to the milling of corn and wheat to generate stable, uniform byproducts optimized for industrial food production, they convert data-based inputs into the forms best suited for exploitation on an industrial scale.⁹⁶

The response to the view that monopolies are efficient and optimal for consumers must thus take seriously platform gatekeepers’ power. It must account for their ability to asymmetrically control the digital marketplaces they actively construct, to offer differentiated access to resources such as data, content, attention, based on control over them. As also emphasized by Shoshana Zuboff, what characterizes these gatekeepers’ power is their ability to shape and manipulate human lives with reckless disregard for the value of these lives and instead with a very clear intent to prioritize the maximization of their revenues.⁹⁷ The problem of digital platform monopoly is a by-product of predominant law and economics understandings of antitrust and market regulation, that legitimate profit maximization efforts as divorced from their social and distributive consequences.

2. Digital Monopoly and Equal Freedom

Both Julie Cohen and Shoshana Zuboff have also shown that the mutually constitutive trajectories of new technologies and market processes have evolved in ways that are detrimental to persons.⁹⁸ Julie Cohen in particular argues that platforms’ extractive intermediation processes commodify aspects of human and social selves subjecting them to abstract and purportedly autonomous market logics.⁹⁹ Once again, increasing the size of the pie and the amount of overall economic and social advantage by

⁹⁶ Julie E. Cohen, *Law for the Platform Economy*, 51 UC DAVIS LAW REVIEW 133, 160 (2017).

⁹⁷ SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* (2019).

⁹⁸ *Id. supra*; TRUTH AND POWER.

⁹⁹ TRUTH AND POWER.

facilitating the centralization of power in digital marketplaces comes at a cost for human life and freedom.

In digital markets, the problem arises most saliently in relation to privacy and free expression. Both are constitutive aspects of the free person in a democracy, meaning that each person must be granted equal privacy and free speech rights in order to be a fully free and equal citizen.¹⁰⁰ The relation between privacy, speech and antitrust law was until recently relatively unexplored, but is increasingly salient.¹⁰¹ It has been argued that breaking-up social media platforms and decentralizing platform power would not help solve speech problems.¹⁰² Even accepting that argument, it seems that a platform ecosystem where gatekeepers are allowed to pursue profit-maximizing goals and to maintain a monopoly position quite naturally evolves into an environment where scale and profits are what matters, content is polarizing, sensational and persons are incentivized to consume quantities of decontextualized content at fast speed instead of taking time to digest discrete quality information. This in turn affects the level of reflexivity in society, the quality democratic deliberation and participation. Contrary to what speech scholars suggest, platform capitalism coupled with market concentration erodes free speech values.

On the privacy and data protection front, a profit-maximizing concentrated platform environment allows data collection, experimentation, differential access and data abuses to be performed on unaware users, small businesses and third parties.¹⁰³ Such an environment favors manipulative design practices that steer users away from privacy protective options towards practices and attitudes that are financially more advantageous to platforms. In other words, profit-maximization in concentrated markets

¹⁰⁰ Samuel Freeman, *Illiberal Libertarians: Why Libertarianism Is Not a Liberal View*, 30 PHIL. & PUB. AFF. 105 (2001); Barrie Sander, *Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law*, EUR. J. OF INT'L L. (forthcoming 2021); Bietti, *Consent as a Free Pass*, *supra* note 81.

¹⁰¹ See, e.g., Genevieve Lakier, *The Limits of Antimonopoly Law as a Solution to the Problems of the Platform Public Sphere*, KNIGHT FIRST AMENDMENT INSTITUTE, March 30, 2020, <https://knightcolumbia.org/content/the-limits-of-antimonopoly-as-a-solution-to-the-problems-of-the-platform-public-sphere>; Eugene Kimmelman, Harold Feld & Augustin Rossi, *The limits of antitrust in privacy protection*, 8 INT. DATA PRIVACY L. 270 (2018); Erika M. Douglas, *supra* note 64.

¹⁰² *Id. supra*, Lakier. Also see Evelyn Douek, *Breaking Up Facebook Won't Fix Its Speech Problems*, SLATE MAGAZINE, May 10, 2019, <https://slate.com/technology/2019/05/chris-hughes-facebook-antitrust-speech.html>.

¹⁰³ See, e.g., Evan Selinger & Woodrow Hartzog, *Facebook's emotional contagion study and the ethical problem of co-opted identity in mediated environments where users lack control*, 12 RESEARCH ETHICS 35–43 (2015).

incentivizes the erosion of privacy and fundamental rights standards, and facilitates the commodification and instrumentalization of life.¹⁰⁴

The growth of purportedly efficient monopolies such as Amazon, Google and Facebook, has led to business models that systematically undermine the recognition and enforcement of privacy and speech values.¹⁰⁵ These business models do not only systematically undermine human rights, they also contribute to the unequal recognition and application of those rights in platform environments, if not their complete disregard.¹⁰⁶ We need to urgently reintroduce social and the political justice considerations in antitrust law, starting from an understanding of platform power, and awareness of the need to regulate platforms so as to secure equal basic rights and material social and economic equality in digital environments.

IV. ANTITRUST'S DIGITAL RENAISSANCE

So far, I discussed the predominant Chicago School approach to antitrust, the influence of law and economics and the effects of the separation of efficiency from justice considerations in digital marketplaces. In this final section, I discuss the Neo-Brandeisian movement which is reviving antitrust's role in promoting fairness, plurality, equality and self-determination in (digital) markets. I trace the normative roots of this antitrust Renaissance and ask whether Neo-Brandeisian antimonopoly can be considered a successful form of Polanyian counter-movement.

A. From Anti-Monopoly Progressivism to Neo-Brandeisianism

1. Normative Roots of Anti-Monopoly Law

¹⁰⁴ Jennifer Cobbe & Elettra Bietti, *Rethinking Digital Platforms for the Post-Covid-19 Era*, CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, May 12, 2020, <https://www.cigionline.org/articles/rethinking-digital-platforms-post-covid-19-era>.

¹⁰⁵ *Id. supra* and see Tomer Shadmy, *The New Social Contract: Facebook's Community and Our Rights*, 37 BOST. U. INT. L. J., (2019) (discussing the way Facebook and similar platforms undermine, repurpose and redefine rights and responsibilities); Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979 (2018) (discussing the harms the rise of big tech platforms poses for the public sphere and free speech values).

¹⁰⁶ See, e.g., SAFIYA U. NOBLE, *ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM* (2018); Safiya U. Noble, *Google Has a Striking History of Bias Against Black Girls*, TIME, March 26, 2018, <https://time.com/5209144/google-search-engine-algorithm-bias-racism/>; Safiya U. Noble, *The Loss Of Public Goods To Big Tech*, NOEMA, July 1, 2020, <https://www.noemamag.com/the-loss-of-public-goods-to-big-tech/>; Mary Madden et al., *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 WASH. U. L. REV. 53 (2017).

Historically, the consumer welfare focus in antitrust law is both relatively recent and artificial. Early progressive antitrust focused to a much greater extent on justice and on the close ties between market regulation, democracy and distributive justice.¹⁰⁷ In Louis Brandeis's words, democracy requires "not merely political and religious liberty, but industrial liberty also."¹⁰⁸ It is only in the 1980s that the ties between competition and distributive justice were consciously severed. Pre-Chicago School antitrust law enforcement was heavily grounded in the need to diffuse and pre-distribute private power in the economy. A particular focus was on the need to ensure political equality, and to prevent excesses of private political power, as captured by Justice William Douglas in his 1948 dissent in the case of *Columbia Steel Co*:¹⁰⁹

all 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.¹¹⁰

Concerns that the concentration of private economic power could be a threat to democracy is a recurrent leitmotiv in liberal political theory. Thomas Jefferson, one of the Founding Fathers of the United States, was a strong advocate of the decentralization of power in all its forms, including through modest private property ownership. In 1776, Thomas Jefferson drafted a state constitution in which he proposed to endow every citizen with up to fifty acres of land, seeing equal and discrete amounts of individual property as an essential enabler of political liberty: all "free members [of the new commonwealth] should possess enough land to enjoy ... personal independence"¹¹¹.

In his late work in *Justice as Fairness: A Restatement*, John Rawls argued explicitly that capitalism is unjust, and in particular that welfare-state capitalism is incompatible with justice because it permits "very large inequalities in the ownership of real property (productive assets and natural

¹⁰⁷ See, e.g., Louis B. Schwartz, 'Justice' and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076-1081 (1979). See 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); Peritz, *supra* note 57. For a more recent account informed by a richer account of political economy see Paul, *supra* note 53.

¹⁰⁸ Louis Brandeis, Address to the Economic Club of New York, November 1, 1912.

¹⁰⁹ *United States v. Columbia Steel Company*, 334 U.S. 495 (1948).

¹¹⁰ *Id. supra*.

¹¹¹ JACK N. RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 305 (2010).

resources) so that the control of the economy and much of political life rests in few hands.”¹¹² In his view only two non-capitalist forms of economic governance could ensure a broad enough diffusion of control over productive resources that is compatible with justice: property-owning democracy and liberal democratic socialism. Both models favor what Polanyi identified as pre-industrial forms of organization of production, i.e. marketplaces that are far from self-regulating but instead operate for the benefit of society. Both these models include a constitutional framework ensuring the protection of basic liberties, a democratic form of governance, fair equality of opportunity, and institutions that ensure that socio-economic inequalities do not violate Rawls’ difference principle, or principle of reciprocity.¹¹³

The difference between the two models is that under property-owning democracy productive means can be privately owned. Contrary to welfare-state capitalism, however, in property-owning democracy the ownership of productive assets must be widely spread across society. Property-owning democracy in other words ensures predistribution on a continuous basis. As Rawls states,

the background institutions of property-owning democracy work to disperse the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy, and indirectly, political life as well. By contrast, welfare-state capitalism permits a small class to have near monopoly of the means of production.¹¹⁴

US antitrust’s original philosophical underpinnings, its original concern for the decentralization of power and the instrumental role that markets play in serving democracy, instead of the other way around, are very close to Rawlsian and also to Jeffersonian ideas of decentralized and fair control over productive resources.¹¹⁵ Current critiques and attempts to move beyond Chicago School antitrust, particularly the Neo-Brandeisian movement, are

¹¹² RESTATEMENT, at para 41. Also see WILLIAM A. EDMUNDSON, JOHN RAWLS: RETICENT SOCIALIST (2017), at 5.

¹¹³ The idea that the least well off must be benefited first by any societal increases in benefits and wealth.

¹¹⁴ RESTATEMENT, at para 42. Note that Rawls confessed in a revised preface to the 1987 edition of *A Theory of Justice* that he regretted his earlier failure to “*distinguish more sharply the idea of a property-owning democracy . . . from the idea of a welfare state . . . [which is] quite different.*”

¹¹⁵ John Wilesmith, *Why Size Matters: Property-owning Democracy, Liberal Socialism, and the Firm*, THE JOURNAL OF POLITICAL PHILOSOPHY (2020); ALAN THOMAS, REPUBLIC OF EQUALS: PREDISTRIBUTION AND PROPERTY-OWNING DEMOCRACY (2016); Frank Pasquale, *Tech Platforms and the Knowledge Problem*, Vol. II AMERICAN AFFAIRS, Summer 2018, <https://americanaffairsjournal.org/2018/05/tech-platforms-and-the-knowledge-problem/>.

driven by a similar ideal.¹¹⁶ Neo-Brandeisians have tended to promote a liberal agenda of economic and political equality that aligns with Rawlsian justice: promoting monopoly break-ups, structural separation remedies and “predistribution” and pushing back against welfare maximization or trickle-down economics.¹¹⁷

2. Neo-Brandeisian Antitrust in Digital Markets

Although the Neo-Brandeisian antitrust movement has not been and is not exclusively concerned with digital markets, it arguably gained in popularity in response to digital monopolies. Lina Khan’s student note “*Amazon’s Antitrust Paradox*”¹¹⁸ in 2017 generated key momentum on antitrust’s dormancy in digital markets.¹¹⁹ The movement gained in momentum from there, united around a common interest in the anti-monopolistic institutionalist path of early progressives, insisting on notable figures such as Louis D. Brandeis.

“Neo-Brandeisian”¹²⁰ scholars and policy-makers are united around a common legal and political agenda that has a negative component – pushing back against Chicago School antitrust and the “consumer welfare” standard – and a positive component – promoting decentralization, distributive justice, equality, self-determination and democracy through antimonopoly law. They have pushed for antitrust reform including strong presumptions against the lawfulness of certain mergers and acquisitions, an offense of abuse of

¹¹⁶ See, e.g., Tong Zhichao, *Rawlsian Property-Owning Democracy: An American Historical Interpretation*, 4 AMERICAN POLITICAL THOUGHT 289, 296 (Spring 2015); (“Reforms between 1890 and 1917 were proposed by Populists and Progressives in order to recapture the old [Jeffersonian] ideal.”); Pasquale, *Id supra*; JEFFREY ROSEN, LOUIS D. BRANDEIS: AMERICAN PROPHET (JEWISH LIVES) (2016) (where Rosen argues that Louis Brandeis was a modern version of Jefferson).

¹¹⁷ On the notion of “predistribution” see, e.g., THOMAS, *supra* note 115. Predistribution is the opposite of redistribution: it demands that a distributive analysis occur at the institutional level instead of at a later stage.

¹¹⁸ *Amazon’s Paradox*.

¹¹⁹ David Streitfeld, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, THE NEW YORK TIMES, September 7, 2018, <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>. Note that the FTC started a case against Google in 2011 which it closed without bringing charges, see, e.g., Brody Mullins et al., *Inside the U.S. Antitrust Probe of Google*, WALL. ST. J., March 19, 2015, <https://www.wsj.com/articles/inside-the-u-s-antitrust-probe-of-google-1426793274>.

¹²⁰ Novak, *supra* note 44; William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in N. R. LAMOREAUX AND W. J. NOVAK (EDS.), *THE CORPORATION AND AMERICAN DEMOCRACY* (2017). But see Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULLETIN 531–539 (2019).

dominance similar to that which exists in the EU, greater powers to the Federal Trade Commission, possibilities to break-up digital monopolies, enforce interoperability and data portability, and hold tech giants to account.¹²¹

While calls for practical and theoretical renewal have successfully revived the importance of reforming antitrust, it remains to be seen whether “Neo-Brandeisianism” will be successful in practice. As a protective countermovement, will it truly change the nature of digital marketplaces, re-embedding justice considerations and addressing the consolidation of digital power? At present, Neo-Brandeisian scholars and policy-makers are on the right path. They are pushing for a slow transformation in the language and role of antitrust, promoting the need to re-embed social, political and normative considerations about fairness, equality and democracy in the regulation of markets.¹²² This effort, which is broadly aligned with a Polanyian approach, is expected to change digital platform marketplaces with positive impacts on the empowerment of persons and small businesses.

B. Lawsuits Against Google and Facebook

Before concluding, it is worth examining whether the movement’s aspirations match the reality of antitrust law on the ground. Is a metamorphosis of antitrust enforcement in digital markets truly under way? If so, what can be expected? In the context of the recent Neo-Brandeisian Renaissance, and after a 16-month long investigation into the state of competition in the US digital economy, on October 6th, 2020 the United States Committee on the Judiciary Antitrust Subdivision issued a more than 400-page report which focuses on the dominant role of four tech giants - Apple, Amazon, Google and Facebook. It proposes a series of remedies and strategies for reining in their power.¹²³ Following the Report, on October 20th, the Department of Justice (DOJ) accused Google of anticompetitively maintaining monopolies in search and search advertising by concluding exclusionary agreements with actors controlling devices, web browsers, and other search access points.¹²⁴ On December 9th, two complaints were issued

¹²¹ House Report, at 19. Also *see supra* notes 13 and 14.

¹²² Khan, *supra* note 59.

¹²³ House Report.

¹²⁴ *United States v. Google LLC*, *infra* note 142; Department of Justice, *Justice Department Sues Monopolist Google For Violating Antitrust Laws*, PRESS RELEASE, October 20th, 2020, <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>. Also *see* Cecilia Kang, David McCabe & Daisuke Wakabayashi, *U.S. Accuses Google of Illegally Protecting Monopoly*, THE NEW YORK TIMES, October 20,

against Facebook, one by more than 40 states¹²⁵ and one by the FTC.¹²⁶ In December 2020, two other lawsuits were started against Google.¹²⁷ The case against Facebook illustrates the potential and limits of current reform.

1. The FTC v. Facebook lawsuit

In the *FTC v. Facebook* case,¹²⁸ filed on December 9th, the FTC argues that Facebook excluded competition and willfully maintained a monopoly in the US market for personal social networking by acquiring competitors including Instagram and WhatsApp and by imposing anticompetitive conditions on access to its APIs and using its APIs as intelligence gathering tools. The States AG lawsuit makes the same or similar allegations.¹²⁹ The harms the FTC identified include the reduction of innovation, reduced quality improvements and a loss of consumer choice. It describes the impacts of Facebook's acquisitions on both users and advertisers, two sides of Facebook's multi-sided platform structure. Harms to advertisers include loss of users, higher prices, less innovation (features, functionalities), lower quality of service, less choice as to platform providers.¹³⁰ Harms to users include the inability to walk away or make choices regarding

personal social networking provider[s] that more closely suits 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 practices.¹³¹

The complaint dwells at length on the intentionally or recklessly anti-competitive nature of Facebook's startup acquisition strategy, including explicit Zuckerberg emails noting that "it is better to buy than compete"¹³² or "I remember your internal post about how Instagram was our threat... One

2020, <https://www.nytimes.com/2020/10/20/technology/google-antitrust.html> (last visited Dec 16, 2020).

¹²⁵ State of New York et al. v. Facebook Inc., No. 1:2020cv03589 (U.S. District Court for the District of Columbia, filed December 9th, 2020).

¹²⁶ FTC v. Facebook Inc., No. 1:2020cv03590 (U.S. District Court for the District of Columbia, filed December 9th, 2020).

¹²⁷ Two filings were made against Google in December: *infra* notes 144 and 145. More generally see Rachel Kraus, *A running list of American antitrust lawsuits against Google and Facebook*, MASHABLE, December 17th, 2020, <https://mashable.com/article/antitrust-lawsuits-facebook-google/> (last visited Feb 4, 2021).

¹²⁸ FTC v. Facebook, *supra* note 133 (Complaint).

¹²⁹ New York v. Facebook, *supra* note 132.

¹³⁰ *Id.* at 49.

¹³¹ *Id.* at 48.

¹³² *Id.* at 2.

thing about startups though is you can often acquire them.”¹³³ The complaint ends with a request for structural separation remedies.¹³⁴

2. The Promise and Limits of Antitrust Reform for Digital Platform Markets

This lawsuit, coupled with other lawsuits and proposals for reform,¹³⁵ is evidence of a wind-change in US antitrust. The House Committee Report and recent lawsuits signal that tech giants are likely to be subjected to increasing scrutiny, and that the age of permissionless expansion, of separating profit maximization efforts from distributive and fundamental rights concerns, is ending. While these efforts are a step forward, more work is needed to disentangle the complexities of digital platform markets and of concentrations of digital power.

The exact normative weight of current US antitrust efforts remains unclear: these trends have unquantifiable potential and clear limits. Arguing for the importance and effectiveness of break-ups, Rory Van Loo has shown that contrary to popular belief, break-up remedies are not costly to administer and make possible significant consumer benefits and surplus.¹³⁶ However even if successful, which is far from a certainty,¹³⁷ a Facebook break-up would not solve all of the issues at play. It would no doubt de-centralize control over digital markets but it would not prevent one of these smaller players from themselves becoming a monopoly. A break-up would give social media users more choice regarding how their data is combined, and might enable greater transparency and accountability over content and data flows, but it would not be conducive to greater democratization and bottom-up participation over how data, content and algorithms are governed. A break-up would also not solve issues around the misaligned profit incentives of advertisers and data brokers nor around media polarization, echo chambers, or the expediency of having a one-stop-shop locus of responsibility on data protection and content moderation.

Beyond break-up remedies, the language of the Facebook complaint remains grounded in law and economic analysis: externalities, incentives and individual choice, demand elasticity, price signals and output differentials. This language fails to capture the complexities discussed in this Article and

¹³³ *Id.* at 5.

¹³⁴ *Id.* at 51 (“divestiture of assets, divestiture or reconstruction of businesses (including, but not limited to, Instagram and/or WhatsApp”).

¹³⁵ See notes 12 and 13.

¹³⁶ Rory Van Loo, *In Defense of Breakups: Administering a “Radical” Remedy*, 105 CORNELL L. REV. 1955 (2020).

¹³⁷ Fiona Scott Morton, *Why ‘breaking up’ big tech probably won’t work*, WASHINGTON POST, July 16th, 2019, <https://www.washingtonpost.com/opinions/2019/07/16/break-up-facebook-there-are-smarter-ways-rein-big-tech/>.

the myriad other ways in which power emerges and manifests online, through infrastructural and epistemic control over marketplaces, through disciplining control over data, knowledge and meaning. Economic language is also a barrier to addressing the systemic harms caused by capitalist modes of production, which urgently need addressing.

The Neo-Brandeisian philosophy behind these cases is indeed reformist, not radical:¹³⁸ at best, these efforts will decentralize digital markets and make them more competitive. But competition itself is not valuable in itself, it can lead to toxicity, government debt and over-consumption.¹³⁹ What current antitrust cases in digital markets don't yet demonstrate is regulators' willingness to push the antimonopoly agenda further. They ought to consider the role of antitrust and antimonopoly law beyond enabling competition and delegating productive decisions to purportedly rational entrepreneurs in an illusory apolitical marketplace, seeing it instead as instrumental to the achievement of more just, egalitarian economies, whose priority is to promote human and ecosystemic flourishing.

CONCLUSION

A uniquely dynamic phase is beginning for antitrust law in the United States. It is likely to have a significant impact on poorly understood and lightly regulated digital platform gatekeepers and marketplaces. Pre-existing antitrust ideologies or frameworks, including the centrality of the "consumer welfare" standard or dominant law and economics analysis, have been proven toothless for reforming these markets. The first US lawsuits against big tech players indicate appetite for a radically different vision of antitrust law as an institution. Optimism however must be combined with awareness of the limits of antitrust law as a standalone tool, and of the shortcomings of the language and theories that form antitrust's intellectual backbone.

This Article normatively investigated the specificities of digital platform environments as self-regulating marketplaces. It took platforms as more than just monopolies, as artificial constructions of law that are perceived and regulated as autonomous super-competitive marketplaces. The Article critically scrutinized antitrust's normative roots, showing how it contributed to the imagined self-regulatory status of platform markets, and consequently to political and social injustices in the form of erosions of fundamental equal protection and unequal access to economic and social advantages. It concluded by scrutinizing current reform efforts and trends. As part of a recent change of direction, antitrust must leave behind divisions of labor

¹³⁸ For a distinction between reformist and non-reformist efforts, see ANDRÉ GORZ, *STRATEGY FOR LABOR; A RADICAL PROPOSAL* (1967).

¹³⁹ STUCKE & EZRACHI, *supra* note 26.

between efficiency or welfare maximization and distribution, between politics and markets, and must instead be viewed once again as a bridge that connects productive processes to politics. It is hoped that reformers will be bold and brave enough to re-think the place of antitrust as part of a long-term vision of justice in digital and non-digital political economies.