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ORIGINAL PAPER

Giants among us: do we need a new antitrust paradigm?

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Abstract
Traditional antitrust policy was formulated to control pricing and output decisions that were not disciplined by competitive forces, either because of monopoly power or agreements in restraint of trade. Because there is no single criterion for evaluating political policy outcomes, antitrust regulators eventually settled on the "consumer welfare standard," correctly recognizing that any other standard was incoherent. Recently "platforms" (defined here as firms or apps that solve the key transaction costs problems of triangulation, transfer, and trust) have tended toward giantism. This had led to calls for a new approach to antitrust, restoring the old multiple set of goals. But every platform by definition defines an industry, and is a monopoly within that industry. Such network economies or advantages in managing trust are the reasons platforms exist in the first place. This paper reviews the history of antitrust, defines platforms and the problems of "giantism," and suggests some policies that certainly won't work and should be abandoned. The problem is power, not monopoly. So power is what the "new paradigm" needs to address.

Keywords Antitrust · Rules versus discretion · Consumer welfare standard · Platform economy

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1 Introduction: the call for a "New Paradigm"

> The restrictive implications for a normative theory of economic policy are severe. There is no criterion through which policy may be directly evaluated. An indirect evaluation may be based on some measure of the degree to which the political process facilitates the translation of expressed individual preferences into observed political outcomes. *The focus of evaluative attention becomes the process itself, as contrasted with end-state or outcome patterns*. "Improvement" must, therefore, be sought in reforms in process, in institutional change that will allow the operation of politics to mirror more accurately that set of results that are preferred by those who participate. One way of stating the difference between the Wicksellian approach and that which is still orthodoxy in normative economics is to say that *the constitution of policy rather than policy itself* becomes the relevant object for reform… The Wicksellian approach concentrates on reform in the rules, which may be in the potential interest of all players, as opposed to improvement in strategies of play for particular players within defined or existing rules. (Buchanan, 1987; p. 247; emphasis added).

The *economic constitution*—or *Wirtschaftsverfass;* what Kurrild-Klitgaard and Berggren (2004) define as "the set of laws defining the structure for economic activities"—must circumscribe state action within a deep but narrow domain: defining and enforcing *general* rules.[1] But it is tempting for state actors to offer specific benefits, and to manipulate the realized pattern of income distribution, because of the benefits that extractive rent-seeking confers on the powerful (Buchanan & Congleton, 1998; Congleton, 2011; McChesney, 1987). Buchanan (1987) summarizes the tension: clear, stable rules improve the process of working within the rules, but sometimes conditions change. We seem to be in such a period now for the way antitrust policy is conceived and practiced.

The normative case for an "economic constitution" is the need for credible, durable obstacles to rent extraction. Otherwise, the political pressures to manipulate patterns of outcomes, and to use threats and hold-up to extract rents, will dominate the economy. Buchanan's insight is that if the members of a society can be presented with a credible means of securing the system from extractive rent-seeking, a large majority—perhaps approaching unanimous consent—would prefer an economic constitution. On the other hand, for Buchanan at least, those absolutes are only *relatively* absolute: we *play* by the rules, but no rule is privileged, or above challenge.[2] We may learn of new institutional forms, or the system itself may evolve in ways that call for a revised set of property rights, regulatory conventions, and judicial procedures. The tension is obvious: if the economic constitution is a credible commitment against unwanted change, how is "good" change possible?

[1] For a more detailed view of the European Union vision of an "economic constitution," see Streit and Mussler (1994).

[2] For Buchanan's own description, see Buchanan (1989). For a review of the application of the "relatively absolute absolutes" principle in Buchanan's system, see Congleton (2014).

There have been five identifiable epochs (Stucke & Ezrachi, 2017; Kovacik, 2020) in the U.S. economic constitution regarding government action in regulating and modifying industry structure and conduct from the top down.

- *Founding-1890* Contracts and agreements in restraint of trade restricted only by common law limits (Bartholomae, 1923) on enforceability.
- *1890–1920* After the Sherman Act in 1890, rules govern two different realms: the *conduct* of business, and the *structure* of industry. This duality was extended by the enactment of the Clayton and Federal Trade Commission Acts (both 1914), which were specifically conceived first to break up, and then to prevent the new formation of, trusts and monopolies.
- *1921–1940* After the Wilson Administration, antitrust activity was rare. Officials found concentrated industries easier to deal with, and industry-government "cooperation" were popular, a change that expanded even further in early New Deal.
- *1941–1977* Unsurprisingly, there was a dialectical response: having nurtured monopoly, the government now had to manage it. Such policies were the heart of the economic constitution: "Antitrust came to represent the Magna Carta of free enterprise" (Stucke & Ezrachi, 2017). For many large firms, restrictions on mergers were acceptable in exchange for the regulatory restriction on entry and protection of market share. Mature businesses implicitly willingly sacrificed fluidity of mergers and acquisitions for the promise of state protection of market share. The broad suite of antitrust enforcement initiatives "was seen as the key to preserving economic and political freedom." (Stucke & Ezrachi, 2017).
- *1978–mid-2010s* Antitrust activism was sharply curtailed as courts internalized and institutionalized the "Consumer Welfare Standard" championed by Chicago Law and Economics theorists and particularly by Robert Bork in his 1978 book, *The Antitrust Paradox*.

In this paper I consider the *next* dialectical response, especially in the context of the new "platform economy." The new political counter-revolution against the Consumer Welfare Standard has produced strident recent calls to reemphasize social justice, the welfare of competitors, the guarantee of labor force stability, and protection for the environment (Feldman & Ewing, 2012; Khan, 2017; Teachout, 2020).

This sixth epoch, if it comes about, would impose radical changes. Perhaps the most complete, and chilling, manifesto of the "new paradigm" is the "Report of the Majority Staff" of the House Subcommittee on Antitrust, Commercial and Administrative Law (Cicilline, 2020). The Report is a wide-ranging, remarkably detailed (450 page) triumphalist declaration of "what we'll do after we win the election!" But a useful overview can be constructed out of a selection of concrete proposals for policy change.

The following are verbatim quotes from the report (the italics are mine):

"…the Subcommittee suggests that the Congress consider…."

- …establishing *nondiscrimination rules* to ensure fair competition and to promote innovation online. Nondiscrimination rules would require dominant platforms to offer equal terms for equal service and would apply to price as well as to terms of access. As several experts noted, nondiscrimination has been a mainstay principle for governing network intermediaries, especially those that play essential roles in facilitating transportation and communications. (p. 382)
- …*shifting presumptions* for future acquisitions by the dominant platforms. Under this change, *any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary* for serving the public interest and that similar benefits could not be achieved through internal growth and expansion. (p. 388)
- …*prohibiting the abuse of superior bargaining power*, including through potentially targeting anticompetitive contracts, and introducing due process protections for individuals and businesses dependent on the dominant platforms. (p. 390)
- …reasserting the *original intent and broad goals of the antitrust laws* by clarifying that they are *designed to protect not just consumers, but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals.* (p. 392)
- …explore presumptions involving vertical mergers, such as a *presumption that vertical mergers are anticompetitive* when either of the merging parties is a dominant firm operating in a concentrated market, or presumptions relating to input foreclosure and customer foreclosure. (p. 395)
- …whether making a design change that *excludes competitors or otherwise undermines competition should be a violation* of Sect. 2 [of the Sherman Act], *regardless of whether the design change can be justified as an improvement for consumers*. (p. 398)

The "New Paradigm" is actually a *return*, to "originalism" (Glick, 2019). But this originalism is the industrial policy and planning of the Progressive reforms of the late 19th century, charging antitrust regulators with a an ambitious and sometimes contradictory checklist of discretionary social goals. Most centrally, the "New Paradigm" would *reverse the presumption* of legality in mergers and acquisitions, placing the burden of proof on economic actors to want to do something. This regulatory regime would ossify the structure and contracts of an industry at an arbitrary point in time, making even marginal economic restructuring contingent on obtaining the appropriate signatures and permissions from bureaucrats and, incredibly (Edwards, 2021), other "stakeholders" such as competitors and labor organizations.

This was a bad idea in 1890, and continued to be a bad idea until it was replaced by the Consumer Welfare Standard (CWS) in the 1970s. My argument against the "New Paradigm" uses "rule utilitarianism," a concept from outside traditional antitrust economics. The first is *rule utilitarianism*, the notion that regulatory policies, including those that seek social justice, should be limited to relatively simple and

easily understood rules, rather than relying on discretion of authorities, even those who can be assumed to have idealized knowledge and motivations.

The following Sect. 2 is a brief history of antitrust policy in the U.S., making connections to the value of clear and consistent rules. Section 3 discuss the new "platform economy," and its unavoidable tendency toward giantism. In the fourth and final Sect. 1 draw some conclusions for future policy, and consider some problems with my claims.

2 Antitrust: monopoly, contestability, and then monopoly again

In the common law, contracts "in restraint of trade" were not enforceable.[3] In the late 19th century, the U.S. Congress passed the Sherman Act (1890; People's Vote, n.d.), making contracts in restraint of trade illegal per se, and punishable by fines and criminal penalties. Second, and more vaguely, "monopoly" itself became illegal, meaning that mere size alone, even if acquired legally, could be a violation of the law.

In the period following the New Deal, this conceptual change was elaborated as the "structure, conduct, performance" paradigm (Bain, 1950; Clark, 1940; Scherer, 1970). The implied goal of economic planners was to approximate the conditions of the hypothetical "perfect competition" model where all the agents were price-takers.

The counter-revolution, based on a better model of market processes, was mobilized in the late 1960s (Bittlingmayer & Hazlett, 2002; Bork, 1967; Buchanan & Lee, 1992; Manne, 1965). The alternative approach to antitrust was founded on a combined *consequentialist* and *ethical* claim that consumer welfare was lexically prior to all other concerns. Mergers, acquisitions, tying arrangements, resale price maintenance, and other actions that had either been illegal or presumptively problematic were now scrutinized considered in terms of their potential benefit for customers. If there was a demonstrable benefit for consumers, the contractual arrangements were presumed to be efficient, and legal.

But since about 2010, there has been a counter-counter-revolution, calling for a return to the original broader conception of social goals for antitrust as industrial planning. Some of this work (e.g., Orbach, 2010) plausibly points out that the CWS was never as precise a standard as proponents had claimed. Others (Khan, 2017; Teachout, 2020, 2021) want to use "antitrust policy" as a rationale for accomplishing a checklist of goals, ranging from industrial policy, to job creation, to controlling "fake news," to redistribution in accordance with social justice.

[3] According to Bartholomae (1923, p. 456):

Competitors sometimes enter into agreements between themselves by which they covenant not to compete with each other in order to secure larger profits. The agreement may be a mere informal understanding or it may be written. The restraint may take the form of limiting output, controlling supplies, fixing prices, dividing territory, etc. The courts have generally held such agreements invalid on the ground that by concentrating the control of a market in the hands of certain parties to the exclusion of others, prices may be arbitrarily advanced, quality deteriorated, etc., to the detriment of the public.

2.1 The consumer welfare standard

The judicial expression of the CWS can be found in the 1977 Supreme Court decision, *Continental T.V., Inc. v. GTE Sylvania Inc*., discussed in detail in Wright and Ginsburg (2013). The facts of the case are simple: continental was a franchised retail seller of GTE-Sylvania televisions, and objected at the vertical arrangements imposed by Sylvania in the franchise contract. Continental alleged that Sylvania, by restricting the ability of sellers to compete by offering the product in various locations and in a variety of settings, were committing a per se violation of Article I of the Sherman Act (1890). In fact, there had been a previous case, *United States v. Arnold, Schwinn & Co* (1967) where various contractual provisions had been held to be per se violations.

But the Supreme Court voted 6–2 (Rehnquist recusing) to overturn *both* the lower court ruling in Continental *and* the precedent in Schwinn. If consumers benefitted, then almost *any* contractual provision, no matter how restrictive, was allowed and could be enforced in court. One reason that CWS took hold was that a new theory—"contestable markets" (Baumol et al., 1982, 1983; see Brock, 1983 or Shepherd, 1984 for reviews)—gave a theoretical foundation for the intuitions that had been advanced in earlier critiques such as Bork (1978). The new theory still recognized that monopoly required discipline by competition, but now it was clear that competition could be *potential*. If the costs of entry into the industry were low, and the costs of exit—liquidating assets and selling inventory, for example—were likewise low, then a variety of observed industry structures, including monopoly, could be consistent with "as if" competitive conditions.

2.2 The value of clear rules, even if some outcomes are unjust

David Schmidtz's, 2006 book, *The Elements of Justice*, illustrates the importance of *rule utilitarianism* (Harsanyi, 1977) over the use of deliberation and discretion.

> I pulled over. The cop pulled in behind. Walked to my window, peered inside, asked for my license and registration.
>
> "New in town?"
>
> Yes, I said. Got in five minutes ago.
>
> "Know what you did wrong?"
>
> "Sorry. There was no stop sign or stop light. The cars on the cross street were stopped, so I kept going."
>
> The cop shook his head. "In this town, sir, we distribute according to desert. Therefore, when motorists meet at an intersection, they stop to compare destinations and ascertain which of them is more worthy of having the right of way. If you attend our high school track meet tomorrow night, you'll see it's the same thing. Instead of awarding gold medals for running the fastest, we

> award them for giving the greatest effort. Anyway, that's why the other cars honked, because you didn't stop to compare destinations." The cop paused, stared, silently.
>
> "I'm sorry, Officer" I said at last. "I know you must be joking, but I'm afraid I don't get it."
>
> "Justice isn't a joke, sir. I was going to let you off with a warning. Until you said that." (Schmidtz, 2006; p. 31).

This makes sense, as ideal theory: why should one driver, for no good reason, be allowed to go while others wait? What if someone else is in a hurry? The problem is that deciding what justice dictates in each separate case is prohibitively costly. That's why we use a dumb system: traffic signals, where lanes take turns based on red and green lights. That's an example of *rule utilitarianism*:

- with traffic lights, the *longest* anyone must wait is 2 minutes
- with the "stop and justify" system, the *shortest* anyone must wait is 5 minutes

Everyone is better off under the fair but unjust system; an economic constitution that implemented the equivalent of stop lights would be chosen unanimously over a system that insists on full social justice. A society, choosing as a group, *should* select the rule that results in the greatest aggregate benefit, and that citizens likewise have a moral obligation to obey such rules, at least in "normal" or "standard" circumstances.[4] In our case, that would mean that the use of the stoplight, as a substitute for "stop and justify," would normally make everyone better off.[5]

The CWS is the equivalent of the traffic signal in my example. Market power is often tolerable, even if the business profits that result are not fully "deserved," so long as consumers benefit (Guzman & Munger, 2020; Munger, 2011). The new social justice version of anti-trust is the equivalent of stopping at every intersection to argue about the aggregate public good. The problem is that as the new platform economy creates giants, the "New Paradigm" will be pushing us toward a system where literally everyone will be worse off, simply to achieve the dubious goal of aligning payoffs with desert.[6]

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[4] This is an important aspect of rule consequentialism, a subset of rule utilitarian thought. As Hooker (2016) put it:

> Rule-consequentialist decision procedure: At least normally, agents should decide what to do by applying rules whose acceptance will produce the best consequences, rules such as "Don't harm innocent others", "Don't steal or vandalize others' property", "Don't break your promises", "Don't lie", "Pay special attention to the needs of your family and friends", "Do good for others generally".

In the broadest terms, then, my argument harks back to the essential insight of constitutional political economy (Brennan & Buchanan, 1985): societies cannot (usefully) expect to select *outcomes*, because the costs and friction involved in doing so create rampant and destructive rent-seeking to control the authority to make those discretionary choices. Instead, societies must operate at one remove, selecting *rules* within which outcomes emerge (Buchanan & Tullock, 1962).

[5] The "normally" condition is a nod to David Hume, and to James Buchanan's "relatively absolute absolutes." For a discussion, see Boettke and King (2021).

[6] For the notion of a new "market epistemology of platforms" see Kiesling (2018).

I now turn to a consideration of the underlying difficulty of the problem of antitrust, based on an analysis of economies of scale and the new "platforms" that dominate the landscape. It is important to consider this problem because it will become clear that a "new paradigm" may well be in order. But the old-new return to originalism being advocated for by the American left will make things worse, not better.

It could be argued (McChesney and Shughart, 1995; Hazlett, 2017, 2020; Shughart, 2021; Wright & Ginsburg, 2013) that this "consumer welfare trumps choice" view of rule utilitarianism has long been true. But in the next section I turn to some reasons why the new platform economy, and the giants it favors, make it more important than ever that antitrust be limited to the paradigm where it can have predictable, positive effects.

3 Platforms, pamphlets, and giants

A "platform" (Kiesling, 2018; Munger, 2021) is a place, real or virtual, that reduces transaction costs of exchange or cooperation, especially peer-to-peer exchange. To succeed, a platform must sell—literally, be able to monetize—the reduction in three key categories of transaction costs.

(1) *triangulation*: information about identity and location
(2) *transfer*: a way of transferring payment and good that is immediate and as invisible as possible
(3) *trust*: a way of outsourcing assurance of honesty, and performance of the terms of the contract.

As Munger (2021) argued, platforms can range from physical spaces (the Damascus "souq" in 2500 BCE, or the "Mall of America" in Bloomington, Minnesota) to paper (the Sears Catalog) to virtual (Amazon, Uber, and Wikipedia). But all platforms provide their users with a "place" where people can reliably pursue shared goals at much lower transaction costs. As is characteristic of many institutions that foster cooperation (North, 1990), there are sharply increasing returns to scale in solving these problems.

In fact, much of the increasing returns to scale in platforms derives from the first-mover advantage in solving the "trust" problem. Suppose you have a new app that could serve as a platform for ridesharing, for apartment-sharing, or for restaurant reviews. No one will use until there are enough reviews to have some certainty about trust, but you can't get reviews unless someone uses the app. This is a classic "path dependence" (Arthur, 1989) problem: the "better" alternative will always be more expensive, and hence at a competitive disadvantage, given the costs already absorbed in building the experience in the older technologies. Arthur called this

problem “lock-in”; in the platform world, it means that all of the survivors will be giants who have inferior products, but who happened to move first.

The problem with that version of events, of course, is that it posits the desirability of some ideal frictionless transition that could be achieved, or at a minimum assisted, by intelligent public policy. As Liebowitz and Margolis (1995) point out, the costs of transition are real costs; in our case, the reduction in transaction costs from having one useable body of comparable reviews is a genuine benefit for consumers. The idea that “we” (who, exactly?) should “break ‘em up” is to ignore the enormous losses to consumer welfare that would result, just for the sake of having an industry concentration table that approximates a blackboard model of “perfect competition.”

But then what is the answer? The argument against trusts was that incumbent firms could coordinate on limiting out output and raising price. In the world of platform firms, the “industry” and the “firm,” at least in a narrow sense, are already exactly the same, so that every firm is by definition of monopoly. Twitter has a monopoly over the Twitter platform, Facebook has a Facebook monopoly.

For that matter, the *New York Times* has a “New York Times” monopoly, paying some people to publish their words on the *Times* platform, and denying others the right to publish there, even if they offer to pay. But no one accuses the *Times* of being a monopoly: it’s a private publishing platform, and in the U.S. that means that it cannot be prevented from publishing, nor can it be compelled to publish. Is Twitter more like a “common carrier,” the original land line telephone service, or more like the *New York Times*?

Recently, I saw on Twitter a discussion of an “innovation,” where group might coordinate several like-minded authors on some platform (an example would be Medium, https://medium.com). These authors would name themselves something, offer a joint subscription price less than the sum of the subscription costs of getting access to each of the writers individually. The authors could still make more money because of the increased volume, and the group would attract new readers through synergies in reputation.

Of course, this model has existed for centuries: it’s called a “magazine” or “newspaper.” Each newspaper is a giant, in the sense that it faces a downward-sloping demand curve and consciously competes for business with a few alternatives. In many cities, in fact, there is one newspaper, operating as a monopoly. No one, as far as I know, is proposing to break up the *Washington Post*, even though it has created a set of exclusive contracts with authors and photographers, packaged them together, and then put the entire monopolistic product behind a single paywall. And there is even monopolistic behavior: recently when it seemed that author Megan McArdle was writing interesting things online, the *Washington Post* had the gall to hire her, so she would no longer compete with them! Clearly anti-competitive; break ‘em up!

The reason this sounds ridiculous to modern economists is that we have internalized the consumer welfare model. My argument is that we need to do that for the new “giants” also. I propose the following test for “giantism”: a firm is an *efficient* monopoly, behaving as if it were operating in a contestable market, if it checks any three of the following five boxes:

- Produces, or allows users to produce, content that is unique to that platform
- Sends out that content on a medium characterized by substantial scale/network economies
- Organizes two-sided or matching markets where most participants are either content providers or
  consumers, but can switch roles
- Vertically integrated, providing hosting, reputation management, or other utilities for users
- Operates in a setting where the merger or combination of producing entities solves transaction costs problems, along the lines described by the Coase-Olson-Ostrom-style problems of organizing cooperation or solving common pool problems

These categories represent an alternative to the "reverse the presumption" view of the New Antitrust Paradigm disciples. Facebook, for example, allows users to produce prose content, images, and videos, and then to share them with others in a group, in a designated list, or with anyone with an internet connection. Twitter allows users to make immediate contact with anyone who "follows" that user, or to anyone who follows someone who "retweets" a post. The value proposition of these sorts of network economies are primarily to increase consumers' willingness to pay to be "on" the platform; the returns to scale the pose barriers to entry are a side effect of the increased willingness to pay for the now more-valuable service. Platforms that consumers are willing to pay for, either in terms of direct payments or willingness to share data, are large precisely because they create consumer surplus.

But there is a problem: giants have *political* and *social* power. Giants need market power because the alternatives are even worse, something like getting out of your car at every intersection and arguing about who gets to go first. Traditionally, the problem faced by a potential "social media" entrepreneur was to solve the problem of three kinds of transaction costs, and they were a bit different from the "triangulation, transfer, and trust" model I have described. The problem has been around since the invention of movable type and the printing press. A tidal wave of printed pamphlets overwhelmed the established institutions—mostly churches and officials—between about 1480 and 1550 (Pettegree, 2015). It became necessary to invent "media," and only giants could do that, because they had the scale and they had reputations that served as hostages if they violated the trust of customers. The system wasn't perfect, but it was better than chaos.

A media outlet needed to be a giant so it could solve the problems of

1. Publication: what is cheaply available?
2. Curation: what is important?
3. Verification: what is true?

Publication has obvious advantages over the spoken word, though minstrels who memorized epic poems were the original "social media." That was pretty

expensive; committing the words to paper did two things: disconnecting the speaker from time (you could read the words the next day, or the next decade, even if the speaker wasn't there) and allowing returns to scale (it was possible to print thousands of copies, so the speaker didn't have to be everywhere at once).

Curation was partly solved by the fixed costs of setup for publication, because only something important would be published, at least for commercial activities. Of course, the causation could be reversed: anything published was important precisely because of the scarcity of published works, so a wealthy person could promote causes simply by paying to have something typeset and made available. Later, in electronic media, media institutions nurtured reputations for being serious and elitist: "CBS Evening News" anchor Walter Cronkite made it sound like Mt. Rushmore was speaking.

Verification was a problem, and still is. It's a transaction cost problem, of course (trust), but the institutions that solve the problem are fragile, and are not likely to survive a transformation of medium. The printing press broke all the then-existing institutions in the late 15th century; while books were still expensive, it quickly became possible to publish pamphlets (Pettegree, 2005; pp. 156–166). Pamphlets, which were small and cost very little, were the 15th century version of Tweets and Youtube videos. Some pamphlets were religious polemics, but many purported to contain "truths" about science, or recent events. Many were what we would now call "fake news," but since in the new era of cheap pamphlet publication there were no institutions that could solve the problem.

The answer to this problem of asymmetric information is obvious in retrospect, at least to those of us in the Public Choice tradition: brand name. Brand names require, by definition, that there is a market structure other than perfect competition; news items or accounts of events are not commodities, but are associated identifiable sources if they are to have any credibility. But the successful brand names, which "verified" their accounts because their reputations would lose value if they sacrificed credibility, enjoyed large economies of scale. It was difficult for a new source, a new press, or a new author to enter the industry. This was a *feature*, not a bug: pure competition would be the Tower of Babel, where no source can be believed.

Interestingly, pamphlets also destroyed the previous institutions' capacity for curation, in a way that is now recognizable again on the internet. Instead of actual importance, the title and subject of a successful pamphlet devolved into "click-bait." For example, "The Discovery of a World in the Moone" and "A Rehearsal, Both Straung and True, of the Heinous and Horrible Actes Committed by Elizabeth Stile" were big sellers. Not quite "Five Vegetables That Burn Belly Fat (You Won't Believe the Third One!)" but close.

I turn now to living with giants.

4 Seeing past the giants

There are three parts to the flurry of new proposals for a novel antitrust paradigm, and each is visible in the excerpts from the House Majority Staff Subcommittee Report (Cicilline, 2020). They are:

1. Structure is conduct; size alone is an offense, and industrial structure should be aggressively managed by government regulators.
2. The goals of antitrust policy must return to an “original” conception that would make Antonin Scalia blush: the goals of the managed industrial structure must remake society into a model of egalitarian fairness. The welfare of consumers would no longer be an exclusive goal, and it’s not clear that it would even be an important goal. The main concerns are the protections of existing jobs and the preservation of small businesses, regardless of how inefficient they are or ineptly they are managed.
3. The mechanism by which this utopian scheme is to be achieved is the reversal of all the existing presumptions. Large businesses would be *guilty* of antitrust violations unless they could prove their innocence in court; contractual relationships that provide goods and services would be *presumed* to be anticompetitive, and therefore in violation of the law, unless the business could prove otherwise; and any merger or acquisition would be presumed to violate the antitrust statutes unless the contracting parties could decisively demonstrate that resulting combination would serve all the wide variety of social justice goals listed in the recommendations.

An apt summary, in more concise form, can be found in the “A Better Deal” document (Senate Democrats, 2017):

> We propose establishing new merger standards that require a broader, longer-term view and strong presumptions that market concentration can result in anticompetitive conduct. These standards will prevent not only mergers that unfairly increase prices but also those that unfairly reduce competition—they will ensure that regulators carefully scrutinize whether mergers reduce wages, cut jobs, lower product quality, limit access to services, stifle innovation, or hinder the ability of small businesses and entrepreneurs to compete. In an increasingly data-driven society, merger standards must explicitly consider the ways in which control of consumer data can be used to stifle competition or jeopardize consumer privacy.

An alternative view, the “New Institutionalism” tradition related to Public Choice and Constitutional Political Economy focuses on rules as solutions to problems of contracting and collective action. For Douglass North (1990), an institution is "any form of constraint that humans devise to shape human interaction" (p. 4); organizations are "groups of individuals bound by some common purpose to achieve objectives" (p. 5). Elinor Ostrom (2005) claimed, "Broadly defined, institutions are the prescriptions that humans use to organize all forms of repetitive and structured interactions including those within families, neighborhoods, markets, firms, sports leagues, churches, private associations, and governments at all scales." (p. 3). For both of these Nobelists, the central claim is that institutions operate at one level, to structure interactions, and other entities then take those rules as (mostly) given and make choices in that context.

The problem is that platform "giants" are *both* institutions *and* organizations, both the setters of rules and the optimizing response to those rules. Clearly, platforms construct the framework within which individuals and groups interact; this solution to the matching problem in "two-sided markets" is the whole reason for their existence. Organizations, often emergent networks of users who had not interacted before "meeting" on the platform, conduct their own activities for their own reasons. Twitter would be very different if it had different rules, or even a different number of characters allowed in a "tweet." As institutions, the platforms can make up rules and then manage customers who "play" by those rules, in the virtual space this creates.

But what if an *organization* (Facebook, the profit-maximizing organization) could control an entire *institution* (Facebook, the gigantic online social media platform)? It might make rules that would reduce the transaction costs of other groups achieving cooperative goals.[7] This could be because the platform wants to attract users, who will figure out ways to use the platform, and create unexpected emergent organizations. And the network economies of being able to have enormous scale for innovation on the platform have no effective limit. Any platform that survives becomes a giant, in the sense defined in the previous section.

By the standards of consumer welfare, and that is the only antitrust standard that should be given legal standing, we have to learn to live among the giants, and learn to use their enormous powers. If there are concerns about privacy and ownership of "personal" data, then the only solution is to seek new tools for creating property rights to one's own information (Jerome, 2013), and require that firms are transparent in how those data can be used.

Still, it is important to think of the value of privacy in sensible terms, not as an absolute barrier to platform activity. As Castro and McLaughlin (2019) show, survey evidence has two very different conclusions, depending on what questions are asked. First, 80 percent of Americans would prefer that online services (Facebook and Google were named specifically) would "collect less of my data." However, if the option for collecting less data is paired with even a slightly higher cost (in the form of a subscription fee) for using the platform, the proportion who express any interest in having platforms "collect less of my data" falls below 35 percent.[8] In other words, nearly 2/3 of survey respondents would be willing to give up their privacy rights, so long as they can use the existing social media giants for free. In terms of the analogy I have made to intersections and stop lights, it seems people are concerned about

[7] The argument is well put by Hazlett (2020):

U.S. policies have managed to incentivize great progress in high tech markets…. There are many public policies that would yet enhance American competitiveness. Rejecting open markets in favor of more highly regulated systems, or pushing antitrust law away from its current focus on Consumer Welfare, are not likely to be among them. (Hazlett, 2020, p. 3).

[8] It is worth noting that some of the proposed regulations of the new antitrust paradigm advocates would not be "break 'em up," but would work more like Glass-Steagall banking regulation (Strain, 2019). For example, Facebook might not be allowed both to serve as a peer-to-peer social media platform and to sell user information to retailers or other corporate interests. But that's why this survey result is important: if Facebook were not able monetize personal information, Facebook would have to charge a subscription fee. Yet that is precisely what customers do not want.

privacy, but not so concerned that they would be willing to spend any considerable portion of the value they derive getting out of their cars and arguing about it.

An "economic constitution" must address a trade-off that can appear to be a contradiction: the rules have to be stable, until they need to change. That is, to work the system must rest on relatively simple, consistent rules that participants use to predict the reactions of regulatory authorities, encouraging investment and the pursuit of honest profit. On the other hand, the dynamism of the economic forces that such a system creates, when it works, demands that rules of the economic constitution be changed. In this paper I have tried to argue that the original, and now resurgent, motivations to deploy top-down regulations to determine market structure are not responsive to the problems created by the new social media platforms.

But I have also argued that there really are problems, and that those problems are problems of power. The difficulty is that antitrust is directed narrowly at market power, where the danger lies in the concentration of political and social power. I do not have the answers for the appropriate response to the power of the new social platform "giants." But I am sure that applying outdated solutions to the wrong problem will delay the time when we start to take these formidable new difficulties seriously.

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